

April 18, 2017

Webinar:

Legal Issues Surrounding the Executive Order on “Sanctuary Jurisdictions”

Slides available at www.naco.org/webinars later this week



Housekeeping items

- Email questions to hsedigh@naco.org
- Slides will be posted at www.naco.org/webinars later this week.

Webinar: Legal Issues Surrounding the
Executive Order on “Sanctuary Jurisdictions”

Slide 2

April 18, 2017



Webinar Agenda

1. Overview of Local Governments' Involvement in Immigration Enforcement
2. Overview of Executive Order on "Sanctuary Jurisdictions"
3. Legal Issues Raised by the Executive Order
4. Overview of Litigation Challenging the Executive Order
5. Questions & Answers

Speakers

- Hadi Sedigh, National Association of Counties
- Lisa Soronen, State & Local Legal Center
- Amanda Kellar, International Municipal Lawyers Association

How are local govs. involved in immigration enforcement?

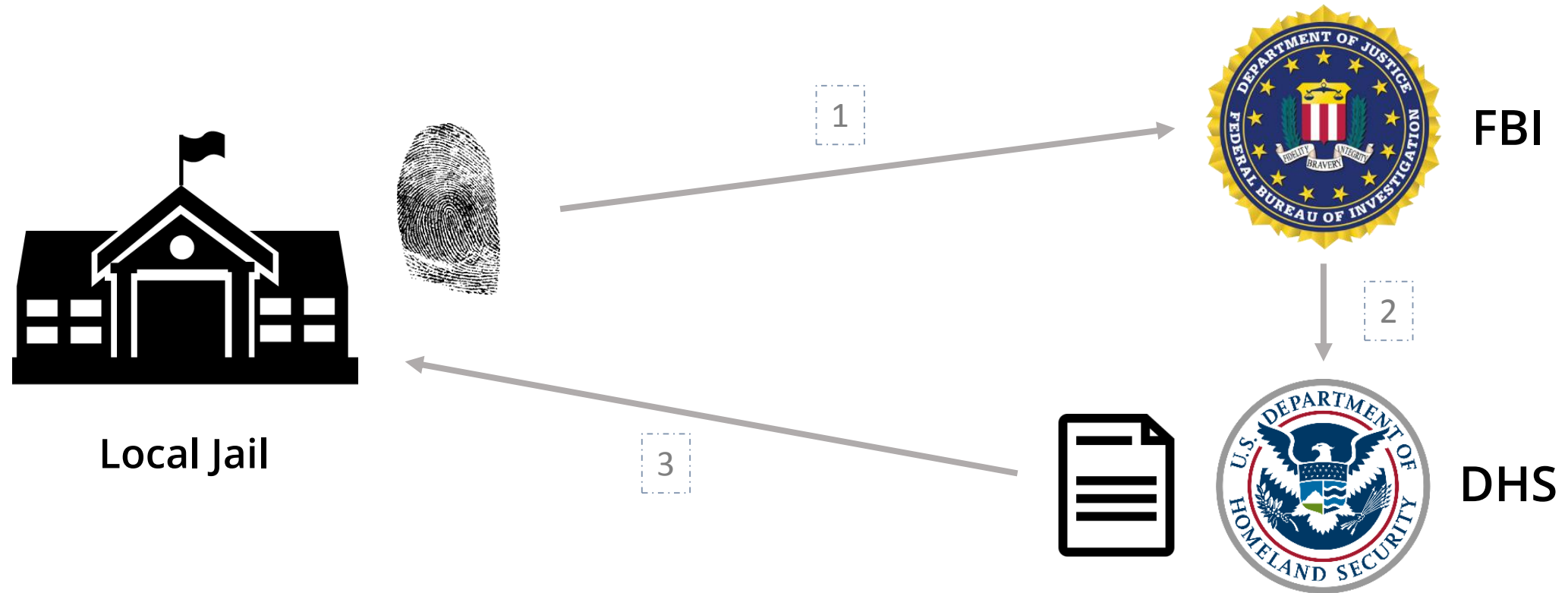
Local law enforcement agencies

- Can enter into voluntary **287(g) agreements** with the federal government under which local officers are deputized to perform immigration enforcement functions, which are otherwise federal authority. 64 agreements at peak, now 37 according to ICE.

