For the most part and for now, Attorney General Jeff Session’s memo defining “sanctuary jurisdictions” per President Trump’s sanctuary jurisdictions executive order returns the law to what it was before the EO.

Per the EO, so-called sanctuary jurisdictions were afraid the federal government was going to take away all federal grant funding if, among other things, they did not comply with warrantless, voluntary Immigration and Customs Enforcement (ICE) detainers, which instruct jails to detain undocumented persons after they may be otherwise free to go so that ICE may pick them up and deport them.

Many cities and counties, even those that don’t label themselves sanctuary jurisdictions, don’t respond to warrantless ICE detainers because numerous courts have held that doing so violates the Fourth Amendment.

In the memo General Sessions determines that the term “sanctuary jurisdiction” only refers to jurisdictions that “willfully refuse to comply with 8 U.S.C. 1373.”

Section 1373 is very narrow; it only prohibits local governments from restricting employee communication of immigration status information to ICE. Many local governments comply with Section 1373 by simply instructing their employees not to ask people about their immigration status so they have no such information to pass along to ICE.

In a motion asking the district court that granted a preliminary injunction blocking the EO to reconsider its decision, the Department of Justice (DOJ) explicitly confirmed that it is not interpreting Section 1373 to require compliance with ICE detainer requests.

The Sessions memo says that the executive order only applies to DOJ or Department of Homeland Security grants.

Jurisdictions applying for certain DOJ grants must certify their compliance with Section 1373. This certification requirement “will apply to any existing grant administered by the Office of Justice Programs and the Office of Community Oriented Policing Services that expressly contains this certification condition and to future grants for which the Department is statutorily authorized to impose such a condition.”

Before the EO, DOJ conditioned receipt of Edward Byrne Memorial Justice Assistance Grant (JAG) ($84 million FY16 directly to local governments) and Community Oriented Policing Services (COPS) ($187 million FY16) grants on complying with Section 1373. COPS and JAG provide funding to employ local law enforcement.

Conditioning JAG and COPS dollars on complying with Section 1373 may be legally problematic. Supreme Court precedent allows Congress (not federal agencies or the President) to place conditions on federal grants but only if Congress does so unambiguously.
While the JAG statute requires compliance with “all other applicable Federal laws,” this phrase is not defined to include (or exclude) Section 1373. The COPS statute contains no such language.

The Sessions memo doesn’t entirely back off of the EO. It highlights that per the EO DOJ may still “point out ways that state and local jurisdictions are undermining our lawful system of immigration or to take enforcement action where state or local practices violate federal laws, regulations, or grant conditions.”

The President’s proposed budget indicates he has not given up on making local governments comply with ICE detainers or conditioning the receipt of other federal grants on complying with ICE detainers. Specifically, the proposed budget would expand Section 1373 to prohibit local governments from restricting local law enforcement compliance with ICE detainers. (Even if passed this provision could have Fourth Amendment and Tenth Amendment problems.) It would also expand Section 1373 to allow the Secretary of Homeland Security or the Attorney General to condition immigration, national security, and law enforcement grant funding on compliance with ICE detainers.

By:
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