# Trump Administration Ratchets up Pressure on "Sanctuary" Jurisdictions

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The Justice Department building. (Photo: Gregory Varnum)

As President Donald Trump and his administration continue to publicly excoriate cities and states that limit cooperation with federal immigration authorities—so-called sanctuary cities—the Justice Department has been steadily building a case to turn those words into concrete penalties. After federal court rulings appeared to deal a blow to initial efforts to punish noncompliant jurisdictions, via an executive order the President signed early in his term, the administration has moved in recent months to place new demands on these states and localities. By February 23, nearly two dozen cities, counties, and states must turn over all formal and informal documents relating to rules of communication between their employees and the Department of Homeland Security (DHS)—or risk a Justice Department subpoena.

This action follows a layered—but persistent—targeting of jurisdictions that do not fully cooperate with U.S. Immigration and Customs Enforcement (ICE), the DHS agency responsible for enforcing immigration laws in the U.S. interior. While there is no legal definition of "sanctuary jurisdictions," the executive branch has used a federal statute, 8 U.S.C. § 1373, to attempt to identify them. Section 1373 bars state or local policies that prohibit entities or officials from sharing immigration status or citizenship information with ICE. The Trump

administration is taking a more expansive view than its predecessors in interpreting Section 1373, and is more rigorously using it as a vehicle to crack down on jurisdictions that limit their cooperation with ICE.

Throughout the 2016 campaign and in the first year of his presidency, Trump promised to punish sanctuary cities by cutting their federal funding. Five days after his inauguration, he signed an executive order attempting to do just that, using language that appeared to threaten all federal funding—rather than specific grants—and to target jurisdictions that in any way limit cooperation with ICE. By November, federal courts in Northern California, Chicago, and Philadelphia had prohibited conditioning grants on compliance with Section 1373, beyond those the Obama administration had already determined required compliance with the statute. These are the Byrne Justice Assistance Grants (Byrne JAG), the State Criminal Alien Assistance Program (SCAAP), and the Office of Community Oriented Policing Services (COPS) grants. The courts also prohibited adding new conditions to the Byrne JAG grants.

These rulings seemed to settle the debate on the enforceability of the executive order. However, since then, the administration has required dozens of cities, counties, and states to prove their compliance with Section 1373, instead of simply accepting their compliance certifications, as the Obama administration had done. And in the process, the administration has also interpreted the statute to hold more jurisdictions accountable for a broader array of noncooperation policies, while ostensibly staying within the scope of the court orders.

While sanctuary cities have existed for decades, the issue became highly politicized in Congress following the 2015 killing of a young woman in San Francisco by an unauthorized immigrant who had been released from the county jail in accordance with noncooperation policies. Since then, the Senate has made many attempts to pass legislation that would punish noncooperative jurisdictions. The latest effort came in February 2018, when the Senate, as part of a larger debate over immigration, failed to advance legislation to codify additional enforcement mechanisms against these jurisdictions.

### Evolving Use of Section 1373 in Grantmaking

Section 1373 became law in 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Prior to the Trump administration, it was mostly interpreted strictly, according to its plain text—when it was enforced at all. Case law has established that the provision does not obligate jurisdictions to collect any information on immigration status or to share with federal officials any information they do not already have.

Obama administration officials were the first to raise the possibility that Section 1373's prohibition on immigration status-sharing restrictions could extend to information such as inmate release dates. In 2012, ICE expressed some concern when Cook County, Illinois passed an ordinance that barred the sheriff from honoring ICE requests to hold jailed individuals longer than otherwise warranted, and further, prohibited communication with ICE regarding incarceration status or release date. Then-ICE Director John Morton wrote a letter to the county, stating that the ordinance's bar on communicating release date information might violate federal law. No further action was taken beyond requesting that the county consider amending the ordinance to avoid legal conflicts. Though the Obama administration did not follow through on this expanded reading of the statute, the move sowed the seeds for a broader interpretation.