Local jails

- Receive **immigration detainers** from the federal government
- Detainers traditionally flowed through a program called **Secure Communities**, was replaced by the Priority Enforcement Program (PEP) in 2014

Secure Communities / Priority Enforcement Program



Webinar: Legal Issues Surrounding the
Executive Order on "Sanctuary Jurisdictions"

Slide 5

April 18, 2017



Why did some local govts. limit detainer cooperation?

Three common reasons

- **Costly lawsuits:** federal courts ruled that counties who honor immigration detainers without probable cause violate the Constitution's protections against warrantless arrests. ICE will not indemnify counties.
- **Bad for local law enforcement:** "if the foreign born come to associate local officers with immigration enforcement, they will hesitate to report crimes or to cooperate in policing activities."
- **Detainer cooperation costs add up:** counties received little reimbursement from the federal government for the cost of incarcerating individuals they would have otherwise released. CSAC found 7% rate.

Overview of Executive Order on “Sanctuary Jurisdictions”

Webinar: Legal Issues Surrounding the
Executive Order on “Sanctuary Jurisdictions”

Slide 7

April 18, 2017



Why this webinar?

- As local government officials you must be able to explain to your constituents the following:
 - What the Executive Order (EO) **says**
 - What the EO **means**
 - Whether the EO is **likely legal**
- None of this is easy
 - EO is **short** and **unclear**
 - Legal issues at stake are **complicated** and **difficult to explain**

Most important points...

- The EO leaves us with many questions and few answers
- Under the broadest reading it is almost certainly unconstitutional
- Context is important—was it drafted based on legal advice?
- Was it drafted to scare cities and counties into taking unnecessary (and even unconstitutional) steps?
 - Even if it wasn't this has been its effect
- Legal issues have not been adequately explained in the mainstream media

What does the executive order say?

- Sanctuary jurisdictions (SJs) must comply with 8 U.S.C. 1373 (which they had to before)
- SJs that willfully refuse to comply with 8 U.S.C. 1373 are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary of Homeland Security
- The Secretary has the authority to designate which jurisdictions are SJs
- “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”

What is uncertain from the Executive Order?

- What is a sanctuary jurisdiction?
- What is the scope of 8 U.S.C. 1373?
- Is compliance with 8 U.S.C. 1373 all the EO requires?
- Are cities and counties that don't comply with warrantless ICE detainers sanctuary jurisdictions?
- What federal funds does the Administration intend to take away?

What is a sanctuary jurisdiction?

- This term is **not defined** in the executive order
- Some possibilities:
 - Jurisdictions that merely don't comply with 8 U.S.C. 1373
 - Jurisdictions that don't ask anyone they interact with about immigration status
 - Jurisdictions that don't respond to warrantless ICE detainers
 - Jurisdictions that won't use any resources to help ICE (for example by telling ICE when a person is being released from custody)
 - Any (even one time) refusal to interact with ICE in anyway for any reason
- We don't know when we will have a definition of a sanctuary jurisdictions

What is the scope of 8 U.S.C. 1373?

- 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.

What is the scope of 8 U.S.C. 1373?

- We don't know
- In plain English and on its face:
 - 8 U.S.C. 1373 bars prohibitions on state and local government entities from maintaining or sharing citizenship or immigration status information with the federal government
 - Does **not** require states and local governments to collect information about immigration status
 - Second circuit case and an California Court of Appeals decision affirm this interpretation

What is the scope of 8 U.S.C. 1373?

- So-called sanctuary jurisdictions claim that they comply with 8 U.S.C. 1373 because they collect no information about immigration status
- If they don't collect the information they cannot maintain or share it
 - DOJ memo from the Obama administration that says as much
- Some SJs have policies telling their employees they are “not required” to share information about immigration status (not requiring employees to share the information is different than prohibiting employees from sharing it)
- Under this understanding of the law **there are (or easily could be) no SJs**

Is compliance with 8 U.S.C. 1373 all that is required?

- We don't know
- But this still begs the question of how broad is the definition of 8 U.S.C. 1373

Does the Definition of SJ Include Not Responding to ICE Detainers?

- A lot of people assume that SJs include cities and counties that don't respond to **warrantless ICE detainers**; why?
 - Some have interpreted 8 U.S.C. 1373 to require compliance with warrantless ICE detainers
 - There is currently no definition of a sanctuary jurisdiction
 - **Definition of SJ might not only turn on what the EO says**

Why Might SJ Definition Include ICE Detainers?

