



DOJ GRANTS AND SANCTUARY CITIES

The Courts Have Consistently Rejected DOJ's Conditions on Federal Grants That Would Have Required States and Localities to Help Enforce Immigration Laws

INTRODUCTION

In 2017, the Department of Justice (DOJ) announced that it would withhold federal grants from state and local jurisdictions applying to the FY2017 Byrne Justice Assistance Grant (Byrne Jag) and COPS Hiring Program (CHP) if jurisdictions failed to cooperate with Immigration and Customs Enforcement (ICE) in deporting members of immigrant communities. Specifically, the DOJ placed the following three conditions on the Byrne JAG and COPS programs:

- Complete a certification of compliance with 8 U.S.C. § 1373 (“Compliance Condition”);¹
- Allow ICE access to jails and detention facilities (“Access Condition”);
- Provide ICE with a 48-hour notice before a detainee is released (“Notice Condition”).

IS IT LEGAL TO ADD THESE REQUIREMENTS TO FEDERAL GRANTS?

No. So far, the courts have soundly rejected the administration’s attachment of these conditions to the Byrne and COPS grant programs. The federal district and appellate courts have found that these conditions exceed congressional authority and violate the Administrative Procedure Act and the U.S. Constitution. Further, two of these courts have held that 8 U.S.C. 1373 is unconstitutional.² As a result, courts have ordered the DOJ to grant federal funds to states and local jurisdictions, irrespective of a jurisdiction’s unwillingness to cooperate with ICE. These decisions covered both the express conditions added to the Byrne JAG program, as well as the ‘prioritization’ scheme added to the COPS grants.³

The following jurisdictions have filed lawsuits to prevent the DOJ from imposing these conditions:

- **The city of Philadelphia** sued the DOJ in *City of Philadelphia v. Sessions* for unlawfully placing these conditions on the Byrne JAG program. On June 6, 2018, the U.S. District Court for the Eastern District of Pennsylvania held that the conditions exceeded congressional authority, violated the constitutional Separation of Powers and Spending Clause, and the Administrative Procedure Act.⁴ Importantly, in regards to complying with 8 U.S.C. § 1373, the court went further to hold that 8 U.S.C. § 1373 is unconstitutional under the Tenth Amendment.⁵
- **The city of Chicago** filed a lawsuit to enjoin the DOJ from adding these conditions to the Byrne JAG program in *City of Chicago v. Sessions*. On September 15, 2017, the U.S. District Court for the Northern District of Illinois granted a nationwide preliminary injunction against the Notice and Access conditions finding that the conditions could exceed Congressional authority.⁶ On April 19, 2018, the Seventh Circuit affirmed the district court’s findings.⁷ The Seventh Circuit later agreed to rehear the question of whether the injunction would stand across the entire country, or just as to Chicago. On July 27, 2018, the district court issued a permanent nationwide injunction against all three of the JAG conditions, and granted a stay of the national scope of the injunction, pending further review from the Seventh Circuit. The district court also found 8 U.S.C. § 1373 unconstitutional.
- **The city of Los Angeles** sued the DOJ in *City of Los Angeles v. Sessions* for imposing the Access and Notice conditions as considerations on scoring applicants for the CHP grant. On April 11, 2018, the U.S. District Court for the Central District of California granted a nationwide permanent injunction against the two conditions, finding that the DOJ imposed them without congressional authority and in violation of the Spending Clause and the Administrative Procedure Act.⁸

¹ For more information about 8 U.S.C. § 1373, see: <https://www.ilrc.org/fact-sheet-sanctuary-policies-and-federal-funding>.

² For more information about the constitutional issues with 8 U.S.C. § 1373, see: <https://www.ilrc.org/unconstitutionality-8-usc-%C2%A7-1373>.

³ The conditions were appended to the COPS program not as express requirements but as factors for favorable prioritization to applicants.

⁴ *City of Philadelphia v. Sessions*, No. CV 17-3894, 2018 WL 2725503 (E.D. Pa. June 6, 2018).

⁵ *Id.* at *31.

⁶ *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 943 (N.D. Ill. 2017), reconsideration denied, No. 17 C 5720, 2017 WL 5499167 (N.D. Ill. Nov. 16, 2017).

⁷ *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018).

