Analysis of January 25, 2017 Executive Order:

Enhancing Public Safety in the Interior of the United States

I. Overview

On January 25, 2017, President Trump issued an Executive Order for the stated purpose of "directing executive departments and agencies to employ all lawful means to enforce the immigration laws of the United States."[i] Among other things, the Order targets noncitizens deemed to present a significant threat to national security and public safety, as well as "sanctuary jurisdictions" that "willfully violate federal law in an attempt to shield aliens from removal from the United States." According to the Order, such jurisdictions "have caused immeasurable harm to the American people and to the very fabric of our Republic."

The Order articulates a policy to: (1) ensure the faithful execution of the immigration laws of the United States against removable aliens; (2) make use of all available systems and resources to ensure the efficient and faithful execution of U.S. immigration laws; (3) ensure that jurisdictions that fail to comply with Federal law do not receive federal funds, except as mandated by law; (4) ensure the prompt removal of all noncitizens subject to orders of removal from the United States, and; (5) support victims (and their families) of crimes committed by removable noncitizens.

Section 4 of the Order implements this policy by directing the full enforcement of immigration laws against all removable noncitizens.

This Article examines the principal legal arguments that parties may muster in efforts to challenge the Order.

II. Enlargement of Enforcement Priorities

In late 2014, then-Department of Homeland Security Secretary Jeh Johnson issued a memorandum putting in place a three-tiered system of enforcement priorities for the apprehension, detention and removal of undocumented immigrants.[ii] Among that group, Secretary Johnson placed in Priority 1 those deemed to be national security threats, those convicted of serious crimes, and those caught at the border attempting entry without authorization. Priority 2 included persons guilty of serious or repeated misdemeanors, recent border crossers, and those who committed significant visa abuse. Priority 3 covered people with a final order of removal issued after 2013. The Obama Administration explained this system of prioritization as follows: "[D]ue to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States."[iii] In practice, this policy meant that undocumented noncitizens with records of minor offenses were not the

focus of enforcement, even if such individuals were encountered by enforcement departments such as the Immigration and Customs Enforcement ("ICE") in the criminal justice system.

Section 5 of the Order replaces this policy with a new and broader priority enforcement scheme.[iv] The Order does not alter the fact that ICE cannot deport people who are currently in valid immigration status absent a conviction for a "deportable" offense under the Immigration and Nationality Act. However, for those who lack valid immigration status, or who have a valid status but also have a conviction, Section 5 of the Order defines far broader enforcement priorities, including:

- Anyone who has been *convicted* of any "criminal offense";
- Anyone who has been *charged with* any criminal offense, "where such charge has not been resolved";
- Anyone who has *committed conduct* that constitutes a chargeable criminal offense;
- Anyone who has engaged in *fraud or willful misrepresentation* in connection with an official matter or application before a government agency;
- Anyone who has *abused any program* related to receipt of public benefits;
- Anyone *subject to a final order of removal*, but who have not complied with their legal obligation to depart the United States or;
- Anyone whom, "in the judgment of an immigration officer," poses a *risk to public safety or national security*.

Note that there is no distinction between felonies and misdemeanors, or between people charged and people convicted. "Any criminal offense" could include speeding, underage drinking, fishing without a license, or, in the absence of a statute of limitations, offenses that occurred years or decades ago. There need not even be a charge, only an immigration agent's subjective and relatively unguided determination that the person committed a "criminal act," which would likely include the misdemeanor of entering the United States without inspection – thus justifying priority enforcement against all undocumented noncitizens. Notwithstanding the harsh outcomes that could result from this new scheme, it is unclear whether parties would wish to challenge this particular aspect of the Executive Order, given the broad deference that courts generally accord to the exercise of prosecutorial discretion and Executive power over immigration matters.

III. Withholding Federal Funding From "Sanctuary Jurisdictions"

Section 9 of the Order provides that, for those jurisdictions that do not comply with 8 U.S.C. § 1373, they shall not be "eligible to receive Federal Grants, except as deemed necessary for law enforcement purposes." Several powerful challenges to this provision can be made.

