The Siege of Sanctuary Cities Has Begun

President Trump wants to turn local police into deportation agents and punish cities that don’t comply. What happens when they fight back?

By Henry Grabar

After months of demonizing undocumented immigrants on the campaign trail, President Donald Trump signed an executive order Wednesday taking aim at the hundreds of “sanctuary cities” that shield them from federal immigration agents. “We’re going to strip federal grant money from the sanctuary cities and states that harbor illegal immigrants,” White House Press Secretary Sean Spicer said at his daily briefing. “The American people will no longer be forced to subsidize this disregard for our laws.”

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Trump is gearing up to deputize cities as the foot soldiers in his fight to round up illegal immigrants. But to do so without help from Congress, he must first rely on an unusually expansive interpretation of federal law to find sanctuary cities illegal. That likely means a court battle is imminent, the first turn in a political reversal that will define the Trump era: a GOP administration grasping for federal power pitted against states and cities trumpeting local control. At stake are the livelihoods of millions of immigrant families that have made sanctuary jurisdictions from Boston to Portland, Oregon, home.

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The text of the executive order, titled “Enhancing Public Safety in the Interior of the United States,” accuses sanctuary cities of causing “immeasurable harm to the American people and to the fabric of our Republic.” It restores to full strength two controversial programs of the Bush and Obama years—287(g) agreements and the Secure Communities Program—that harnessed local police and sheriffs to enforce federal immigration law. And it directs the secretary of the Department of Homeland Security to publish a weekly public list of crimes committed by aliens in sanctuary jurisdictions: a police blotter of crimes by brown people. What exactly constitutes a sanctuary jurisdiction? That’s up to Trump’s DHS.

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But in other ways, the order exhibits the restraints on what the president can accomplish alone—and how much pain he can really inflict on cities that defy him on immigration. (For example, it promises 5,000 new Border Patrol agents and tripling the Immigration and Customs Enforcement workforce from 6,000 enforcement agents to 18,000—subject to appropriations from Congress.) Its promise to strip federal grants from sanctuary cities is limited to punishing cities for enforcing “don’t tell” laws, which prohibit local officials from sharing immigration status information with the feds. Those have been illegal since 1996, when a New York City law was overturned after a suit brought by then-Mayor Rudy Giuliani.

The Trump administration will likely try to argue that a broad range of noncompliance policies can be categorized as “don’t tell” laws—and that by that expanded definition, sanctuary cities are already in violation of that federal statute, 8 U.S.C. 1373. One thing states and cities could be concerned about, says Annie Lai, a professor of law at the University of California–Irvine, is the order’s emphasis on the “discretion” of Trump’s Cabinet officials. “The Attorney General and the secretary may have an interpretation of 1373 that may go beyond the express terms of the text,” she says. But, she added, that interpretation is unlikely to hold up in court, especially given a spate of recent court decisions challenging the policies that sanctuary cities won’t enforce.

States and cities are confident they’re in the right. “Cutting off funds for cities that refuse destructive deportations is unconstitutional,” Kevin de Leon, a Los Angeles representative and leader of the California Senate, said on Twitter. “See you in court.”

New York Attorney General Eric Schneiderman also shot back. “Local governments seeking to protect their immigration communities from federal overreach have every right to do so,” he said in a statement. He vowed to fight the administration’s order.

The statute in question prohibits governments from restricting the exchange of information about citizenship and immigration status. A city can’t stop its police officers from complying if an ICE agent asks about a detainee’s immigration status. The statute been on the books for 20 years and is well-known to city officials. But it hasn’t, until recently, been thought to apply to the noncompliance tactics of sanctuary cities.

The Sanctuary Cities movement has been around for decades, but its recent ascent was a direct reaction to the hassle and risk of enforcing the Secure Communities policy, or S-Comm, as I wrote at length last year. Obama abolished S-Comm in 2014. Trump just reinstated it.

Under S-Comm, participating jurisdictions send fingerprints of arrested persons to DHS, which in turn issues “detainer requests” for individuals it suspects could be deported. A city receiving a “detainer request” is supposed to hold a suspect until ICE can come get him or her. Between 2011 and 2013, S-Comm was responsible for 243,000 deportations—about 40 percent of total interior removals.

But the program was fraught with problems. Especially in its early years, detainer requests did not target criminals: More than 50 percent of those deported either had no criminal record or had been arrested for low-level offenses like traffic violations and marijuana possession. The cost to immigrant communities was enormous. Local relations with police deteriorated, causing police chiefs to turn against the program. And finally, a number of court cases implied that the “detainer requests” might be unconstitutional and put cities in violation of the Fourth Amendment.

Here’s where things get complicated. When cities refuse to hold someone in a cell or notify ICE of a release date, they’re withholding practical information—but not information about immigration or citizenship. That’s why sanctuary cities and states believe they don’t violate the federal law cited in Trump’s order.

There’s a clear difference between telling officials not to share information and telling officials not to detain people, pointed out Adam Cox, a law professor at New York University.

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Congressional Republicans disagree. Texas Rep. John Culberson, who chairs the House Appropriations subcommittee in charge of the Department of Justice budget, believes that sanctuary cities do violate that old information-sharing law. And in July, responding to Culberson, the DOJ inspector general appeared to open a door to the validity of that view (italics mine):

> We have concerns that other local laws and policies, that by their terms apply to the handling of ICE detainer requests, may have a broader practical impact on the level of cooperation afforded to ICE by these jurisdictions and may, therefore, be inconsistent with at least the intent of Section 1373.

That’s not the strongest language. The DOJ asked sanctuary jurisdictions to certify their compliance with the law, and that was that. But guess who thought that letter constituted a full-blown legal indictment of cities like New York, Chicago, and New Orleans? Soon-to-be Attorney General Jeff Sessions, who said the opinion “must bring an end to the excuses proffered by numerous Democratic leaders to defend the extreme and dangerous practices of sanctuary jurisdictions.”

If Sessions still thinks cities, counties, and states are in violation of that provision, he could move to withhold DOJ grant money as soon as he gets sworn in. It’s not a ton of money. California received about $132,000,000; its total budget is more than 1,000 times that. And cities and states will take him to court immediately to litigate how broadly the statute can be applied.

Real punishment for sanctuary cities and states will probably have to wait for Congress. There’s no shortage of GOP enthusiasm for such a measure: Senators like Ted Cruz, Jeff Sessions, and Pat Toomey have proposed bills to ban federal funds for sanctuary cities.

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Even so, there are limitations on how Congress can punish local noncompliance, which (pace Sessions) has been construed as legal. Across-the-board cuts, which could strip billions in money for education, police, and other services from cities, would be devastating—but are almost certainly illegal. Smaller, more precise conditions attached to policing grants stand a better chance in court but would be easier for cities to resist. Most big-city mayors have pledged that they will not relinquish sanctuary status—or as some mayors call it, status as a “Fourth Amendment City.”

One way or another, the president is now at war with the nation’s cities, including his own, and countless law-enforcement officials who don’t like being told how to do their jobs.


The good news is that Congress can stop him.

By Fred Kaplan
President Trump’s executive order giving Steve Bannon a seat on the National Security Council’s Principals Committee is an assault on common sense and tradition—that much is obvious. It also appears to be a violation of federal law.

Fred Kaplan is the author of Dark Territory: The Secret History of Cyber War.

According to Title 50 of the U.S. Code, Section 3021, which established the National Security Council, it “shall be composed of” the president; the vice president; the secretaries of state, defense, and energy; and “the secretaries and undersecretaries of other executive departments and of the military departments, when appointed by the President by and with the advice and consent of the Senate, to serve at his pleasure.”