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NACo analysis: potential county impacts of the executive order on "Enhancing Public Safety in the Interior of the United States"

On January 25, President Trump signed an executive order titled "Enhancing Public Safety in the Interior of the United States." The order aims to "ensure the public safety of American people in communities across the United States as well as to ensure that our Nation's immigration laws are faithfully executed."

While this and other executive orders signed by President Trump have been the subject of much national attention and political debate, county leaders are faced with practical implications that the executive order could have on local governments and their law enforcement agencies. Counties across the country are assessing the order and how its provisions align with existing federal statutes and court precedents. In doing so, counties are aiming to avoid a **potentially difficult situation in which they are forced to choose between two deeply undesirable outcomes: running afoul of recent federal court rulings in a manner that invites litigation and legal liability, or losing access to significant federal funds needed to serve local communities.**

As we work to assess serious constitutional, legal and practical concerns with this order from a county operations perspective, we stand ready to partner with administration officials, including leaders at the U.S. Department of Justice and U.S. Department of Homeland Security, to pursue our shared priority of ensuring the safety of local communities across the nation. In-depth dialogues between federal and local officials can help to highlight workable solutions that serve this shared responsibility without placing local governments in a lose-lose situation.

In assessing this executive order, NACo is focused on constitutional principles that have been affirmed by federal courts – outlined below – rather than underlying questions of federal or local immigration policy.

- **The federal government cannot compel states or their political subdivisions, such as counties, to enforce federal laws**, according to U.S. Supreme Court rulings on the Tenth Amendment and its division of powers between the federal government and states.
- **Federal withholding of funds from otherwise eligible state and local entities could also violate the Tenth Amendment** if such withholding effectively coerces adoption of federal policies by those entities, or if withheld funds are unrelated to the federal policies in question.
- **Counties have no legal obligation to honor immigration detainers, and when they choose to honor these requests, they risk violating the Fourth Amendment's protections** against "unreasonable searches and seizures," which apply to foreign nationals in the United States.

With these constitutional principles in mind, NACo has analyzed the "Executive Order on Enhancing Public Safety in the Interior of the United States," and looks forward to dialogues between federal and

local officials that can help to facilitate effective and practical implementation of the administration's executive order in a manner that serves our shared responsibility of keeping America safe.

Please note: This analysis is **not** intended to serve as legal advice for any county or other entity, and we encourage you to seek such advice from your county attorney or other professional legal service provider in assessing the specific consequences of this order on your jurisdiction.

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1. Analysis of Sanctuary Jurisdictions provisions: constitutional issues related to federal withholding of funds from otherwise eligible state and local governments

Background: In recent years, numerous proposals put forth by members of Congress have called for the withholding of federal funding from sanctuary jurisdictions. Although there is no formal definition of a sanctuary jurisdiction, the term is generally used to refer to states and localities that decline some or all federal requests for assistance with immigration enforcement. As referenced above and expanded upon below, numerous jurisdictions across the country decline such requests due to adverse legal, fiscal and public safety impacts.

Several bills and amendments introduced during the 114th Congress would have withheld certain federal funds from sanctuary jurisdictions if enacted. Typically, the funds targeted in these proposals were related to law enforcement, though some bills also targeted emergency management and homeland security funding, and a bill introduced by Sen. Pat Toomey (R-Penn.) also targeted Community Development Block Grant (CDBG) funding. Ultimately, none of these proposals were enacted during the 114th Congress.

Key language from the executive order (emphasis ours):

> Sec. 9. Sanctuary Jurisdictions. 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.
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> (a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall 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 the Secretary. The Secretary **has the authority to designate**, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall 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.**

Analysis: While the signing of this executive order does not itself trigger the withholding of federal funds from any jurisdiction, the Trump Administration has paved a wide path for future withholdings from counties that are deemed to be sanctuary jurisdictions. Whereas previous proposals on this issue have targeted specific funding streams, the executive order seems to target all federal grants except those

deemed necessary for law enforcement purposes. Further, the order seems to put forth a broad and potentially vague definition of sanctuary jurisdictions, and does little to clarify longstanding confusion related to the classification of jurisdictions as sanctuaries. Further guidance from federal agencies could provide clarity on this issue.

Nonetheless, while the intent of the order to broadly prevent sanctuary jurisdictions from receiving federal funding is clear, there is less clarity regarding the administration's ability to carry out the withholdings laid out in the order. Enforcement efforts could be strengthened with supportive statutory changes put forth by lawmakers in Congress, although such changes would likely require filibuster-proof support in both chambers. In any case, the constitutional and legal issues outlined below could limit, delay or derail the withholding of funds from local jurisdictions as laid out in this executive order.

