

GOVERNING

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Why Trump's 'Sanctuary Cities' Policy Is Likely to Lose in Court

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Two weeks ago, a federal court temporarily halted the Trump administration's attempt to cut federal funding from so-called sanctuary cities, local governments that, to varying degrees, refuse to cooperate with federal immigration authorities. The final outcome of the case -- and others like it -- will be hugely consequential for states' and localities' ability to set policies that fall out of line with the White House.

The case could also set a new legal precedent. No legal experts that *Governing* spoke with knew of a past case like this one, and no precedent was mentioned in the judge's decision last week.

The good news for sanctuary cities and states is that constitutional law experts say the Trump administration will likely lose in court. The bad news is that Congress may have the power -- within limits -- to carry out the same policies.

"The big issue in the case is this: Can the executive [branch] unilaterally make up its own grant condition for recipients of federal funds?" says Ilya Somin, a law professor at George Mason University and an adjunct scholar at the libertarian Cato Institute, who has written extensively on the subject. "If it can, that's a threat to federalism and to separation of powers."

The most recent case before the court was brought by Chicago, but San Francisco and the state of California are also suing the Trump administration over this policy.

At issue is the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG), which is doled out to localities for fighting crime. In carrying out President Trump's anti-immigration agenda, U.S. Attorney General Jeff Sessions in July imposed a set of three new conditions on Byrne JAG that could make hundreds of cities ineligible for the funding.

The first condition requires cities to prove compliance with a federal law that prevents cities and states from restricting communication with federal immigration agencies "regarding the immigration status, lawful or unlawful, of any individual." The second requires cities to allow U.S. Department of Homeland Security (DHS) officials to access jails and prisons to determine the immigration status of any inmate inside. And the third requires cities to give DHS 48 hours' notice before releasing an immigrant of interest, giving the department time to travel there and pick the inmate up upon his or her release.

On Sept. 15, U.S. District Judge Harry D. Leinenweber placed a nationwide preliminary injunction on the latter two conditions, meaning he found it likely they would eventually be ruled unconstitutional, on the basis that neither is authorized by the statute of Byrne JAG. In other words, the judge ruled that the executive branch can't impose conditions on the grant that aren't authorized by Congress because according to the U.S. Constitution, Congress is the only federal governing body with the power to legislate.

But Congress itself could become a threat to local control in sanctuary jurisdictions. In June, the U.S. House passed the No Sanctuary for Criminals Act, which, among several provisions, would strip a variety of law enforcement grant funds (including Byrne JAG) from sanctuary cities. The bill is currently pending in the Senate, with no discernible timeline for consideration.

The Department of Justice (DOJ), for its part, contends that the conditions imposed by Sessions are well within executive branch authority. Assistant Attorney General Chad Readler argued there are already conditions imposed on the grants, including some set by the Obama administration that dictate what kinds of weapons can be bought with the money. Leinenweber, however, ruled that the new conditions go further, usurping power from Congress in an unconstitutional way.

The DOJ did not comment on the ruling in the case and did not respond to requests from *Governing* to discuss its legal arguments.

The judge *did* uphold the first condition, requiring cities to prove compliance with a specific federal law, U.S.C. Section 1373. That's because part of Byrne JAG's statute says all recipients of the grant must "comply with all provisions of this part and *all other applicable federal laws*." (Emphasis added). Judge Leinenweber interpreted "all other applicable federal laws" to include Section 1373.

Both legal experts, Somin and Schwinn, think the judge was mistaken in preserving the first condition. Schwinn thinks the U.S. Supreme Court's "anti-commandeering" precedent, which prevents the federal government from "commandeering" the states, renders 1373 likely unconstitutional. Somin has a detailed argument over at *The Washington Post* centering around different Supreme Court precedents, as well as the anti-commandeering principle.

Chicago similarly argued that 1373 is unconstitutional. Though the city lost that argument, a spokesperson for the City of Chicago Corporation Counsel's Office says they do not expect their application for Byrne JAG to be denied on the basis of 1373 because (despite arguing against it) they're in compliance with the law. (The city is not, however, in compliance with the other two conditions.)

"This is really a separation-of-powers idea -- that Congress has the power to establish federal grants and any conditions on them, and that the executive branch [acted] beyond its powers by imposing conditions without congressional authorization," says Steven Schwinn, a professor at John Marshall Law School and author of the Constitutional Law Prof Blog.

The risk posed to local control and federalism is relatively self-evident, says Somin of the Cato Institute. If a president can impose conditions on federal grant money without congressional approval, suddenly a lot of grant money is at risk -- and not just for law enforcement, he says.

"[Conservatives] are likely to regret their enthusiasm if a liberal Democratic president uses the same tactic to force states to increase gun control, adopt a Common Core curriculum or pursue liberal policies on transgender bathrooms," Somin wrote in a [blog post](#) on the subject.

Both the city of Chicago and the DOJ are likely to appeal the parts of the case they lost. The DOJ [recently announced](#) it will appeal an earlier decision that struck down Trump's much wider-reaching executive order on sanctuary cities, which tried to strip these localities of *all* federal grant funding. Eventually, either one of these cases could come before the U.S. Supreme Court.

The city of Chicago received \$2.3 million in JAG money last year and has applied for \$2.2 million in grant money this year to go toward new technology in the police department. Cities across the country apply for these grants, which in Fiscal Year 2016 totaled \$347 million.