It was also during the Obama administration that compliance with Section 1373 was first linked to federal grants. In 2016, the Justice Department promised to investigate and, if necessary, take action against jurisdictions in violation of Section 1373 that received funding through Byrne JAG, SCAAP, or COPS grants. This followed a DHS Office of Inspector General (OIG) report that identified several jurisdictions potentially in violation of the *intent* of the law, including Chicago, Cook County, New York City, Orleans Parish (New Orleans), and Philadelphia. The report focused mostly on policies that specifically prohibited disclosure of immigration information. Beyond that, OIG expressed concern that staff in compliance-limiting jurisdictions might feel inhibited from otherwise communicating with ICE.

While no enforcement action was taken against these jurisdictions, and it was never determined whether they violated the law, the Justice Department later in 2016 issued guidance stating that applicants for Byrne JAG, SCAAP, and COPS grants were expected to comply with Section 1373.

*Section 1373 under the Trump Administration*

After federal courts halted the Trump administration's initial attempts to more broadly sanction noncooperating jurisdictions, the administration was left with Section 1373 as its only tool. Since then, it has systematically attempted to add teeth to the statute. In May 2017, the DHS fiscal year (FY) 2018 budget proposal pressed Congress to amend Section 1373 to require that jurisdictions share inmate information—including release date, home address, and contact information. The proposal did not advance in Congress but revealed the administration's intent.

In October 2017, the Justice Department sent letters to the same five jurisdictions that were identified in the 2016 OIG report, informing them that they appeared to violate Section 1373. Similar letters were sent to 29 other jurisdictions in November. Some of the policies questioned relate to limits on sharing immigration and citizenship information. But the letters also identified other policies that, to the Justice Department, could prohibit employees from asking ICE about individuals' immigration status, thus seeking clarification that staffers could still request that information. The letters also questioned policies directing employees not to respond to ICE requests for notification of detainees' release dates. In adding conditions beyond information-sharing prohibitions, the administration seems to have borrowed a page from its predecessor.

The Justice Department letters asked jurisdictions to *certify* that their policies—and their communications with staff—comply with Section 1373. The letters threatened to rescind FY 2016 Byrne JAG funding—which supports local law enforcement on a range of efforts—and withhold FY 2017 funding (see Table 1).

**Table 1. Byrne Justice Assistance Grants (JAG) Received by Jurisdiction, FY 2016**

| Jurisdiction | Byrne JAG Funding |
|---|---|
| State of California | $18,244,000 |
| State of Illinois | $6,742,000 |
| New York City, NY | $4,298,000 |
| Chicago, IL | $2,132,000 |
| State of Oregon | $2,080,000 |
| Los Angeles, CA | $1,871,000 |
| King County, WA | $673,000 |
| Louisville Metro, KY | $598,000 |
| City and County of San Francisco, CA | $523,000 |
| City and County of Denver, CO | $427,000 |
| Jackson, MS | $260,000 |
| Sacramento County, CA | $242,000 |
| Lawrence, MA | $72,000 |
| Albany, NY | $66,000 |
| Bernalillo County, NM | $63,000 |
| West Palm Beach, FL | $61,000 |
| Sonoma County, CA | $48,000 |
| Burlington, VT | $40,000 |
| Berkeley, CA | $39,000 |
| Fremont, CA | $23,000 |
| Watsonville, CA | $20,000 |
| Cook County, IL | $19,000 |
| Monterey County, CA | $18,000 |
| **Total** | **$38,559,000** |

*Notes*: The table lists jurisdictions under threat of loss of Byrne JAG funding.
*Sources*: Office of Justice Programs, "Awards Made for 'Edward Byrne Memorial Justice Assistance Grant (JAG) Program - Local Solicitation,'" updated February 14, 2018, available online; Bureau of Justice Assistance (BJA), "2016 California Local JAG Allocations," accessed February 14, 2018, available online; BJA, "2016 Illinois Local JAG Allocations," accessed February 20, 2018, available online; BJA, "2016 New Mexico Local JAG Allocations," accessed February 20, 2018, available online.