Constitutional issues related to which federal funds can be targeted: requirement of nexus between targeted funds and policy goals, and prohibition of federal coercion through funding decisions

The executive order's broad targeting of federal grants seems to contradict Supreme Court precedent regarding the constitutionality of withholding federal funds from otherwise eligible state and local jurisdictions to advance policy goals. Two Supreme Court cases – *South Dakota v. Dole* (1987) and *National Federation of Independent Businesses v. Sebelius* (2012) (NFIB) – have limited the amount and types of funding that can be withheld, based on protections against federal coercion that are extended to states and their political subdivisions by the Tenth Amendment.

In *South Dakota*, the well-known case on federal threats to withhold highway funds from states that did not raise their legal drinking age to 21, **the Court ruled that conditions on the receipt of federal funds must not be "so coercive as to pass the point at which 'pressure turns into compulsion,'" and that the condition must be related to the "particular national project or program to which the money was being directed."** The Supreme Court upheld the federal government's conditions in this case because it found that the proposed five percent cut in funding was "relatively mild," and that drinking age policies relate directly to highway funding because they work to ensure safe interstate travel.

The Court's ruling in *South Dakota* was at issue in *NFIB*, which dealt with a provision of the Affordable Care Act (ACA) that would have withheld all Medicaid matching funds from states that refused to expand Medicaid as authorized under the new health care law. In that case, **the Court reaffirmed both aspects of the *South Dakota* ruling mentioned above – that there must be a relation or nexus between funding withheld by the federal government and the policy goal in question, and that the amount of funding withheld cannot be so great that it becomes coercive.** While the Court did find a nexus between the funding and policy goal in this case, it also found that the threat of withholding all Medicaid funds from states amounted to a "gun to the head" that left states with no practical option other than expanding Medicaid. Because of this, the ACA provision that threatened to withhold Medicaid funds from non-expansion states was held to be unconstitutional.

Since President Trump's executive order appears to call for the withholding of all targeted grants in full, enforcement of the order seems likely to pass "the point at which pressure turns into compulsion" in terms of the amount of funding at stake. Further, the order seems to contradict the requirement that

there be a nexus between withheld funds and federal policy goals, since most federal funds are unrelated to immigration enforcement. In fact, the only funds explicitly excluded from withholding in the order (law enforcement grants) are arguably also the only funds that pass the "nexus" test. Based on this, the withholding of federal funds under the sanctuary jurisdictions provisions of the order may stand on shaky legal ground.

Constitutional issues related to which jurisdictions are determined to be sanctuaries: limits to federal statutory requirements related to local assistance with immigration enforcement

The executive order calls for compliance with 8 U.S.C. 1373 by state and local governments, and makes those who fail to comply with the statute ineligible for almost all federal grants (section 1373 is analyzed at length below). However, the order broadens its scope by also targeting any jurisdiction "which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law," and gives the Secretary of the U.S. Department of Homeland Security (DHS) the discretion to designate jurisdictions as sanctuaries. Until further guidance is issued, it will be difficult for many counties to determine whether or not they are likely to be considered a sanctuary jurisdiction under this order.

It is more feasible to assess at the current juncture whether a county is in compliance with 8. U.S.C. 1373. Section 1373, in relevant part, states that federal, state and local governments and their officials "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."

The text of section 1373 is notable in that it does not extend any affirmative duty on state and local governments, and further because its scope is limited to information related to citizenship or immigration status. That is to say, **there is no requirement in section 1373 that local and state governments comply with immigration detainers (requests from federal authorities that local jails detain individuals for immigration purposes beyond the point at which they would otherwise be released),** nor does the statute have any application to local policies that limit communication related to criminal history or release dates of individuals being held in jails.

The Second Circuit Court of Appeals affirmed this in *City of New York v. U.S.* (1999), a challenge to section 1373 initiated by the city after the statute was added to the federal code in 1996. While the court rejected the city's argument that section 1373 was itself a violation of the Tenth Amendment, it **stated that the statue does not "affirmatively conscript states, localities, or their employees into the federal government's service," and further that 1373 does not "directly compel states or localities to require or prohibit anything."** The statute, the court said, prohibits "state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information" with federal authorities.

Based on this, and because compliance with 8 U.S.C. 1373 is the stated policy goal of President Trump's executive order, attempts to withhold federal funds from local jurisdictions for refusal to honor detainer requests or other policies unrelated to the sharing of immigration status with federal authorities could prove vulnerable to legal challenges. Further, since many local jurisdictions automatically share

biometric data with federal authorities when an individual is booked into their jail, some have argued that counties are in this way automatically complying with section 1373, regardless of their policies on immigration detainers.

