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Sanctuary cities and secure communities

The brewing storm for political subdivisions

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President Donald Trump's Jan. 27 executive order banning travel to the United States from seven majority-Muslim countries and Washington and Minnesota's subsequent federal lawsuit seeking to enjoin the order's enforcement rightly garnered significant media coverage.


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Similarly, portions of an earlier executive order from Jan. 25 titled "Enhancing Public Safety in the Interior of the United States" targeting so called "Sanctuary Cities" that have ordinances prohibiting city workers from cooperating with United States Immigration and Customs Enforcement ("ICE") in the detention of undocumented persons, have also garnered extensive media attention and at least one lawsuit, a challenge by the city of San Francisco.

Given the white-hot media attention on these disputes, it is not surprising for other effects of the Jan. 25 executive order to slip under the radar. Do not associate lack of coverage with lack of impact, however. The Jan. 25 executive order contains interior enforcement provisions on all political subdivisions, from cities with or without specific sanctuary ordinances on their books to county sheriff departments, jails and detention entities. The effect on these political subdivisions could be profound.

DHS secure communities

When an undocumented person is arrested, whether for DUI, shoplifting or homicide, his or her fingerprints are taken by the local law enforcement agency, sent to the FBI, and eventually to the Department of Homeland Security (DHS) which includes ICE. Prior to November 2014, under what was then called the "Secure Communities" program, ICE would then issue a "detainer" on the undocumented person, asking the local law enforcement agency to hold the undocumented persons until ICE could take them in custody for possible deportation proceedings.

These ICE Secure Community detainers were not issued by a judge, were not required to be based on reasonable suspicion or probable cause, and were issued regardless of the severity of the underlying criminal charge. Given the obvious controversial impact and constitutional questions surrounding these Secure Communities procedures, they produced litigation. Miranda-Olivares v. Clackamas Cty , No. 3:12-cv-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (holding that county violated the Fourth Amendment by relying on an ICE detainer that did not provide probable cause regarding removability); Morales v. Chadbourne, 996 F. Supp. 2d 19, 29 (D.R.I. 2014) (concluding that detention pursuant to an immigration detainer "for purposes of mere investigation is not permitted").

DHS priority enforcement program

In November 2014, recognizing these problems and that "[g]overnors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation," DHS abandoned Secure Communities. U.S. Dep't of Homeland Sec., Memo on Secure Communities (Nov. 20, 2014).

It was replaced with the ICE Priority Enforcement Program ("PEP") which made several important changes. It changed ICE's requests for "detention" to requests for mere "notification" (unless probable cause was present) and limited these requests to a subset of arrestees charged with more serious, often violent, offenses. Even under these new and less onerous PEP rules, many political subdivisions, by ordinance, policy and practice, refused to recognize the requests from ICE.

These actions by DHS, the "Sanctuary Cities," and other political subdivisions angered many in Congress. This response is not surprising given 8 U.S.C. Sec. 1373 ("Section 1373") which mandates that "no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from" sending "information to, or requesting or receiving such information from" ICE as to "the immigration status, lawful or unlawful, of any individual."

Members of Congress are resourceful when frustrated, and several members wrote to the Department of Justice (DOJ) in 2016 asking how political subdivisions that were not cooperating with ICE were able to receive grants from the DOJ's Office of Justice Program and Office of Violence Against Women when receipt of these grants require the grantee to be in compliance with federal laws.

A DOJ Office of Inspector General (OIG) investigation ensued and, in May 2016, the OIG reported that he had "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