⁸ *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1093 (C.D. Cal. 2018).

- **The state of California** filed a lawsuit in *State ex rel. Becerra v. Sessions* to enjoin the DOJ from placing the conditions on the Byrne JAG program and CHP grant. Although the final resolution of the case is still pending, the court denied California's request for a preliminary injunction on March 5, 2018, finding that the grants were not a big enough portion of the state budget to warrant a preliminary injunction.⁹
- **The state of Illinois** filed a lawsuit against the DOJ in July 2018, seeking a court order against the notice, access, and compliance conditions and arguing that 8 U.S.C. § 1373 is unconstitutional.¹⁰
- **Evanston, IL and the U.S. Conference of Mayors** filed a joint lawsuit asking the court to declare the notice, access, and compliance conditions unconstitutional and to enjoin DOJ from imposing them on the FY2017 or any future Byrne JAG grants.¹¹
- **New York, New Jersey, Massachusetts, Connecticut, Washington, and Virginia** filed a joint lawsuit in July 2018, claiming that all the Byrne JAG conditions are unlawful and asking the court to enjoin DOJ from enforcing them.¹²

HOW MUCH MONEY IS AT STAKE?

Different jurisdictions receive varying amounts of money under these grants.

- **The COPS CHP grant** program gives out large sums of money to hire officers; most awards are between \$100,000 - \$500,000, and some larger counties receive as much as \$1 - 3 million.
- **Byrne Grants:** The JAG program awards a total of about \$300 million per year to states and localities. Most states and counties in the country apply for and receive JAG funds according to the statutory formula. Generally, larger and more populous cities and counties receive \$100,000 - \$300,000, while most cities receive \$10,000 - \$50,000. States receive the majority of federal funds and re-grant substantial amounts to local law enforcement agencies.

WHAT DO THESE GRANTS FUND?

- **Byrne** grants fund a variety of law enforcement programs, from body armor to drug enforcement and border security efforts. FY2017 “areas of emphasis” of the Byrne JAG program included: reducing gun violence, FBI's national incident based reporting system, officer safety and wellness, border security, and collaborative prosecutions between police and prosecutors. Nothing in the Byrne JAG program mentions or prioritizes immigration enforcement. The Byrne JAG program has been widely criticized for funding discriminatory drug war policies and incentivizing aggressive enforcement measures without tracking actual improvements in public safety, health, or crime reduction.¹³
- The **COPS CHP** program is specifically for hiring police officers, for the purpose of “community policing.” The agency defines community policing as programs that “encourage[] agencies to proactively develop solutions to the immediate underlying conditions contributing to public safety problems.” This definition of community policing has nothing to do with communities, and ignores the problems of racial profiling, coercion, and police brutality in building better public safety programs. Instead, the COPS program appears to address community safety by simply expanding the size and scope of police forces, including the placement of police officers in schools.

NEW CERTIFICATION REQUIREMENTS ADDED TO MORE DOJ GRANTS IN JUNE 2018

The DOJ announced on June 28, 2018 that they would add **new requirements of certifying compliance with various federal immigration laws** to four different federal grant programs for the 2018 cycle.¹⁴ These funds are a range of

⁹ *State ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1037 (N.D. Cal. 2018).

¹⁰ *State of Illinois v. Sessions*, No. 1:18-cv-04791 (N.D. Ill. Jul. 12, 2018).

¹¹ *City of Evanston v. Sessions*, No. 1:18-cv-04853 (N.D. Ill. Jul. 16 2018).

¹² *State of New York et al v. Sessions*, No. 1:18-cv-06471 (S.D.NY Jul 18, 2018).

¹³ See, e.g., National Juvenile Justice Network, *Fiscal Policy Center Toolkit: How to Find and Use Byrne Justice Assistance Grant (JAG) Information for Juvenile Justice Reform*, 2 (2016), available at http://www.njnn.org/uploads/njnn-publications/NJNN_Toolkit_How-to-Use-JAG-Funds_Oct19-2016FINAL.pdf.