- The EO also reinstated Secured Communities—premise of this program was local government compliance with ICE detainers
- The EO uses this language: “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**”
- The President has labeled cities like San Francisco SJs even though San Francisco complies with the plain English interpretation of 8 U.S.C. 1373 (but doesn’t respond to warrantless ICE detainers)

Why Might SJ Definition Include ICE Detainers?

- DHS in 2016 (the Obama years) in an Office of the Inspector General memo **sort of implied** that complying that ICE detainers *might be* required by 8 U.S.C. 1373
- Attorney General Sessions' March 27, 2017 statement is all about local governments not responding to ICE detainers
- Why else have a (temporarily defunct) weekly Declined Detainer Outcome Report?

Might Compliance Be Required Even Beyond 8 U.S.C. 1373 & ICE Detainers?

- We don't know
- This is the scary language: "or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law"

IMHO

- The most reasonable/desirable reading of the EO this:
 - If you comply with 8 U.S.C. 1373 you aren't a SJ
 - 8 U.S.C. 1373 is easy to get around by simply not collecting immigration status information (and other ways)
 - The EO doesn't implicate ICE detainers or anything else

Federal Funds on the Table

- Language from the EO: SJs “are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary”

Federal Funds on the Table

- **We don't know**
- Possibilities
 - **Every penny of federal money** (grants, reimbursements, and fee-for-service funds) (Trump has said himself)
 - Just **federal grants** except law enforcement grants the AG or DHS Secretary thinks are “necessary for law enforcement purposes” (plain language of EO says)
 - Federal **grants** that can be taken away “**consistent with law**”/**conditioned on compliance** with 8 U.S.C. 1373 (stated in Trump response to lawsuits)
 - All Office of Justice Program (**OJP**) grants and maybe some/all Community Oriented Policing Services (**COPS**) grants (AG Sessions’ statement March 27)

What would this look like?

- Let's look at two scenarios
 1. All federal funding
 2. Grants conditioned on compliance with 8 U.S.C. 1373

All Federal Funding

- 10-15% of most local governments budgets

Grants Conditioned on Compliance with 8 U.S.C. 1373

- **DOJ** says that these grants are conditioned on compliance with 8 U.S.C. 1373
 - OJP: State Criminal Alien Assistance Program (SCAAP) (partial reimbursement for incarcerating undocumented people) (\$210 million FY16)
 - OJP: Edward Byrne Memorial Justice Assistance Grant (JAG) (funds a range of law enforcement programs) (\$84 million FY16)
 - COPS Hiring Program (pays for officers to work on community policing/crime prevention) (\$187 million in FY16)

Grants Conditioned on Compliance with 8 U.S.C. 1373

- Only **Congress** (not DOJ) can set grant conditions
- By **statute** only JAG grants require a certification of compliance with “all other applicable Federal laws” (which is not defined to include or exclude compliance with 8 U.S.C. 1373)
- JAG grants have nothing specifically to do with immigration enforcement (we will get to the significance of this later)
- Remember total JAG funding: \$84 million FY16

Bottom Line on Funding

- We don't know what federal funding is on the table
- As a practical matter this may not matter that much because...
- As a legal matter probably little or no federal funding can be taken from SJs

Legal Issues Raised by Executive Order

Webinar: Legal Issues Surrounding the
Executive Order on “Sanctuary Jurisdictions”

Slide 29

April 18, 2017



Legal Issues Raised by Executive Order

- Constitutionality of Section 1373
- ICE Detainers—Fourth and Tenth Amendment violations
- Spending Clause violations
- Void for vagueness
- Due Process

Tenth Amendment Refresher

- The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
- Prohibits the federal government from “commandeering” state and local officials to help enforce federal law. *See Printz v. United States*, 521 U.S. 898 (1997).

Printz v. United States, 521 U.S. 898 (1997).

- “We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. 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. It matters not whether policymaking is involved, and no case-by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”

What are the legal issues relating to 8 U.S.C. 1373?

- We comply with Section 1373
- 1373 is unconstitutional on its face (Tenth Amendment / anti-commandeering)
- 1373 is unconstitutional as applied (requiring compliance with ICE Detainer requests)

Section 1373 is Unconstitutional on its Face

- Violates the Tenth Amendment
 - Regulates states in their capacity as states. *See New York v. United States*, 505 U.S. 144 (1992).
 - Commandeers state / local government employees to assist with enforcing federal immigration law / act as arms of federal government. *See Printz v. United States*, 521 U.S. 898 (1997).