Perhaps not satisfied by the certifications submitted, the Justice Department in late January 2018 notched up the pressure and sent letters to 23 of the jurisdictions asking them to provide documentation of internal communications, to prove compliance with Section 1373. If such evidence is not submitted by February 23, the Justice Department intends to subpoena it.

Restrictions on the sharing of inmate release dates appear to be the main target of the administration. However, in *Steinle v. City and County of San Francisco, et al.*, a U.S. district court in California ruled in January 2017:

> *"If the Congress that enacted the Omnibus Consolidated Appropriations Act of 1997 (which included § 1373(a)) had intended to bar … restrictions of sharing inmates' release dates, it could have included such language in the statute. It did not, and no plausible reading of 'information regarding . . . citizenship or*

*immigration status' encompasses the release date of an undocumented inmate."*

Despite this ruling, the Justice Department maintains that Section 1373 forbids a policy prohibiting the sharing of release date information.

### Local Responses

Actions taken by targeted jurisdictions have varied. In response to the focus during the campaign and after Trump's election on penalizing sanctuary jurisdictions, in January 2017 Clark County (home to Las Vegas) and Miami-Dade County both started fully complying with ICE detainers. Contra Costa County in California responded to the November letter by saying it would rewrite a policy that seemed to expressly prohibit the sharing of immigration information.

Most jurisdictions that received Justice Department letters are doubling down, however, insisting they are in compliance. Reacting to its November letter, Burlington, Vermont distinguished between immigration and detention information, saying it only prohibits sharing the latter. And in response to the January letters, the mayors of New York, Chicago, and Denver decided not to attend a White House meeting with U.S. mayors, and others issued statements asserting their compliance.

Following the January subpoena threats, 16 state attorneys general, led by New York, filed a brief supporting the City of Chicago in its lawsuit challenging the Justice Department's additional conditions on Byrne JAG funding. They argue that the Justice Department does not have the authority to require compliance with Section 1373, much less require further cooperation with immigration authorities not mandated by federal law.

Another of the recently targeted jurisdictions, the city of West Palm Beach, Florida, filed a lawsuit in early February against Attorney General Jeff Sessions, asking a federal court to declare it in compliance with Section 1373. There is precedent for this: A federal judge in November declared Philadelphia's policy in compliance.

### Remaining Questions

Many issues surrounding Section 1373 and the withholding of funds remain unsettled. Most relevant perhaps is the question of what exactly the term "immigration status information" in Section 1373 encompasses: Should it be read broadly to include any information about a removable noncitizen, or narrowly? States and localities might argue that they have no obligation to share further information, such as release date, about a removable noncitizen when they did not gather the immigration status information themselves, having gained it only through a DHS detainer. Further, in some jurisdictions, an inmate's release date is publicly available. Jurisdictions may follow the lead of Philadelphia and West Palm Beach, and proactively ask courts to declare their compliance with Section 1373. And given that the broader challenges to the Justice Department's actions are in various stages of litigation in federal courts, the final decision will likely end up at the Supreme Court.

Even if courts eventually determine that the Justice Department may not restrict grants based on its expanded interpretation of Section 1373, the administration could adopt other tactics. It might drag out the litigation, and meanwhile refuse payment of Byrne JAG grants to applicants it deems as not sufficiently cooperative. Byrne JAG funding for FY 2017 has been effectively frozen: At the time of publication, just two FY 2017 grants had been

issued, while for FY 2016, more than 1,000 were issued. And the Justice Department can also continue to press a PR campaign against jurisdictions it views as uncooperative, in an attempt to shame them and sway public opinion against them.

