



FAQ: TRUMP'S EXECUTIVE ORDER ON SANCTUARY CITIES

Who is affected and how?

In an Executive Order on immigration enforcement issued January 25, 2017, the President directed that sanctuary cities will not be eligible to receive federal grants.

What exactly this means, what exactly is a sanctuary jurisdiction, what funds may be affected, and how or when any of this will be administered remains unclear.

However, on April 25, 2017, a federal judge enjoined Section 9 of the the Executive Order (the section regarding sanctuary jurisdictions). The judge found many constitutional problems with Order, and ruled that it must be put on hold until its legality is settled in court.

This FAQ seeks to address what the order means, what is unclear, and what remains to be determined.

What does the Executive Order say?

The Executive Order discusses various aspects of immigration enforcement. Section 9 of the order says that: "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." The order states that in furtherance of this policy, jurisdictions that wilfully refuse to comply with 8 U.S.C. § 1373, a federal statute, shall not be eligible to receive federal grants.¹ The Secretary of Homeland Security may designate, in his discretion, what jurisdictions are sanctuaries.

The Executive Order also directs the head of the Office of Management and Budget to provide information on all federal grant money currently received by sanctuary jurisdictions. The Order further instructs the Attorney General to "take appropriate enforcement action" against any entity that violates 8 U.S.C. 1373,² that "has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." In addition, DHS shall publish weekly reports of the jurisdictions that decline ICE detainer requests.

¹ Executive Order: Enhancing Public Safety in the Interior of the United States, President Donald Trump, January 25, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

Is the Executive Order legal?

Several cities and counties filed lawsuits against the Executive Order, challenging its constitutionality on multiple grounds. A federal district court has already granted an injunction, forbidding the government from taking action to implement or enforce the Order until further notice. This is not a final decision on the validity of the order, but a temporary hold. Nonetheless, the court found that the Order is likely to be proven unconstitutional, and so the it must be stopped before it causes irreparable harm.

For more information about these lawsuits and their legal arguments, see [The Lawsuits Against Trump's Threat to Defund Sanctuary Cities](#).

What federal grants are affected by this order?

The Executive Order is not limited to any particular grants, leaving potentially all federal funding at stake.

The Department of Justice argued in its legal defense of the Order that only grants administered by the Department of Justice or the Department of Homeland Security are at issue, not *all* federal grants. Moreover, the DOJ stated that the order only applies to grants where the grant already clarifies that compliance with 8 USC § 1373 is a requirement for receiving the funds: SCAAP, JAG, and COPS grants.

However, in enjoining the Executive Order, the federal court rejected this interpretation. This is not the way President Trump, Attorney General Jeff Sessions, or other administration officials have publicly described the order. They repeatedly claimed that sanctuary cities would not receive *any* federal funds, and the actual language of the Order is much broader than the DOJ sought to argue.

² For more information about 8 USC § 1373, see: <https://www.ilrc.org/fact-sheet-sanctuary-policies-and-federal-funding>

What is the definition of a “sanctuary jurisdiction”?

The executive order does not provide a definition for the term “sanctuary.” The government intentionally left that unclear, so that jurisdictions with any kind of protective local immigration policy will be worried about losing funding. Public statements from President Trump and Jeff Sessions have targeted cities that don’t comply with immigration detainers or who have embraced the label of sanctuary cities. The executive order gives complete discretion to the Secretary of Homeland Security to designate who is a sanctuary jurisdiction. The lack of clarity and advance notice is one of the reasons that the federal judge ruled that the Order is likely unconstitutional and issue a temporary halt to any implementation.

Does the Executive Order cut funding to jurisdictions that won’t hold people on ICE detainers?

A common assumption is that the Executive Order will take funding from jurisdictions that won’t hold people on ICE detainers. Many of the public statements from the Trump administration have focused on compliance with detainers, so it may have been the intent of the Order to focus on those jurisdictions.³

But if the federal government tries to take money from jurisdictions who refuse to hold people on detainers (of which there are hundreds across the country), they will face significant legal and constitutional challenges.⁴ The federal government cannot commandeer state and local resources (such as police officers and detention cells) to enforce a federal regulatory program.

Moreover, the federal government cannot condition grants on actions that would violate the Constitution, and many federal courts have found that localities who held someone on an immigration detainer violated that person’s Fourth Amendment rights.⁵

³ 8 USC § 1373 does not require compliance with detainers, although it is possible the government will try to argue that it does. Such a position would not be supported by the text of the statute or caselaw.

