

Legal Sidebar

Plan to Restrict Federal Grants to “Sanctuary Jurisdictions” Raises Legal Questions

02/14/2017

On January 25, 2017, President Trump issued [Executive Order \(EO\) 13768](#), “Enhancing Public Safety in the Interior of the United States.” Among other things, this EO raises the prospect of withholding federal grant money from state or local government entities that have adopted any “statute, policy, or practice that prevents or hinders the enforcement of Federal law.” The text of the EO has raised questions about what constitutes a “[sanctuary jurisdiction](#),” what federal funds may be denied to such jurisdictions, and how the Executive will implement the EO. Several lawsuits have recently been filed challenging the EO.

This Sidebar provides a description of the EO, highlighting, in particular, potential questions about how the EO could be construed. The Sidebar also briefly discusses the claims made by those jurisdictions challenging the EO. These issues will be explored further in future CRS products and presentations.

Terms of the EO

The EO declares that “[i]t is a 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](#),” a federal statute that bars states and localities from restricting the sending or receiving of information to or from federal immigration authorities regarding persons’ “immigration or citizenship status,” among other things. The EO further provides that jurisdictions that “willfully refuse to comply” with 8 U.S.C. § 1373 (which the EO denominates “sanctuary jurisdictions”) are ineligible for federal grants, with certain narrow exceptions. To carry out this funding restriction, the EO directs the Attorney General and the Secretary of Homeland Security (DHS Secretary) to “ensure” that “sanctuary jurisdictions” are ineligible for federal grants. It also provides the DHS Secretary with “the authority to designate . . . a jurisdiction as a sanctuary jurisdiction.” In addition, the EO directs the Attorney General to take “appropriate enforcement action” against entities that “violate” 8 U.S.C. § 1373 or have enactments, policies, or practices that “prevent[] or hinder[] the enforcement of Federal law.”

Which jurisdictions may be affected? The EO authorizes the DHS Secretary to identify “sanctuary jurisdictions,” which are those that he deems (“in his discretion and to the extent consistent with law”) “willfully refuse to comply with 8 U.S.C. 1373,” among other things. It is unclear what the phrase “consistent with law” may mean in this context, as federal law does not define what constitutes a “sanctuary jurisdiction” (although [legislation has been introduced](#) in the 115th Congress that would define this term). Relatedly, regarding the EO’s provisions about enforcement actions by the Attorney General, the EO does not specify what constitutes “hindering” the enforcement of federal law, nor does it clarify whether “federal law” includes any federal statute or regulation or is limited to federal immigration laws.

Which federal funds are affected? The EO directs the Attorney General and the DHS Secretary to “ensure” that sanctuary jurisdictions are ineligible for “Federal grants.” On its face, this language could be seen to [include a wide variety of federal funds](#) that state and local jurisdictions receive in the areas of housing, education, economic development, transportation, disaster relief, and health care. This reading could be seen to be supported by another provision of the EO, which requires the Director of the Office of Management and Budget (OMB) “to obtain and provide relevant and responsive information on *all* Federal grant money that currently is received by any sanctuary jurisdiction” (emphasis added). On the other hand, one could read the OMB provision more narrowly, as purely

concerned with information-gathering to help determine which grants [may require legislation](#) to restrict the flow of such money to these jurisdictions. Also, questions could be raised about whether and to what degree federal grant [funds unrelated](#) to immigration or law enforcement may be subjected to anti-sanctuary conditions pursuant to Supreme Court case law on the Spending Clause, as is discussed below.

Another issue is whether the EO applies to grant funding that has already been disbursed to grant recipients or only to future grants. The EO does not directly address this question. However, insofar as the EO directs that the order “be implemented consistent with applicable law,” it could be seen to apply only to future grant funding, in accordance with [Supreme Court precedent](#) that requires any federally imposed funding condition be spelled out “unambiguously” so that the grant recipient may “voluntarily and knowingly accept[.]” such condition. In the case of funds that have already been disbursed, the grant recipient generally could not be said to have agreed to accept a condition that it was unaware of at the time it accepted the grant award, unless the grant program’s authorizing legislation requires applicants to provide assurances that they will [comply with “applicable federal laws”](#) (such as 8 U.S.C. § 1373).

Lawsuits Challenging the EO

At least one jurisdiction—Miami-Dade County—has [changed its practices](#) because of the possible loss of federal funds and reportedly will honor certain requests to hold aliens pursuant to [immigration detainers](#). Several other jurisdictions, in contrast, have filed lawsuits against the President and his senior officials challenging the EO’s constitutionality and seeking an injunction barring its implementation. These jurisdictions include the [City of San Francisco](#), CA; the [County of Santa Clara](#), CA; and the Massachusetts cities of [Chelsea and Lawrence](#). Their lawsuits argue, among other things, that the EO violates the Fifth and Tenth Amendments and the Spending Clause of the U.S. Constitution.

Fifth Amendment Claim. The lawsuits brought by Santa Clara County and the Massachusetts cities allege that the EO is unconstitutionally vague by not providing fair notice as to which jurisdictions are affected and what sanctions may be imposed. The Supreme Court has [held](#) that, under the [Due Process Clause](#) of the [Fifth Amendment](#), a federal law is void for vagueness if it “fails to apprise persons of ordinary intelligence of the prohibited conduct,” or is so standardless that it “encourages arbitrary and discriminatory enforcement.” Given this case law, the plaintiffs claim that the EO “[lends itself to subjective interpretation and discriminatory enforcement](#)” because it lacks definitions of “key terms” such as “sanctuary jurisdiction,” “Federal grants,” and “appropriate enforcement action.”

Tenth Amendment Claim. All three lawsuits argue that the EO’s empowerment of the Attorney General to bring an “enforcement action” against any entity that violates 8 U.S.C. § 1373 impermissibly “[commandeers](#)” state and local governments by compelling them to enforce federal law. This, they say, is in violation of [Supreme Court case law](#) concerning the Tenth Amendment that stated the “Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”

Spending Clause Claim. All three lawsuits also assert that the EO fails to meet certain criteria set forth in [Supreme Court cases](#) construing Congress’s authority under the [Spending Clause](#) to impose conditions on recipients of federal funds. These High Court decisions have suggested that such conditions may not be [unduly coercive](#) or [unrelated to the federal interest furthered by the funds](#). In addition, as mentioned earlier, a funding condition must be established “unambiguously” to allow the recipient to make an informed decision about the consequences of accepting the grant. Specifically, the jurisdictions challenging the EO allege that the EO: (1) coerces recipients into complying with federal law by proposing to eliminate federal funding that constitutes a large percentage of a state or local government’s budget; (2) “[imposes conditions that are not germane to the purpose of the funds insofar as it reaches funds that are unrelated to law enforcement or immigration](#),” and (3) places conditions on federal grants that were not unambiguously stated before the funds were awarded.

It remains to be seen how the courts will rule on these challenges, or on any other similar suits that might be brought.