Can the President Defund Sanctuary Cities?

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I. INTRODUCTION

On Thursday (January 26, 2017), President Trump made good on his campaign promise to address sanctuary cities. In an Executive Order he directed the Attorney General and Secretary of Homeland Security to "ensure that jurisdictions that refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants," except as deemed necessary for law enforcement purposes.

But can the Executive Order really eliminate all federal funding for sanctuary cities? Lawsuits will contend that the United States Constitution stands in the way. They may argue that (1) Executive Orders have limits, (2) the Executive Order, in violation of the Tenth Amendment, attempts to "conscript" states and local governments to enforce federal immigration laws; and (3) the Executive Order exceeds any power that even Congress has under its "spending power" to condition federal funding on compliance with federal programs.

President Trump's Executive Order on "sanctuary jurisdictions" – or at least the actions that will be forthcoming – may create a long road of litigation for many states and cities.

II. PRESIDENT TRUMP'S EXECUTIVE ORDER TO DEPRIVE SANCTUARY CITIES OF FEDERAL FUNDING.

On January 25, 2017, President Trump issued two executive orders on immigration. These orders encouraged federal and state cooperation in immigration enforcement, but also threatened sanctuary jurisdictions with cuts in federal funding.

The Executive Order "Enhancing Public Safety in the Interior of the United States" states: "Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic."

Under section 9, "Sanctuary Jurisdictions," the Order states: "It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373."

In furtherance of this policy, the Order:

- Directs the Attorney General and Secretary of Homeland Security, to "ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or Secretary."

- Grants the Secretary "the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction."
- Directs the Attorney General to "take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."
- Directs the Secretary to "utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens."
- Directs the Office of Management and Budget "to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction."

The Executive Order is extremely broad.

The Order not only directs the Attorney General to take action "against any entity that violates 8 U.S.C. 1373" but also any entity "which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."

The Order is not limited to funding related to immigration or law enforcement, but includes a threat to cut all "Federal grants."

III. What Is Section 1373?

The Executive Order directs the Attorney General and Secretary to defund jurisdictions that "willfully refuse to comply with 8 U.S.C. 1373."

Enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, section 1373(a) prohibits state and local jurisdictions from restricting communication with federal immigration authorities concerning undocumented individuals.

Section 1373 states:

(a) IN GENERAL. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES. Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.
(3) Exchanging such information with any other Federal, State, or local government entity. (8 U.S.C. § 1373)

IV. Why Does The Executive Order Focus On Section 1373?

The Executive Order focuses on compliance with Section 1373 because, at least according to one court, Section 1373 does not run afoul of the Tenth Amendment.

The Tenth Amendment, usually invoked in favor of "states' rights" prohibits the federal government from "conscripting" the states into assistance in enforcing federal programs. The Tenth Amendment "limits the power of Congress to regulate by 'directly compelling [states] to enact and enforce a federal regulatory program.'" *City of New York v. United States, 179 F.3d 29, 33-35 (1999)*; see *Sturgeon v. Bratton*, 174 Cal.App.4th 1407 (2009) ("Congress is prohibited by the Tenth Amendment from passing laws requiring states to administer civil immigration law") *City of New York*, however, rejected a Tenth Amendment challenge brought by the City of New York against Section 1373. "These Sections do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS." *City of New York*, 179 F.3d at p. 35.

Since *City of New York*, the Tenth Amendment has not received much attention as applied to immigration law, but that is bound to change with the Trump administration.

Importantly, in light of Section 1373, many jurisdictions thought of as "sanctuary" jurisdictions actually do not directly prohibit employees from providing information to federal immigration authorities.[1]

V. The Executive Order Also Is Directed At Jurisdictions That Do Not Honor Federal Detainers

The Executive Order does not explicitly target jurisdictions that refuse to honor federal immigration "detainers," but the breadth of its directive suggests that it does. As stated above, the Order directs the Attorney General to "take appropriate enforcement action" against any entity "which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."

ICE detainers request that the agency hold an incarcerated individual for 48 hours to give ICE time to investigate and take custody of the individual for violation of the federal immigration laws. (8 C.F.R. 287.7.)

Law enforcement agencies, however, are not legally required to honor detainers. "Immigration detainers do not and cannot compel a state or local law enforcement

[1] King County falls into this category. There is no County Code or other County policy that prohibits the sharing of information with the federal government, rather the County chooses not to collect this type of data.

agency to detain suspected aliens subject to removal." *Galarza v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014); see also *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at **3, 6-8 (D. Or. Apr. 11, 2014). See also Attorney General Bulletin No. 2012-DLE-01, "Responsibilities of Local Law Enforcement Agencies under Secure Communities." (December 4, 2012), confirming that federal detainers are requests, not commands, to local law enforcement agencies.[2]

Because detainers are discretionary, California has enacted legislation to regulate compliance with them. The state legislature enacted the California Transparency and Responsibility Using State Tools Act ("TRUST Act"), California Government Code sections 7282-7282.5, which requires that certain conditions be met, including that the detainee have a criminal history that includes a serious or violent felony. See Kamala D. Harris, Attorney General Bulletin No. 14-01, "Responsibilities of Local Law Enforcement Agencies Under Secure Communities and the TRUST Act." (June 25, 2014).

To supplement the TRUST Act, on September 28, 2016, the state legislature enacted the "Transparent Review of Unjust Transfers and Holds Act" ("TRUTH Act"), AB 2792. The TRUTH Act seeks to educate the potential targets of ICE enforcement about their rights and make ICE activities more transparent.