⁴ For more detailed description of the legal and constitutional limits on conditions to federal funding see <https://www.ilrc.org/letter-law-profs-1373>; <https://www.ilrc.org/interview-professor-bill-hing-threats-federal-funding-sanctuary-cities>.

Can the Secretary of Homeland Security designate *anyone* as a sanctuary?

The Executive Order says that the Secretary of Homeland Security has discretion to designate who is or is not a sanctuary jurisdiction. The Order provides no direction on how he will do this, when, or on what basis. We don’t yet know what the government intended, or how Secretary Kelly will interpret this order.

Because of this confusion, several cities and counties filed lawsuits against the Executive Order claiming that the order violates Due Process because it is so vague. Localities have no way to know if or when they would be designated as a sanctuary jurisdiction, nor what they could do to challenge that designation or prevent funds being cut.⁶ The federal court for the Northern District of California agreed with this, and put the order on hold until further notice.

What is 8 USC § 1373?

8 USC § 1373 is a federal statute that prohibits local and state governments and agencies from enacting laws or policies that limit communication with DHS about “information regarding the immigration or citizenship status” of individuals. The statute prohibits such policies, but does not contain any requirement for specific action, such as asking for immigration status or holding someone on an ICE detainer.

If compliance with 8 USC § 1373 is the ultimate definition of sanctuary or determines application of the Executive Order, then funding cuts are likely to be minimal. Localities already have to comply with this federal statute, which has been in effect for more twenty years. However, San Francisco has claimed that this statute itself is unconstitutional because it intrudes on the sovereign powers of the states.

⁵ For information on the court cases regarding the legality of ICE detainers, see: <https://www.ilrc.org/immigration-detainers-legal-update-october-2016>

⁶ For more information on the lawsuits against the Executive Order, see <https://www.ilrc.org/lawsuits-against-trump%E2%80%99s-threat-defund-sanctuary-cities>

What are the legal constraints on the President's ability to cut this funding?

Ultimately the legality of these funding threats will be determined by the courts, but there are many constitutional constraints on the President's authority in this realm.

First, our constitutional structure provides Congress with authority over federal spending, not the executive branch. This means that Congress generally gets to decide what are the conditions on grants, and those must be unambiguously stated in the law, so that states know what is expected. The President can't make up his own rules outside Congressional parameters.

Second, the federal government cannot commandeer the resources of state and local governments to enforce federal laws. That is, the federal government can't force local law agencies to help with immigration enforcement. They can make requests, but the locality has no legal duty to respond.

Congress can offer incentives to local agencies to help with federal programs or make specific policy choices preferred by the federal government, and those incentives could be strings on particular federal funding. But even then, there are several limitations to what conditions the federal government can attach to grant funding, and how. These limitations were recently reiterated by the Supreme Court in the Obamacare litigation: *NFIB v. Sebelius*. The incentives cannot be so threatening or stringent as to be coercive. In addition, the conditions must be related to the purpose of the grant. Grants for health care probably cannot be conditioned on whether the local police department agrees to help enforce immigration law. Moreover, conditions can't induce the state or local entity to violate the constitution – such as by detaining people for immigration in violation of the Fourth Amendment.

Finally, the government can't retroactively impose conditions on already existing grants. Attaching new requirements to grants requires changing the statutory authority for each specific grant program going forward.

Finally, the Constitution requires that the government provide Due Process of law, and the executive order does not seem to provide any process or transparency for this de-funding action at all. As Santa Clara County claimed in its lawsuit against the order, there is "no opportunity to contest the Attorney General's decision or have that decision reviewed by an independent tribunal," and there is not even necessarily any notice that a jurisdiction has been designated a sanctuary at all.

For all these reasons, the Executive Order has been enjoined by the federal courts.

Can local governments continue to maintain local policies against involvement with immigration enforcement?

Yes. Hundreds of cities and counties across the country have local policies directing that their own agencies and resources not be spent on immigration enforcement. Whether or not they are referred to as 'sanctuary' policies, they are a wise and lawful exercise of local authority. Local governments are protected by the legal and constitutional structures described above, and cannot be stripped of federal grant money without due process and clear direction from Congress. Although the Executive Order leaves many questions unanswered, the Constitution constrains federal power, and the courts will enforce it.



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