



DOJ Grant Conditions Targeting Sanctuary Jurisdictions: Litigation Update

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On April 19, 2018, the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) [upheld](#) a nationwide preliminary injunction blocking the Department of Justice (DOJ) from implementing two new conditions that the agency imposed on the receipt of federal funds from the [Edward Byrne Memorial Justice Assistance Grant](#) (Byrne JAG) Program. This litigation is one of several lawsuits stemming from Section 9 of President Trump’s January 30, 2017 [Executive Order](#) targeting “sanctuary jurisdictions” and executive implementation of that order. One group of lawsuits has sought to enjoin the executive order’s enforcement. Another group of lawsuits, including one filed by the City of Chicago, Illinois, were brought after the DOJ announced new conditions for certain federal grant programs that made the receipt of funds contingent on grant recipients’ compliance with particular federal immigration policies. The focus of this Sidebar discusses the Chicago litigation, including potential legislative responses to the injunction. More in-depth information on the nature of sanctuary jurisdictions, the executive order, its implementation, and the related litigation can be found in a general distribution memorandum, *Sanctuary Jurisdictions and Related Litigation*, which is available from the [author](#).

Byrne JAG Conditions: The Byrne JAG program provides federal funds to the states, District of Columbia, Puerto Rico, and other territories for various non-federal criminal justice initiatives. On July 25, 2017, the DOJ issued a [press release](#) and accompanying [background document](#) announcing new conditions for recipients of the Byrne JAG program:

1. **Compliance Condition** – Byrne JAG program recipients must certify compliance with [8 U.S.C. § 1373](#) (Section 1373), meaning that the jurisdiction declares it does not restrict its offices and personnel from sending or receiving citizenship or immigration status to or from federal immigration authorities.
2. **Access Condition** – Grant recipients that have detention facilities housing aliens (e.g., local jails or state prisons where aliens may be confined) must permit immigration

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enforcement officers to access those facilities to meet with housed aliens and inquire into their eligibility to remain in the country.

3. **Notice Condition** – When the Department of Homeland Security (DHS) believes that an alien in state or local custody is removable from the United States for a violation of federal immigration law, officers with DHS’s U.S. Immigration and Customs Enforcement (ICE) may issue a “[detainer](#)” requesting that the state or local entity give notice of the alien’s pending release from custody so that ICE may take control of the alien for possible removal proceedings. To be eligible for grants under the Byrne JAG program, DOJ announced that recipients generally must give DHS 48 hours’ advance notice before releasing from custody an alien wanted for removal.

These requirements were made applicable to Byrne JAG applications that were due six weeks later, [on September 5, 2017](#), meaning that applying jurisdictions would need to be in compliance with all three conditions within six weeks.

Chicago Litigation: After the DOJ announced the new Byrne JAG conditions, the City of Chicago sued, asking the U.S. District Court for the Northern District of Illinois to enjoin the Attorney General from implementing the Byrne JAG conditions. Chicago’s suit challenged each of the conditions described above. In particular, Chicago argued that the conditions are unlawful for three reasons: (1) The statute creating the Byrne JAG program does not confer agency discretion to add substantive conditions to the receipt of federal funds; (2) the conditions were imposed in violation of the Constitution’s principles of separation of powers because the DOJ—an executive branch agency—unlawfully exercised the spending authority exclusively granted to the legislative branch; and (3) even if the DOJ had been delegated the discretion to impose conditions on Byrne JAG eligibility, the notice and access conditions exceed the spending power granted in the Constitution.

The district judge [preliminarily enjoined](#) the notice and access conditions on a nationwide basis, but allowed the compliance condition to remain in force. The court agreed with Chicago that, in imposing the notice and access conditions, the DOJ likely exceeded the statutory authority Congress granted to it in the Byrne JAG statute. But the court concluded that the compliance condition was lawfully imposed based on language in the [Byrne JAG](#) statute that requires recipients to certify compliance with “[all other applicable Federal laws](#).” The court [opined](#) that “[t]he most natural reading of the statute authorizes the Attorney General to require a certification of compliance with all other applicable federal laws, which by the plainest definition *includes Section 1373*.”

On appeal, the [Seventh Circuit](#) agreed with the district court’s assessment that Chicago was likely to succeed on the merits of its claim that the Attorney General lacked statutory authority to impose the notice and access conditions and thus, by doing so, violated the separation of powers. The compliance condition was not at issue in the appeal, and the Seventh Circuit expressed no opinion on its lawfulness.

In defending the lawfulness of the notice and access conditions, the government had principally argued that [34 U.S.C. § 10102\(a\)\(6\)](#)—which sets forth the duties and functions of the *Assistant Attorney General* pertaining to the Office of Justice Programs, which administers the Byrne JAG program—gives the *Assistant Attorney General* (AAG) the authority to impose the two conditions. The government pointed to the statutory text granting the AAG the authority to exercise “powers and functions as may be vested in the [AAG] pursuant to this chapter or by delegation of the Attorney General, *including placing special conditions on all grants, and determining priority purposes for formula grants*.” This italicized text in particular, the government contended, allows the AAG to impose any conditions on all grants in that chapter of the U.S. code.

The Seventh Circuit rejected the government’s contention. The Seventh Circuit noted that the placement of the word “including” in Section 10102(a)(6) narrows the scope of the AAG’s power to impose grant conditions to instances when he is so authorized by the chapter of the U.S. Code that houses Section

10102(a)(6) *or* if the Attorney General delegates to the AAG his own authority to impose grant conditions. But here, the court concluded, the chapter does not authorize the AAG to impose conditions on the Byrne JAG program. Moreover, the court held that the Attorney General lacks independent authority to condition Byrne JAG program grants, and so he had no power to delegate conditioning authority to the AAG.

Judge Manion **dissented** in part from the Seventh Circuit panel decision, disagreeing with the nationwide scope of the injunction. “We are not the Supreme Court,” Judge Manion declared, “and we should not presume to decide legal issues for the whole country, even if they are purely facial challenges involving statutory interpretation.” Further, he added that notwithstanding whether the Seventh Circuit “may be convinced that the statute says one thing, we should not discount the fact that our honorable colleagues in other districts and other circuits may view things differently.”

Considerations for Congress: So far, no other **court** that has considered a challenge to the DOJ’s newly imposed Byrne JAG conditions has found statutory authority for the notice and access conditions. But Congress could amend the Byrne JAG statute to confer the Attorney General with the discretion to impose new conditions, or, perhaps, to codify the notice and access conditions. Indeed, **several bills were introduced during the 114th Congress** seeking to condition the receipt of certain federal funds on state and local compliance with federal immigration policies like the information-sharing provisions of Section 1373 and honoring ICE detainees, but none were enacted. Similar measures have been introduced during the **current Congress**, including the **No Sanctuary for Criminals Act**, which the House of Representatives passed last summer. Still, any grant limitation must adhere to constitutional requirements, including limitations related to state sovereignty and the Tenth Amendment. In particular, the Supreme Court **has interpreted** the Tenth Amendment and background principles of federalism to require that conditions imposed on the receipt of federal funds (1) be unambiguously stated, (2) be germane to the federal interest in the particular program to which the money is directed, (3) not violate other constitutional provisions, and (4) not be unduly coercive so that states have no real choice but to enact or administer a federal regulatory program or risk losing the funds.