Although compliance with detainers is discretionary, the Executive Order is an attempt to coerce local jurisdictions into honoring them by threatening federal funding.

VI. Can The Executive Order Really Cut Off All Federal Funding?

As explained above, the Tenth Amendment prevents the federal government from "conscripting" the states to aid in federal immigration enforcement. For that reason, the Executive Order instead threatens to cut federal funding if states and local governments do not cooperate.

Numerous legal challenges are possible. For example, there may be a challenge to the Executive Order itself as beyond the President's authority. Similarly, there may be a challenge to any attempt by the Attorney General or Secretary of Homeland Security to implement the Order based on the contention that they are in violation of the Administrative Procedure Act or otherwise acting ultra vires. See e.g., *Texas v. United States*, 809 F.3d 134 (2015), affirmed by equally divided Court, 136 S.Ct. 2271 (June 23, 2016) (affirming preliminary injunction forbidding Department of Homeland Security's implementation of Deferred Action for Parents of Americans and Lawful Permanent residents program ("DAPA") because it was subject to challenge under the APA).

The Executive Order purports to enforce Section 1373, but attempts to wield power that Congress itself may not have.

[2] Because of federal court decisions had found that holding an individual on a detainer without other judicial determination of probable cause was a violation of the IVth Amendment, King County modified County Code to make it county policy to only honor ICE detainers when accompanied by a federal judicial warrant.

Under its spending power, Congress may attach conditions on the receipt of federal funds. Art. I, § 8, cl. 1; *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987); *Wood v. Yordy*, 753 F.3d 899, 903 (9th Cir. 2014). This includes the power to condition grant of federal funds "upon the States 'taking certain actions that Congress could not require them to take.' … Such measures 'encourage a state to regulate in a particular way.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601-2602 (2012).

But recognizing the potential for abuse, the United States Supreme Court imposed limits on Congress's power to set conditions on the grant of funds. *S. Dakota v. Dole*, 483 U.S. at 207; *Mayweathers v. Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002).

The President's Executive Order tests the limits set by the Court for Congress.

First, any conditions on federal funding must be unambiguous so that a state or local jurisdiction knows what it is getting into. In a letter dated July 7, 2016, the Attorney General's Office of Justice Programs stated that agencies in receipt of certain law enforcement grants had agreed to "Standard Assurances" which state: "The applicant hereby assures and certifies compliance with all applicable Federal statutes, regulations, policies, guidelines and requirements." Such a general "assurance" may be inadequate notice that grantees must comply with Section 1373 or immigration detainers.

Second, the conditions on funding must be related to the federal interest in the particular national projects or programs that are being funded. "[O]therwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." *N.Y. v. United States*, 505 U.S. 144, 167 (1992); *Mayweathers v. Newland*, 314 F.3d at 1067. This requirement may prevent the Trump administration from pulling federal funding that is unrelated to immigration or law enforcement concerns.

Third, the conditions on funding may not induce the states to engage in unconstitutional activities. One court already has held that an agency violated an individual's Fourth Amendment rights when it honored an ICE hold and detained the individual beyond his release date. *Miranda-Olivares v. Clackamas Cty.*, 2014 WL 1414305, at *11.

Fourth, Congress may not cross the point at which pressure turns into compulsion. In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, the Court determined that a state that opted out of the Affordable Care Act's Medicaid Expansion stood to lose all of its existing Medicaid funding, which accounted for over 20 percent of the average state's total budget. Id. at 2604. The Court invalidated the Act's financial inducement as "a gun to the head." Id. The Executive Order broadly calls for the elimination of all federal grant funds, which may constitute a large percentage of state or local budgets. For that reason, the Order may violate the rule of *Sebelius*.

One thing is certain. There will be hard fought litigation if the federal government attempts to pull federal funding from "sanctuary jurisdictions."

VII. ICE Already Has Compiled Lists Of "Sanctuary Jurisdictions."

The Executive Order requires ICE to continue to track jurisdictions that do not honor detainers. In fact, ICE already has extensive lists.

In May 2016, the Office of the Inspector General responded to a request by the Office of Justice Programs to investigate whether "several jurisdictions" receiving grant funds, "may be in violation of 8 U.S.C. 1373." The OIG used lists of suspect jurisdictions provided by ICE to select jurisdictions for review. The OIG used a report from ICE entitled "Declined Detainer Outcome Report," dated December 2, 2014, and a later report by ICE that identified 155 jurisdictions that have "policies that limit or restrict cooperation with ICE and, as of Q3 FY 2015, have declined detainers." See Memorandum of the Office of Inspector General, U.S. Department of Justice, *Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C.* § 1373 by Grant Recipients, Appendix, May 31, 2016, pages 2, 11.[3]

SOURCE: Renne Sloan Holtzman Sakai LLP, Public Law Group,[4] "Can the President Defund Sanctuary Cities?" January 27, 2017,

http://publiclawgroup.com/2017/01/27/can-the-president-defund-sanctuary-cities/

[3] Based on a review of the "redacted list" (an unredacted list is not available) King County is on the list.

[4] "Renne Sloan Holtzman Sakai LLP (Public Law Group®) was founded to serve large and small public agencies, nonprofits and community-based organizations, and private entities throughout California. The Public Law Group® combines the knowledge of legal practitioners with the practical experience of human resources professionals. The firm is built on the successful outside-the-box approach developed by our Chair, former San Francisco City Attorney Louise Renne." http://publiclawgroup.com/firm-profile/