Argument #1: 1373 is Unconstitutional on its Face Regulating States in their Capacities as States

- “The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” *New York v. United States*, 505 U.S. 144 (1992).
- Argument here: The Court has held that state / local governments are not federal regulatory agencies. Thus, the Tenth Amendment prohibits Congress from commanding states to administer a federal regulatory program in that area. Scope of state sovereignty includes the power to choose not to participate in federal regulatory programs and that such power in turn includes the authority to forbid state or local agencies, officials, and employees from aiding such a program even on a voluntary basis.

Argument #2: 1373 is Unconstitutional on its Face – Commandeering Argument

- The federal government through this statute and EO is treating local employees and resources as its own, in violation of *Printz* and the Tenth Amendment.
- Argument is that Section 1373 interferes with how local governments direct and control the actions of their employees and officials.

1373 is Unconstitutional on its Face – But See: *New York v. United States*, 179 F.3d 28 (2d Cir. 1999)

- Case was a facial challenge to Section 1373.
- Held: “states do not retain under the Tenth Amendment an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs.”
- Because it was a facial challenge court did not “locate with precision the line between invalid federal measures that seek to impress state and local governments into the administration of federal programs and valid measures that prohibit states from compelling passive resistance to a particular federal program.”

1373 is Unconstitutional on its Face: Takeaways

1. Second Circuit was probably right here on the facial challenge argument.
2. Burden in a facial challenge case is substantial /most difficult challenge to mount successfully. Challenger must establish that no set of circumstances exists under which the Act would be valid.
3. The Second Circuit interpreted this as a voluntary statute – the same way a lot of the jurisdictions suing have – i.e., it doesn't require local governments to collect info, it just says they cannot prohibit their employees from sharing that info if they do collect it.

Section 1373 is Unconstitutional as Applied

- Even if Second Circuit was right and Section 1373 is constitutional on its face, if EO/Section 1373 requires ICE Detainer compliance, then the statute and the EO are unconstitutional as applied.
- First Question then is : Does the EO / Section 1373 require ICE Detainer compliance?

What are the Legal Issues with Requiring Compliance with ICE Detainers?

- Tenth Amendment / Anti-commandeering
- Fourth Amendment
- Spending power cannot be used to induce state / local governments to violate Constitution – *South Dakota v. Dole*, 483 U.S. 203 (1987).

Tenth Amendment Issues with ICE Detainers

- Courts have concluded that ICE Detainer requests are voluntary or else they would violate the Tenth Amendment:
 - “Under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government. Essentially, the federal government cannot command the government agencies of the states to imprison persons of interest to federal officials.” *Galarza v. Szalczyk*, 745 F.3d 634, 640-43 (3d Cir. 2014).
 - *Flores v. City of Baldwin Park* (C.D. Cal. Feb. 23, 2015): “[F]ederal law leaves compliance with immigration holds wholly within the discretion of states and localities.”
 - *LaCroix v. Junior* (Miami case, Florida state court) “States cannot cede their reserved powers to the federal government – no, not even if they wish to do so.”

Tenth Amendment Issues with ICE Detainers

- Would require significant expenditure of time, money, and resources by local governments and their employees by requiring them to actively share information and jail immigrants at their own cost in their own facilities without reimbursement by federal government – far more than what was at issue in *Printz* with background checks and far more than simply complying with Section 1373.
- Santa Clara lawsuit notes: it was costing \$159 per day / per inmate to comply with ICE detainers and federal government will not reimburse. So just for that county, it was costing approximately \$25,000 a day to comply with ICE Detainers.
- Miami was paying \$670,000 per year to house inmates pursuant to ICE Detainers.

Fourth Amendment Issues with ICE Detainers

- Fourth Amendment Issues:
 - Starting point: Need probable cause to hold someone in jail (criminal infraction)
 - ICE detainer requests generally do not come with a warrant and they are related to civil not criminal infractions so no probable cause based on immigration status – *See Galazar v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *Arizona v. United States*, 132 S.Ct. 2492 (2012) (unauthorized presence in the United States is merely a civil infraction; “it is not a crime.”)

Fourth Amendment Issues with ICE Detainers

- Local governments therefore violate an individual's Fourth Amendment rights by holding them pursuant to a warrantless ICE Detainer request without independent probable cause to hold the person. *See Galazar v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014).