- Full text of 8 U.S.C. § 1373
- 2016 Office of Inspector General investigation
- Decision in *Steinle v. City and County of San Francisco* finding Section 1373 allows jurisdictions to withhold information on inmates' release dates
- U.S. District Court order in *County of Santa Clara v. Trump* and *City and County of San Francisco v. Trump* blocking part of President Trump's executive order
- October 12, 2017 Justice Department letters to five jurisdictions
- November 15, 2017 Justice Department letters to 29 jurisdictions
- January 24, 2018 Justice Department letters to 23 jurisdictions
- April 2017 Policy Beat on the Trump administration's initial actions against sanctuary jurisdictions and their reactions

**National Policy Beat in Brief**

***Senate Rejects Four Immigration Proposals.*** The Senate voted down three immigration proposals on February 15 in a failed attempt to provide a pathway to citizenship for some unauthorized immigrants who were brought to the United States as children, known as DREAMers. A fourth proposal, sponsored by Sen. Pat Toomey (R-PA), which would have increased enforcement against so-called sanctuary jurisdictions, also failed to pass.

Many DREAMers received work permits and protection from deportation under the Deferred Action for Childhood Arrivals (DACA) program, implemented by the Obama administration in 2012. In September 2017, the Trump administration announced it intended to phase out the program. All three DREAM proposals would have offered a pathway to citizenship for varying numbers of DREAMers. The simplest proposal, sponsored by Senators John McCain (R-AZ) and Chris Coons (D-DE), paired legalization with border security funding. Another proposal, sponsored by Senator Chuck Grassley (R-IA) and endorsed by the White House, would have funded a border wall, made changes to asylum laws, vastly cut legal immigration, and ended the diversity visa program, essentially enacting the White House framework outlined several weeks prior. The third proposal, from a bipartisan group of senators who dubbed themselves the Common Sense Coalition, would have provided border wall funding, made minor changes to legal immigration, and required the Department of Homeland Security (DHS) to focus immigration enforcement efforts on people with criminal convictions and unauthorized immigrants who arrived after June 30, 2018. DHS and the White House strongly objected to this latter provision, arguing it would create a window for unauthorized immigrants to enter without consequences.

The President's decision to terminate DACA is due to go into effect March 5, when larger numbers of DACA recipients are slated to begin to lose their protections—though a pair of court rulings are allowing those eligible for the program to renew their status. With the end of DACA looming, some senators are now pushing narrower or more temporary solutions. The House may consider a proposal sponsored by Judiciary Committee Chairman Bob Goodlatte (R-VA) that would boost border security and authorize funds for a wall, change asylum laws, slash legal immigration, and provide a temporary, renewable legal status for DACA recipients with no path to citizenship.

There is also talk of tying a legalization measure to a March 23 must-pass spending bill. However, no legislative solution appears imminent amid deep ideological differences in Congress.

- **Migration Policy Institute (MPI) commentary** on the number of DREAMers who would have qualified for residency under each of the three Senate proposals
- **CNN article** on possible future DREAM-related actions

***Second Federal Court Rules that DHS Must Continue Accepting DACA Applications.*** A federal district court in Brooklyn, New York ruled February 13 that DHS must continue to accept the renewal applications of current and past DACA recipients. DHS stopped accepting new DACA applications on September 5, 2017, after announcing the start of the program's phaseout. While the agency allowed certain DACA holders whose protection was expiring imminently to renew, those with expirations after March 5, 2018 were told they could not renew. The judge ruled that the reasoning behind the DHS decision to terminate DACA is likely to be arbitrary and capricious under the Administrative Procedure Act. However, the judge made clear that he was not ruling that rescinding DACA was unlawful, or that DHS may not rescind DACA. The ruling came in cases brought by individual plaintiffs and 17 state attorneys general.

This ruling follows a similar one in January from a federal district court in California, which the Justice Department subsequently appealed to the Ninth Circuit U.S. Court of Appeals and the Supreme Court. The Justice Department has not indicated whether it intends to appeal the New York ruling. Whether the New York and California cases will be consolidated remains to be seen. However, the Supreme Court could decide later this week whether it will hear the Justice Department's appeal of the California case. If it does, a ruling could come as early as June.