In sum, based on recent federal court rulings and plain readings of the statute referenced in the executive order, enforcement of penalties put forth by the order against counties deemed to be sanctuary jurisdictions could violate the Constitution.

2. Analysis of "Secure Communities" provisions: reinstitution of a federal program with potentially adverse legal, fiscal and public safety impacts at the local level

Background: The Secure Communities program was established in 2008, during the last year of the George W. Bush Administration, and continued through most of the Obama Administration until it was replaced in 2014. Through the program, federal authorities sought the assistance of state and local governments in identifying and deporting individuals who had come in contact with their law enforcement agencies, typically through immigration detainers. When the program was established, the U.S. Department of Homeland Security (DHS) put forth the following as the goals and objectives of the program:

1. Identify criminal aliens through modernized information sharing;
2. Prioritize enforcement actions to ensure apprehension and removal of dangerous criminal aliens;
3. Transform criminal alien enforcement processes and systems to achieve lasting results.

Although Secure Communities remained in operation for six years before it was replaced, concerns related to local public safety, constitutional liabilities and the unreimbursed costs of detaining individuals beyond their original release dates led numerous jurisdictions to end their participation in the program, and in turn typically led to these jurisdictions being labeled sanctuaries.

Key language from the executive order (emphasis ours):

> Sec. 10. Review of Previous Immigration Actions and Policies. (a) The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and to **reinstitute the immigration program known as "Secure Communities**" referenced in that memorandum…
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> (c) To protect our communities and better facilitate the identification, detention, and removal of criminal aliens within constitutional and statutory parameters, **the Secretary shall consolidate and revise any applicable forms to more effectively communicate with recipient law enforcement agencies.**

Analysis: Through this provision of the executive order, the Secure Communities program is reinstituted, and its replacement, the Priority Enforcement Program (PEP), has been terminated. As mentioned above, many counties ended their participation in Secure Communities due to a series of concerns with

implementation of the program, and the reinstitution of the program through this executive order will likely give rise these concerns once again.

It is worth noting, however, that the executive order calls on the Secretary of DHS to revise the forms used in the Secure Communities programs "to more effectively communicate" with local law enforcement agencies, and also that the order makes mention of "constitutional and statutory parameters" in calling for these revisions. This presents an opportunity for discussions between federal officials and their state and local counterparts that could help to alleviate some of the long-standing concerns – outline below – with the former Secure Communities program.

Legal liabilities that lead to costly and lengthy litigation

Some counties participating in Secure Communities faced lawsuits alleging violations of the constitutional rights of the undocumented immigrants they detained. The Fourth and Fifth Amendments of the Constitution, which protect against unreasonable searches and mandate due process of law, have been held applicable to undocumented immigrants, and counties risked violating these constitutional rights when they detained undocumented immigrants under Secure Communities.

A federal district court held in 2014 that Clackamas County, Ore. had violated an immigrant's Fourth Amendment rights when she was held after her scheduled release date so that ICE could investigate her status. **The court found that the county did not have probable cause to detain this individual beyond her original sentence – "the ICE detainer alone did not demonstrate probable cause" – and that continued detention without probable cause constituted a new arrest that resulted in "prolonged, warrantless, post-arrest, pre-arraignment custody."** Notably, the court also affirmed that immigration detainers are federal requests, rather than mandatory orders, and outlined potential constitutional issues with requiring local governments to comply with immigration detainers.

Days after the ruling, the Clackamas County Sheriff issued a statement announcing that his county jail would no longer hold an individual based solely on an immigration detainer. In his statement, the Sheriff added, "Should my office be informed by any other law enforcement agency that there is sufficient legal basis for us to hold a person in custody, that there is probable cause for such a detention, we will hold such persons in custody." Nonetheless, the county continues to be listed as a sanctuary jurisdiction on unofficial lists of such jurisdictions compiled by national research organizations.

Lack of reimbursement when counties honor immigration detainers

States and counties that participated in Secure Communities often did so without much, or any, reimbursement from the federal government, despite the fact that immigration enforcement is a federal responsibility. **The California State Association of Counties found that in FY 2012, counties in California spent an estimated $300 million to incarcerate undocumented immigrants, but received only $21 million — or seven percent — in reimbursements from the federal government.** Elsewhere, in a 2011 ordinance limiting the Cook County, Ill. Sheriff's ability to honor immigration detainers, the county's Board of Commissioners wrote in part that "Cook County can no longer afford to expend taxpayer funds to incarcerate individuals who are otherwise entitled to their freedom."