¹⁴ United States Department of Justice, Department of Justice Announces New Immigration Compliance Requirements for FY 2018 Grants, June 28, 2018. These grants are: 1) Supporting Innovation: Field-Initiated Programs to Improve Officer and Public Safety; 2) Justice Accountability Initiative (JAI): Pilot Projects Using Data-driven Systems to Reduce Crime and Recidivism; 3) Gang Suppression Planning: Build Capacity for a Multilateral Data-Driven

discretionary grant programs for law enforcement and non-government agencies that largely focus on criminal justice, law enforcement and gang issues. Like the Byrne JAG and COPS programs, many of these grants also fund aggressive prosecution and policing strategies that target communities of color.

DOJ announced that acceptance of these grants requires certification of compliance with 8 U.S.C. § 1373, as well as certification that the jurisdiction understands and has no “law, rule, policy, or practice” that would aid or abet violations of 8 U.S.C. § 1324(a), or impede federal officers in exercising their authority under 8 U.S.C. § 1357(a), § 1226(a) & (c), and § 1366(1) & (3).¹⁵ These federal statutes encompass the arrest, interrogation, and detention authority of federal immigration agents, criminal laws regarding “harboring” undocumented immigrants, communications with immigration authorities about citizenship and immigration status, and the reporting of data on incarceration of undocumented immigrants. In addition, DOJ will prioritize applicants that will “address the problem area identified in its application through cooperation with federal immigration authorities.”¹⁶

Applications for these grants are ongoing, and thus no litigation has been filed against these new certification requirements so far. DOJ may follow up with threatening letters against certain applicants who they claim are thwarting immigration enforcement, as they did in the Byrne JAG context.¹⁷

WHAT SHOULD LOCALITIES DO IN RESPONSE?

Understand the Legal Landscape

- Every court to review the question has ruled against the DOJ and found that the notice and access conditions exceed congressional authority and violate the Constitution.
- Even where the new conditions were framed as “considerations” for prioritizing funding, rather than straight requirements, they were found to be illegal.¹⁸
- So far two federal courts have found 8 U.S.C. § 1373 unconstitutional, based on new Supreme Court precedent. Consider how the unconstitutionality of 8 U.S.C. § 1373 affects your local policy choices see ILRC’s guide: [The Unconstitutionality of 8 U.S.C. § 1373 and Its Implications for Sanctuary Policies](#).
- The DOJ and the Trump Administration appear to be wholly unconcerned that these conditions are unconstitutional; their tactics are intended to scare local agencies into complying with their demands on immigration enforcement.

Stand Up for Good Local Policies

- Localities that restrict access to jail facilities or limit information sharing with ICE are doing so because of a strong governmental interest in building healthier relationships with the communities they are sworn to protect.
- Greater involvement with abusive and unaccountable federal agencies like ICE and CBP is bad for public safety and undermines local authority.
- Consider opting out of these grant programs to begin with. Federal grants that simply fund more police officers and more militaristic equipment will not help build community trust or improve relations between law enforcement and communities of color. Even if a grant sounds like it has a good purpose, for example to combat opioid addiction, why is the police or sheriff’s department the agency funded to run such a program, instead of a clinic or school or NGO? Programs that invest in the community and support education, rehabilitation, and job growth are a better use of funds than feeding the machinery of mass incarceration.

Strategy to Promote Public Safety; and 4) A Law Enforcement and Prosecutorial Approach To Address Gang Recruitment of Unaccompanied Alien Children program.

¹⁵ See Certification form at: <https://ojp.gov/funding/Explore/pdf/FY2018JAComplianceWithVarious.pdf>.

¹⁶ The solicitations provide the following language: “In addition, an applicant may receive priority consideration by explaining how it would address the problem area identified in its application through cooperation with federal immigration authorities, including compliance with 8 USC §§ 1373, 1644, and 1324, participation in a 287 (g) or other cooperation program, honoring requests for notice of release, transfers of custody, and/or short term extensions of custody, and providing access to detention centers so federal immigration authorities may conduct interviews. If you choose to seek this priority consideration, please explain specifically how you believe these forms of cooperation will address the problem area you have identified, and how you will use these grants funds to achieve this end.”

¹⁷ See ACLU, Major Developments Relating to “Sanctuary” Cities Under the Trump Administration (July 5, 2018) available at <https://www.aclu.org/other/major-developments-relating-sanctuary-cities-under-trump-administration>

¹⁸ *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087 (C.D. Cal. 2018).