- ***New York Times* article** on the New York district court ruling
- **Amended Memorandum & Order & Preliminary Injunction** in *Batalla Vidal v. Nielsen* and *State of New York v. Trump*

***DHS Lifts Ban on Refugees from 11 Countries, Implements Tougher Screening.*** On January 29, DHS announced that it will once again accept refugee applications from nationals of 11 "high-risk" countries. While DHS has not formally named the countries, officials have said they are Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria, and Yemen. When the administration lifted its overall pause on refugee admissions in October 2017, it deprioritized applications from these countries so that DHS could conduct an additional 90-day security review of screening procedures for these refugees. Even as applications from these 11 countries are being accepted again, DHS will vet these refugees even more stringently than those from other countries, likely extending this group's already lengthy application process. A total of 338 nationals of the 11 countries were admitted between October 2017 and January 2018, compared to 16,000 in the same period last year. This is equal to just 2 percent of the number admitted from these countries in the same period last year, while overall refugee admissions were at 21 percent of what they were last year. Countries may be added or removed from the "high-risk" list, which will be reevaluated every six months.

President Trump also signed a memorandum establishing a National Vetting Center, which will facilitate interagency information sharing among DHS, the State Department, the Justice Department, and the intelligence

community. The center will oversee screening of visa and immigration applicants, noncitizens attempting to enter the country, and those in removal proceedings, to identify threats to "national security, border security, homeland security, or public safety."

- *Washington Post* article on refugee admissions and security
- CNN article on the National Vetting Center
- *Presidential Memorandum on Optimizing the Use of Federal Government Information in Support of the National Vetting Enterprise*
- Interactive refugee admissions tool from the Refugee Processing Center

***President Trump's FY 2019 Budget Request Increases Funding for Immigration Enforcement.*** On February 12, the Trump administration released its budget request for fiscal year (FY) 2019, which begins October 1, 2018. While seeking cuts across other agencies, it requests sizeable increases for U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). Within CBP, these increases would include $1.6 billion to build 65 miles of border wall in Texas, as well as $211 million to hire 750 Border Patrol agents. ICE would get $571 million to hire 2,000 ICE agents and 1,300 support staff, as well as $2.8 billion for 52,000 detention beds—up from 39,000 beds funded by Congress in FY 2017.

The budget also seeks a 28 percent increase for the immigration courts system, the Executive Office for Immigration Review (EOIR), a component of the Justice Department. This includes $40 million for 75 new immigration judges and 375 support staff.

While Congress never enacts a President's budget as proposed, it offers an indication of the executive branch's goals.

- USA Today article on the budget request
- DHS Budget-in-Brief for FY 2019
- Executive Office for Immigration Review Budget Request at a Glance

***USCIS May Expand Ability to Deny Visas and Green Cards to Public Benefits Recipients.*** U.S. Citizenship and Immigration Services (USCIS), the DHS agency charged with adjudicating visa and immigration benefits applications, is soon likely to propose a new rule that expands the criteria to deny visas or green cards based on someone's past legal use of public benefits. A noncitizen is considered inadmissible to the United States if USCIS determines he or she is likely to become a "public charge;" currently, USCIS considers the receipt of government cash assistance in making this determination. Leaked drafts show the proposed regulation would allow USCIS to examine an immigrant's use of a broad array of public benefits, including for their U.S.-citizen children. Examples include Head Start, the Children's Health Insurance Program, Affordable Care Act subsidies, and food stamps. After the proposed rule is published in the *Federal Register*, the public will likely have 60 days to submit comments.

- Vox article on the proposed rule, including a draft of its text

***Border Apprehensions Decrease for First Time Since April.*** Border Patrol agents made 26,000 apprehensions at the Southwest border in January, a 10 percent decrease from the 29,000 apprehensions in December, marking the

first significant drop since April 2017. Apprehensions are often used as an indicator of how many people attempt to cross the border in a given period. While apprehensions declined precipitously from October 2016 through April 2017, which many attributed to the hardline immigration enforcement narrative coming from President-elect and then President Trump, they rose steadily from April through December 2017. Most of the decrease between December and January comes from declines in apprehensions of unaccompanied minors and families: There were 3,300 fewer of these migrants apprehended in January than in December.

