In July the Department of Justice (DOJ) added two new requirements for states and local governments to receive federal Edward Byrne Justice Assistance Grants (Byrne JAG) for law enforcement funding. Chicago, San Francisco, and California have filed lawsuits against Attorney General Jeff Sessions arguing that these new requirements are unlawful. Chicago argues that another requirement added earlier is unlawful as well.

Congress created Byrne JAG in 2005 to provide “flexible” funding for state and local police departments. In April 2017 DOJ required Chicago (and eight other jurisdictions) to provide documentation that it complies with 8 U.S.C. 1373, which prohibits states and local governments from restricting employees from sharing immigration status information with federal immigration officials.

In July 2017 DOJ added a “notice” and an “access” requirement to receive Byrne JAG funds. Recipients must now (1) provide 48 hours advance notice to the Department of Homeland Security (DHS) regarding the scheduled release of “aliens” and (2) allow access to correctional or detention facilities to meet with “aliens” and inquire about their right to be in the United States.

The three lawsuits make similar claims. Chicago’s lawsuit is furthest along so its arguments are best developed. For this reason, this article focuses on Chicago’s claims in more detail.

Chicago, like many so-called sanctuary jurisdictions, claims that it complies with 8 U.S.C. 1373 because it prohibits its employees from collecting residents’ immigration status information so employees have no such information to give to federal officials.

The new requirements violate Chicago’s Welcoming City policy which prohibits city employees from responding to Immigration and Customs Enforcement (ICE) inquiries about custody status or release date and allowing ICE to conduct investigations in city facilities about immigration status, except if a detainee is suspected or convicted of a serious crime.

Chicago makes numerous arguments for why these conditions are unlawful. Regarding the notice and access conditions, Chicago argues the following:

- Neither requirement is contained in the Byrne JAG statute. In some grant programs Congress has explicitly authorized the Attorney General to add grant conditions but Congress did not do so in this case.
- Even if the Attorney General had authority to add conditions it could not add these conditions per the Spending Clause as they are not relevant to the objectives of the Byrne JAG program.
- Complying with the notice and access requirements would cause the city to violate the Fourth Amendment because most of Chicago’s arrestees are held less than 24 hours (then they are transferred to the county jail or released).
- Only Congress and not the President may place conditions on federal funds.

Regarding 8 U.S.C. 1373, while the Byrne JAG statute says that grantees must comply with “all
applicable laws,” Chicago argues that this includes not every law on the books but the “specialized body of statutes that govern federal grantmaking.” Also, Chicago can’t be forced to certify compliance with 8 U.S.C. 1373, because it “constitutes facially unconstitutional commandeering.” That is, it directs the functioning of states and local governments by requiring them to not stop their employees from sharing immigration status information with federal immigration officials.

Chicago is seeking a preliminary injunction to prevent DOJ from enforcing any of these conditions on states and local governments. Byrne JAG applications are due September 5.

By:
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Tags:
Sanctuary cities | Tenth Amendment | commandeering | executive power | immigration | spending clause

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