Moreover, **the federal program that provides reimbursements to state and local governments for incarcerating undocumented immigrants, the State Criminal Alien Assistance Program (SCAAP), has seen its funding slashed by more than 70 percent since FY2000, even as the number of jurisdictions applying for reimbursements has doubled.** The program's funding peaked in FY2002 at $565 million, and has since been slashed to the current level of $210 million. The Obama Administration even called for total elimination of the program in its budget proposals, including its FY 2017 proposal, but lawmakers have continued to provide some funding for SCAAP through annual appropriations.

Deterioration of relations between immigrant communities and local law enforcement

In ending their participation in Secure Communities, some states and counties stated that participation in the program actually compromised local law enforcement efforts. In 2013**, the California state Legislature passed a law finding that "immigration detainers harm community policing efforts because immigrant residents who are victims of or witnesses to crime, including domestic violence, are less likely to report crime or cooperate with law enforcement when any contact with law enforcement could result in deportation."**

King County, Wash. stated similar concerns in 2013 in approving an ordinance that limited the county's cooperation with immigration detainers to "only those who have a demonstrable and significant criminal history and therefore might present some risk to public safety." In its ordinance, the county stated that "Although the intended focus of programs like Secure Communities is the removal of individuals with serious criminal records, data released by [DHS] indicates that, between 2008 and 2011, seventy-eight percent of the detainer requests issued against individuals at the county adult jail involved individuals with no criminal records or convictions."

As Secure Communities is reinstated, these adverse impacts are likely to intensify. As previously mentioned, however, the executive order alludes to some of the issues counties have faced when participating in the program as it was originally designed, and calls for revisions to the program that could help to address these concerns. Federal officials could facilitate greater local participation in the program moving forward by making these revisions based on in-depth dialogues with local officials.

3. Analysis of provisions related to 287(g) agreements: potential impacts of increased delegation of federal immigration enforcement to local law enforcement officials

Background:

In 1997, the Illegal Immigration Reform and Immigrant Responsibility Act added section 287(g) to the federal immigration statute, addressing the "performance of immigration officer functions by state officers and employees." This amendment enables federal authorities to enter into agreements with state and local law enforcement agencies, "permitting designated officers to perform immigration law enforcement functions, provided that the local law enforcement officers receive appropriate training and function under the supervision of [federal authorities]." These agreements are typically carried out through Memorandums of Agreement (MOA) that define the scope and limitations of the delegation of authority. According to DHS, the federal government currently has 287(g) agreements with 34 law enforcement agencies in 16 states.

Key language from executive order (emphasis ours):

> Sec. 8. Federal-State Agreements. It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.
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> (a) In furtherance of this policy, **the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g)** of the INA (8 U.S.C. 1357(g)).
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> (b) To the extent permitted by law and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, **to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers** in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.
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> (c) To the extent permitted by law, the Secretary may **structure each agreement under section 287(g) of the INA in a manner that provides the most effective model for enforcing Federal immigration laws for that jurisdiction.**

Analysis:

287(g) agreements were scaled back after the program peaked in 2012 with the participation of 64 local governments. This was in part due to criticisms of the program that are similar to criticisms of Secure Communities – **that "if the foreign born come to associate state and local law enforcement agencies with immigration enforcement, they will hesitate to report crimes or to cooperate in policing activities,"** as relayed by the Congressional Research Service in a recent report. The report also highlights another criticism of the program: that it **results in inconsistent enforcement of federal immigration laws across jurisdictions – at times allegedly caused by racial or ethnic biases – as local law enforcement agencies become involved in immigration enforcement.**

Though the executive order looks to strengthen and expand the 287(g) program, potentially giving rise to continued criticisms of the program, the order also requires engagement and consent from local officials in the preparation of these agreements and does not attempt to place any mandates on local agencies to participate in the program. The order also calls for federal authorities to structure each agreement "in a manner that provides to most effective model for enforcing federal immigration laws for that jurisdiction." This language should help to ensure that local public safety considerations and circumstances related to immigrant populations are factored into the production of each agreement, but could also exacerbate concerns that the 287(g) program results in uneven application of immigration laws throughout the country.

Conclusion

President Trump's Executive Order on Enhancing Public Safety in the Interior of the United States is likely to have significant impacts on county governments and our law enforcement agencies. While the sanctuary cities provisions of the order could potentially lead to major loss of funding for many local governments, federal enforcement actions and subsequent legal challenges that will likely follow will determine how much funding is at stake and which jurisdictions are impacted. **In implementing this and other provisions of the executive order, in-depth dialogues with local officials can enable federal authorities to focus their efforts in a manner that acknowledges and addresses long-standing concerns with federal immigration enforcement and its local impacts. America's counties stand ready to partner with federal officials to find workable solutions that serve our shared and crucial responsibility of preserving the safety of our nation and its local communities.**