- *Los Angeles Times* article on changes in apprehension numbers
- CBP data on border apprehensions

***ICE Gains Access to Nationwide License Plate Database.*** ICE finalized a contract in January with Vigilant Solutions to access its license plate database, which contains more than 2 billion license plate photos through partnerships with private groups and local law enforcement agencies. The contract will allow ICE to search for specific plate numbers and determine where they are often spotted, which may allow ICE to identify a home or work address. ICE can also be notified of when and where a picture of a specific plate is freshly captured.

- The Verge article on the database

***DHS Extends Temporary Protected Status for Syrians.*** On January 31, DHS announced it would extend Temporary Protected Status (TPS) for the 7,000 Syrian beneficiaries for 18 months, through September 30, 2019. The Homeland Security Secretary can designate TPS for a country's nationals in the United States if the country is experiencing armed conflict, environmental disaster, or other extraordinary and temporary conditions. TPS provides eligibility for work authorization and protection from deportation. DHS stated that it was extending TPS for Syrians because the armed conflict and resulting conditions that led to Syria's designation continued to exist. TPS was originally designated for Syria in 2012, and was redesignated, not just extended, at the end of every earlier period of status (in 2013, 2015, and 2016). That meant that not only did the existing TPS recipients continue to be protected, but Syrians who had arrived in the United States after 2012 became newly eligible. In contrast, the January 31 decision continues protections for those currently eligible, but does not expand eligibility.

- Reuters article on the extension of TPS for Syrians
- DHS press release on the extension
- *Migration Information Source* Policy Beat on TPS

***Labor Department Sees Surge in Temporary Worker Applications.*** Following an unprecedented number of requests, the Labor Department will revise how it processes employers' applications for temporary labor certification, a prerequisite for employers to sponsor temporary foreign workers. USCIS issues up to 33,000 H-2B temporary worker visas in each half of the fiscal year. On January 1, the department received 4,500 H-2B labor certification applications covering 81,000 positions—three times the 1,500 applications for 27,000 positions it received on January 1, 2017. (For employees starting jobs in the second half of the fiscal year, the Labor Department recommends submitting certification requests between January 1 and 15.) Although the department stated that applications would now be processed based on time of day they were received, rather than simply by date, USCIS has yet to finalize its process for determining which applications for the 33,000 positions, out of those

certified, will be processed for adjudication.

- *Federal Register* notice announcing the new process

**State Policy Beat in Brief**

***Federal Court Rules Holding People on ICE Detainers Is Unconstitutional in Some Cases.*** A U.S. district court judge in California ruled in a class-action case that the Los Angeles County Sheriff's Department violated the Fourth Amendment when it held people based solely on ICE detainers, without a final removal order and when the person was not in removal proceedings. The decision relied on past case law establishing that local law enforcement officers have the authority to make arrests for criminal, but not civil violations; that unlawful presence in the United States is a civil violation; and that holding someone on an ICE detainer constitutes a new arrest by a local law enforcement officer, meaning it must be based on probable cause. Because ICE detainers do not show probable cause of criminal activity, but rather of unlawful presence, local law enforcement agencies violated the Constitution in making arrests based solely on detainers, the judge ruled.

- Associated Press article on the ruling
- Judge's ruling in *Roy v. County of Los Angeles* and *Gonzalez v. ICE*
- Immigrant Legal Resource Center update on court decisions on ICE detainers

***Washington State Restricts Driver's License Information Sharing with ICE.*** Driver's license applicants in Washington State no longer have to list their place of birth in order to apply, following an emergency rule change by the state's Department of Licensing. The department also will no longer provide any other personal information to ICE without a court order. The changes aim to protect unauthorized immigrants with driver's licenses whose personal information the department was releasing to ICE, in response to requests, 20 to 30 times a month. ICE arrest reports indicate that it used driver's license application fields indicating place of birth, as well as the identity document used to apply, as evidence of the immigration status of some people ICE agents arrested.

- *Seattle Times* article on the previous information sharing practice
- HuffPost article on the policy shift
- National Conference of State Legislatures resource on states offering driver's licenses to unauthorized immigrants