Lisa Soronen

President Trump’s memoranda on anarchist cities, while generating significant criticism, does not take federal money away—yet. If the federal government actually tries to do so, affected jurisdictions will almost certainly sue.

Four features of the memoranda are of interest. First, it instructs the Office of Management and Budget (OMB) to seek details of all federal funds provided to Seattle, Portland, New York City, and Washington, D.C. By September 16, OMB must issue “guidance” to agencies required to provide this information. But it may take agencies a while to comply with this request.

Second, it requires the Attorney General, beginning on September 16, to publish a list of so-called anarchist jurisdictions.

Third, it defines anarchist jurisdictions as those which (1) forbid the police from intervening to “restore order amid widespread or sustained violence or destruction”; (2) have withdrawn law enforcement protection from a particular area; (3) have “disempower[ed] or defund[ed] police departments”; and (4) have “unreasonably refuse[d] to accept offers of law enforcement assistance from the Federal Government.” Finally, the Attorney General may consider “other related factors” he or she “deems appropriate.”

Finally, of most interest, it requires “[w]ithin 30 days of the date of this memorandum, the Director of OMB shall issue guidance to the heads of agencies on restricting eligibility of or otherwise disfavoring, to the maximum extent permitted by law, anarchist jurisdictions in the receipt of Federal grants that the agency has sufficient lawful discretion to restrict or otherwise disfavor anarchist jurisdictions from receiving.”

It is unclear what criteria OMB will offer for agencies to use to determine which grants so-called anarchist jurisdictions may no longer receive or should be disfavored from receiving or if OMB will be able to come up with any. It is also unclear OMB’s “guidance” will actually require agencies to restrict or disfavor so-called anarchist jurisdictions.

The U.S. Constitution’s Spending Clause grants Congress, not the President or his or her administration, the authority to tax and spend. The Supreme Court has held Congress may place conditions on federal money given to states and local governments. However, Congress must provide “unambiguous” notice of the conditions and ensure the conditions are related to the purposes of the grants. It is hard to believe Congress has conditioned any federal grant money on not being an “anarchist jurisdiction.”

If OMB encourages agencies to add conditions for receiving federal money to those Congress has laid out in statute, this will likely be unsuccessful. At the President’s direction, the Attorney General added a number of conditions to the Byrne JAG program, which provides money for a wide variety of state and local law enforcement programs, to prevent so-called sanctuary jurisdictions from receiving them. The United States have lost all cases challenging these additional conditions to date but one.