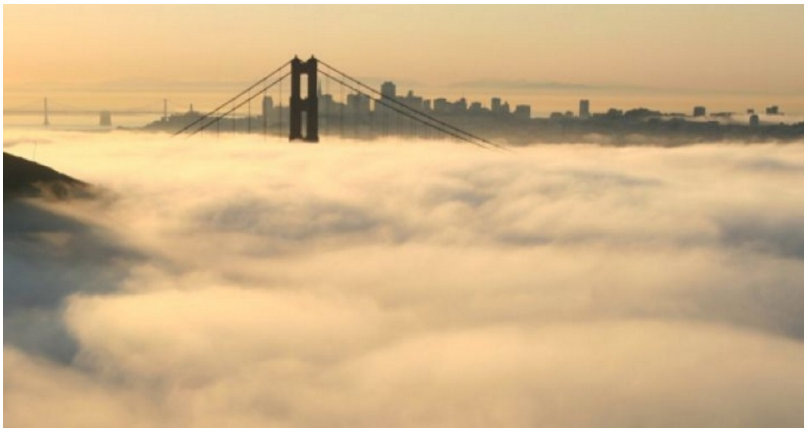
Written by **Warren Mass** on February 1, 2017

San Francisco Sues Trump to Stop Executive Order About Sanctuary Cities



A group of attorneys led by San Francisco City Attorney Dennis Herrera filed a lawsuit on January 31 in the U.S. District Court for the Northern District of California against President Trump, Secretary of Homeland Security John Kelly, and Acting Attorney General Dana Boente, claiming that the "President of the United States seeks to coerce local authorities into abandoning what are known as 'Sanctuary City' laws and policies."

The lawsuit objects to an executive order signed by Trump on January 25 ("Enhancing Public Safety in the Interior of the United States") proclaiming that "Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States."

The order continues by stating: "It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373."

Title 8, Section 1373 of the U.S. Code pertains to "Communication between government agencies and the Immigration and Naturalization Service." It states:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

The Trump executive order goes on to put some teeth into its enforcement by stating:

> In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

Herrera and his co-plaintiffs in the lawsuit (including Chief Assistant City Attorney Jesse Smith, and Chief Deputy City Attorney Ronald Flynn) take issue with the Trump administration order, however. In a statement quoted by the *San Francisco Chronicle*, Herrera questioned the constitutionality of the executive order. "Not only is it unconstitutional, it's un-American," Herrera said at a January 31 City Hall news conference. "It is necessary to defend the people of this city, this state and this country from the wild overreach of a president whose words and actions have thus far shown little respect for our Constitution or the rule of law."

"The fabric of our communities and billions of dollars are at stake," said Herrera, who the *Chronicle* reported was joined by Mayor Ed Lee, San Francisco Supervisor Hillary Ronen, and several deputy city attorneys at the conference. "President Trump does not appear to understand the Constitution and the limits it imposes on executive power."

The *Chronicle* noted that San Francisco receives approximately $1 billion annually from the federal government, which accounts for a little more than 10 percent of the city's budget and that federal aid is in jeopardy if the Trump administration enforces the order.

The report quoted Bill Ong Hing, a professor of immigration law at the University of San Francisco as saying, "I think there is a clear violation of the 10th Amendment here. The federal government cannot commandeer nonfederal officials to do its work."

The language of the lawsuit also argued along those lines, stating: "The City and County of San Francisco ("San Francisco") seeks declaratory and injunctive relief against the United States of America and the above-named federal officials for violating the Tenth Amendment, U.S. Const. amend. X."

Interestingly, one portion of the suit employs language commonly used by strict constitutionalists:

> The Constitution establishes a balance of power between the state and Federal governments, as well as among the coordinate branches of Federal government, to prevent the excessive accumulation of power in any single entity and reduce the risk of tyranny and abuse from any government office. In so doing, the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

That argument made in the above statement is unimpeachable, but does it apply to the case of "sanctuary cities" — or to the Trump executive order, "Enhancing Public Safety in the Interior of the United States"? If the San Francisco attorneys want to challenge the executive order on constitutional grounds, shouldn't they first challenge the federal law (8 U.S.C. 1373) it attempts to enforce? If 8 U.S.C. 1373 is constitutional, then the executive order demanding its enforcement should also be constitutional. If the San Francisco attorneys think 8 U.S.C. 1373 is unconstitutional, then their fight should be with those who passed that section of the U.S. code, which was part of Public Law 104-208 (H.R. 3610 and S. 1894), passed by the 104th Congress and signed by President Bill Clinton on September 30, 1996.

The lawsuit complains: "The Executive Branch may not commandeer state and local officials to enforce federal law"; however, the Trump executive order attempts to do no such thing. It does not propose to "commandeer" local officials, but merely have them comply with 8 U.S.C. 1373 (which, as noted, was signed into law by President Clinton) which specifies that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."

Expecting a local government official to send information to (or receive information from) the INS about the lawful or unlawful immigration status of an individual hardly constitutes "commandeering" that official — it merely expects him or her to perform as a good citizen.

As we noted in a recent article about an illegal alien from El Salvador who filed a lawsuit on January 17 against the city and county of San Francisco for violating San Francisco's sanctuary city law by arresting and detaining him, sharing information with federal immigration authorities is not the same as taking personal responsibility for enforcing federal immigration statutes.

In that article, we stated that a law passed by San Francisco in 1989, and signed by then-mayor Art Agnos, the City of Refuge Ordinance, also known as the "Sanctuary Ordinance," included a prohibition on San Francisco employees assisting or cooperating with any investigation, detention, or arrest conducted by the federal agency charged with enforcement of federal immigration law. However, we wrote:

> Therein lies the crux of the matter. In most circumstances, even an ordinary citizen, not to mention a city official, can be charged under federal law with "misprision of felony" for failing to inform authorities about the commission of a crime. Therefore, so-called sanctuary city laws create a dilemma for city officials, who must decide which of two conflicting laws they will obey. However, this point has not, to our knowledge, been addressed by any court, probably because "misprision of felony" charges are difficult to prove and are rarely brought.

The Trump executive order does not go so far as to attempt to bring "misprision of felony" charges against local officials who fail to comply with 8 U.S.C. 1373, probably because that would be a difficult legal case to make. Instead, it relies on a tool that is based on more solid constitutional grounds — the "carrot and stick" approach. A municipality that insists on being a "sanctuary city" and refuses to cooperate with federal immigration authorities is not eligible to receive federal grants.

This also raises an interesting constitutional point. The strict constitutionalist would say that most federal grants are not constitutional anyway, because according to the 10th Amendment that the city attorneys for San Francisco so nicely quoted for us, they provide funding for areas not delegated to the United States (federal government) by the Constitution.

However, the San Francisco city attorneys cannot have it both ways. They cannot logically cite the 10th Amendment to stop the federal government from withholding billions for dollars from the city on the grounds that the Trump administration is intruding into areas not authorized by the Constitution when the funds they so jealously covet are going to pay for programs not authorized by the Constitution, either.

And as we noted, if the San Francisco city officials have a problem with the constitutionality of Trump's executive order, which merely serves to enforce existing law, then they should ask their representatives in Congress to introduce legislation to change that law, which was passed by the 104th Congress and signed into law by President Bill Clinton. In the 20 years since that law was passed, no federal court has ruled that it is unconstitutional.

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