Fourth Amendment Issues: Liability under Section 1983

- Municipalities can face civil liability under Section 1983 for “blindly complying” with ICE detainer requests without independent probable cause assessment. *See Miranda-Olivares v. Clackamas Cnty.*, (D. Or. 2014); *Morales v. Chadbourne* (D.R.I. Jan. 24, 2017); *Galazar v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014).
- Damages are real. In one case for example, person was awarded \$30,000 in damages plus \$100,000 in attorneys fees/ costs for such a violation.

Spending Clause Issues with Requiring ICE Detainer Compliance

- Congress may not condition federal spending on a local jurisdiction taking actions that violate the Constitution. (*South Dakota v. Dole*).
- Here, the EO arguably indicates that any jurisdiction that fails to honor ICE civil detainer requests will find itself ineligible for federal funding. But federal courts across the country have held that detaining individuals who would otherwise be released from custody, at ICE's request, violates the Fourth Amendment.
- Argument is that EO is unconstitutional because it compels (via economic coercion) local jurisdictions to violate the Fourth Amendment.

Requiring Compliance with ICE Detainers: Key Takeaways

- To the extent EO requires ICE Detainer compliance, EO is almost certainly unconstitutional under Tenth Amendment and *South Dakota v. Dole* by inducing local governments to violate Fourth Amendment.
- Local governments face civil liability, including attorney's fees, for blindly complying with ICE Detainers absent probable cause.
- Compliance with ICE Detainers is very expensive for local governments and they will not be reimbursed by federal government for costs or lawsuits.

Spending Clause Refresher

- "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States...."
- It sounds like a blank check for Congress to do whatever it wants with the money it has
- But the Supreme Court has read numerous limitation into Congress's Spending Clause authority

Spending Clause Issues

- Authority belongs to **Congress**
- Coercion
- Not germane

Spending Issue #1: Spending Clause Authority Belongs to Congress

- Most fundamental problem with this EO is that the **President** is trying to exercise **Congress's** Spending Clause authority
- President and DOJ can't place new conditions on the receipt of federal funding—only Congress can
- The EO in this case is modelled after **failed federal legislation**

Spending Issue #1: Spending Clause Authority Belongs to Congress

- I don't know of any **federal statutes** that specifically state no funding is available for jurisdictions that don't comply with 8 U.S.C. 1373 or are SJs
- Only JAG grants require a certification of compliance with "all other applicable Federal laws"
 - Is complying with 8 U.S.C. 1373 an "other applicable" federal law?
- DOJ (not Congress) has read a mandate to comply with 8 U.S.C. 1373 into SCAAP and the COPS Hiring Program

Spending Issue #2: Coercion

- Congress may place conditions on state and local governments receiving federal funding
- Amount of money conditioned can't be so great that it is coercive

Spending Issue #2: Coercion

- In *South Dakota v. Dole* (1987), the Supreme Court held that South Dakota's loss of 5% of federal funds otherwise obtainable under certain highway grant programs because the state didn't want to change its drinking age to 21 wasn't coercive
- In [*NFIB v. Sibelius*](#) (2012), Chief Justice Roberts famously described the federal government's plan to withhold all Medicaid funding if states refused to agree to the Obamacare Medicaid expansion as a coercive "gun to the head"
 - In that case states stood to lose over 10 percent of their overall budget by not agreeing to the Medicaid expansion

Spending Issue #2: Coercion

- Strength of this argument depends on what federal funding is on the line
- If local governments stand to lose **all federal funding** the coercion argument is very strong for local governments
- Remember: **Congress** would have to rewrite federal statutes to deny SJs federal funding

Spending Issue #3: Not Germane

- The Supreme Court has held that per the Spending Clause conditions Congress place on grants must be “germane” or “related to” the federal interest in the grant program
- In [*South Dakota v. Dole*](#) (1987), the Supreme Court noted that South Dakota (wisely) didn’t try to argue that taking federal highway funding away was unrelated to South Dakota’s refusal to adopt a drinking age of 21

Spending Issue #3: Not Germane

- No federal statutes specifically state that no funding is available for jurisdictions that don't comply with 8 U.S.C. 1373 or are sanctuary jurisdictions
- Let's assume a court agrees when Congress said under the JAG program that grantees must comply with "other applicable federal laws" it unambiguously meant including 8 U.S.C. 1373
- Supreme Court has said the outer bounds of the "germaneness" or "relatedness" limitation aren't well defined
- JAG—has nothing to do with immigration enforcement/undocumented persons

Spending Clause Bottom Line

- If **all federal funds** are on the line the EO likely has all possible spending clause problems
- If only grants **conditioned on compliance** with 8 U.S.C. 1373 or “**consistent with law**” are on the table taking away JAG money
might be okay (assuming Congress spoke clearly on conditioning the grant and there is no germaneness problem)

Void for vagueness

- A federal law is unconstitutionally vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement”
- Key terms in EO aren’t defined
 - Sanctuary jurisdiction
 - Federal grants
 - Law enforcement purposes
 - Appropriate enforcement action
 - Statute, policy, or practice that prevents or hinders the enforcement of Federal law

Due Process Refresher

- The federal government may not deprive anyone of property without “due process of law”
- Argument in this case:
 - So one day our federal money will be gone
 - Just like that with
 - With no notice or hearing

Legal Issues Key Takeaways

- Section 1373 likely constitutional on its face.
- If EO/Section 1373 require ICE Detainer compliance, then likely unconstitutional under Tenth Amendment and *South Dakota v. Dole*.
- Blindly complying with ICE Detainer requests violates individual's Fourth Amendment rights and results in Section 1983 damages for local governments.
- EO likely violates Spending Clause
- Vagueness and Due Process arguments are also strong.

Overview of Litigation Challenging the Executive Order

Webinar: Legal Issues Surrounding the
Executive Order on “Sanctuary Jurisdictions”

Slide 61

April 18, 2017



City/County Litigation – Who is Suing?

- San Francisco (Complaint/Preliminary Injunction)
- Santa Clara County (Complaint / PI)
- Massachusetts (Chelsea & Lawrence – Complaint only)
- City of Richmond, California (Complaint/PI)
- Seattle / Portland, Oregon (Complaint only)

Where is each case procedurally?

- Santa Clara, San Francisco, and the City of Richmond, California filed motions for preliminary injunctions before same Judge in Northern District of California
- San Francisco / Santa Clara were first to file and their oral arguments were consolidated on 4/14
- Briefing schedule for City of Richmond less clear at this time, but oral argument will likely be in May.
- Massachusetts and Seattle cases have just filed complaints, but federal government filed a motion to dismiss the Massachusetts Complaint on 4/10.

What do the Lawsuits say on the Merits?

- We comply with 1373 / 1373 is unconstitutional
- Tenth Amendment /anti-commandeering
- Spending Clause Violation
- Fourth Amendment violation (ICE Detainers)
- Fifth Amendment / Due Process – notice and opportunity to be heard
- Unconstitutionally Vague

Preliminary Injunction Needs Irreparable Harm #1

- Financial Harm – loss of billions (service cuts, layoffs, cancelation of contracts)
- Budgeting uncertainty – cut programs now? Start a reserve fund? Leave everything in place and hope the federal government doesn't take away funds?

Preliminary Injunction Needs Irreparable Harm #2

- Community Harm (Policing / Health Consequences)
- Violation of Constitutional Rights = per se irreparable harm
- Forced to change local policies (We don't want to comply with 1373, but we have to)

Federal Government Response

- Federal government filed its opposition to the Santa Clara PI on 3/9 and opposition to the San Francisco PI on 3/22.
- Filed Motion to dismiss Massachusetts (Chelsea / Lawrence) Complaint on 4/10.
- Should file opposition to City of Richmond's PI motion today.

Federal Government's Response /Arguments

- **Opposition to Preliminary Injunction Motions:**

- They cannot show irreparable harm – didn't change the law, only seeking to enforce existing law
- Not ripe / no standing (hasn't taken any action)
- EO specifies that federal officials are to take these actions as “permitted by law” or as “consistent with law.”
- Claims cannot seek nationwide injunction and injunction, if issued, should only apply to the City / County
- Does not say much of anything on the merits.

Federal Response: Irreparable Harm

- Too speculative / not concrete: “The County does not allege that the Federal Government has taken any of these actions. Nor does the County claim that it has been designated as a ‘sanctuary jurisdiction’ or that it has been denied any federal funds. The County likewise does not allege that it has been notified that any funds will be denied. None of those actions has occurred, and those events may never occur. The County’s conjecture about the “possibility” of future harm alone does not justify preliminary injunctive relief.”
- Claims the EO incorporates the law regarding grant conditions and procedures.

San Francisco / Santa Clara Reply to Federal Government

- Opposition says almost nothing about merits (which says something about the strength of their claim)
- Case is ripe / we do have standing
 - Already taken steps to change policy to comply with 1373
 - Federal government's public statements about losing federal funding including AG's remarks from March singling out San Francisco
 - Whatever EO does, it conditions *some* funding on compliance with 1373 so case can be heard

Federal Government's Motion to Dismiss

- Filed a Motion to Dismiss the Massachusetts (Chelsea / Lawrence) Complaint on 4/10, arguing:
 - Not ripe / Don't have standing: Delaying judicial review until there has been some concrete application of the Executive Order or some specific enforcement of Section 1373 would allow an opportunity for factual development of the Cities' claims and would avoid judicial speculation.
 - Fail to state a claim that Section 1373 violates the Tenth Amendment on its face. (Second Circuit case)
 - Fail to state a claim under Fifth Amendment vagueness doctrine
 - The Cities Fail to State a Claim for Declaratory Relief Regarding Their Compliance with Section 1373

Oral Argument Highlights

- At outset Judge asked the lawyers to only focus on EO and not on constitutionality of 1373. Requested additional briefing on constitutionality of 1373.
- DOJ lawyer argued EO doesn't change the law, just seeking to enforce existing law. Judge asked what was the point of the EO then? DOJ lawyer said bully pulpit.
- SF argued that EO changed existing law by requiring ICE Detainer compliance. DOJ lawyer said the EO doesn't require ICE Detainer compliance. DOJ still sees this as voluntary (statements made in open court seem to contradict Sessions' public remarks).

Oral Argument Highlights: Funding

- Federal government spent vast majority of argument saying that EO is to be interpreted narrowly. Argued “plain” interpretation was that only federal funds at issue are those DOJ and DHS grants tied explicitly to compliance with Section 1373 so very little money at stake. (Judge was skeptical that this was the “plain interpretation”).
- Judge asked: “In other words, is the 1.7 billion for SC and 1.2 billion + 800 million in multi-year grants for SF safe?” DOJ answered: “Yes.”
- City / County countered that statements by named defendants and drafters of EO (Trump / Sessions) directly contradict that interpretation with their public statements. If that is position federal government wants to take, they should have submitted a declaration, and we shouldn’t have to rely on those statements by lawyer from DOJ.

Oral Argument Highlights

- In trying to distinguish from travel ban case where President's public statements were used to aid in interpretation of order, DOJ lawyer said he had talked to others at DOJ and they agreed with his interpretation of EO (i.e., little funding at risk, doesn't change the law).
- Judge at least seemed to take this statement by DOJ lawyer seriously. Unclear if that would apply to AG Sessions where his public statements have been contrary to DOJ's court interpretation.
- DOJ took the position that language in EO that says: "consistent with federal law" etc., fixed any constitutional problems with EO. Judge asked something like, "but if an executive order was issued that prohibited the sale of property to African Americans, 'consistent with federal law'" doesn't make it constitutional / save it, does it?" DOJ agreed that that language would not save such a law.

What's Next with the Litigation?

- Could get a decision in 1-2 weeks from oral argument in San Francisco / Santa Clara lawsuits. Whole point of motion for preliminary injunction is saying time is of the essence so should get a decision sooner rather than later.
- But likely no ruling on the constitutionality of 1373 right away since that was not argued yet.
- Both Santa Clara and San Francisco are seeking a Nationwide Injunction / federal government opposes nationwide injunction.

Nationwide Injunction?

- Argument is that because the Executive Order and Section 1373 apply nationwide, the Court should issue a nationwide injunction.
- Precedent for nationwide injunction (travel ban case)
- But if the court grants preliminary relief only as to the litigant's claim that it complies with Section 1373, that relief would not require a nationwide injunction.
- Ultimately, this is going to be up to the judge / has discretion.

Possible Outcomes

- EO is unconstitutional: immediate injunction for duration of litigation
- EO is unconstitutional, but injunction is stayed pending appeal (federal government will seek this if EO is deemed unconstitutional)
- Temporary Injunction (set period of time)
- Scope of injunction – just as to litigant v. nationwide.
- Appeal to the Ninth Circuit / Supreme Court (inevitable)

Questions??

- Email questions to hsedigh@naco.org
- Slides will be posted at www.naco.org/webinars later this week