First, Section 1373 does not require states and localities to cooperate with the Immigration and Naturalization Service. Rather, it provides that that states and localities may not prohibit their employees from sending or receiving immigration-related information to

federal officials. State or local law enforcement agencies are not required to collect information, or provide requested information, or, in short, enforce federal immigration laws.

Second, there are constitutional limitations to which even a statute (which has the force of law, unlike this Executive Order) can compel states or localities to participate in federal law enforcement under the "anti-commandeering doctrine."[v] This doctrine holds that the federal Government may not require states to enforce federal laws, although it may authorize or encourage such a role, including through federal grants to participating states or the withholding of certain funding — provided that the withholding is not so extensive that the courts view it as unduly coercive.

And although the federal Government has the power to condition receipt of federal funds on the States' complying with restrictions on the use of those funds, a threat to cut *all* federal grant money to such jurisdictions, even by statute, would likely be regarded as unconstitutional under the Supreme Court's 2012 decision involving the Affordable Care Act, *National Federation of Independent Business v. Sebelius*.[vi] In that case, the Court overturned the part of the Affordable Care Act that withheld all Medicaid funding from states that failed to expand their Medicaid eligibility to conform to ACA rules, reasoning that such a broad funding restriction was unconstitutionally coercive.[vii] Consequently, any federal effort to compel localities to engage in immigration enforcement on the threat of withholding federal funding, including funding having no relation with federal immigration enforcement policy, would face strong legal and Constitutional challenges, including claims that mandatory compliance violates the Constitution's Tenth Amendment.[viii]

Indeed, on February 3, 2017, the County of Santa Clara, California filed a lawsuit challenging the Order as "patently unconstitutional."[ix] The County argues that the Order constitutes an unprecedented attempt to expand executive power, and purports to vest the President with legislative powers that even Congress itself does not lawfully possess. With respect to what the County describes as the Order's "Enforcement Provision," which states that "the Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statue, policy or practice that prevents or hinders the enforcement of Federal law,"[x] the County contends that this provision

> reworks the entire structure of our federal republic, granting the federal executive branch untrammeled discretion to punish state and local governments for taking any action—or simply having a policy or practice—that the federal government finds inconvenient. The Enforcement Provision thus violates the anticommandeering aspect of the Tenth Amendment, as well as federalism principles more generally.[xi]

And with respect to the blanket "Defunding Provision," (discussed above), the County relies on the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, explaining that the Order's threat to withhold grants for perceived noncompliance is a proverbial "gun to the head," the point of which is to "compel each affected jurisdiction to adopt a regulatory system as its own, which is contrary to our system of federalism."[xii]

Third, the Order does not provide a definition of the term "sanctuary jurisdiction," although it appears to link the term to the concept of "declined detainers" in the Order's Section 9(b). Detainers are requests from federal immigration authorities for a local jail to hold noncitizen inmates subject to removal — usually booked on crimes unrelated to immigration violations — for up to 48 additional hours so federal officials can take them into custody. But notably, a detainer request is just that, a request, and, with limited exception, a state or local law enforcement agency may ignore it. Consequently, the Order seeks to impose sanctions upon localities, in the form of federal grant restrictions, for perceived noncooperation with federal immigration authorities, based upon a federal law that does not require cooperation from those localities.

IV. Increase in ICE Resources and Expansion of 287(g) Program

Section 7 of the Order directs the Director of ICE to "hire 10,000 additional immigration officers" and Section 8 calls for the expansion of the "287(g) program,"[xiii] which permits the Department of Homeland Security to deputize state and local law enforcement officers to perform the function of federal immigration agents. Such "287(g) officers" have access to federal immigration databases, can interrogate and arrest noncitizens believed to have violated federal immigration laws, and may lodge "detainers" against alleged noncitizens held in state or local custody.

The 287(g) program suffered from numerous problems and, as a result, the program was cut back under the Obama Administration. Perhaps foremost among these problems, the program led to widespread, unconstitutional racial profiling. Among other evidence, this was documented in an investigation by the Department of Justice that concluded that the Maricopa County, Arizona Sheriff's Office engaged in a pattern and practice of constitutional violations, including racial profiling of Latinos, after entering into a 287(g) agreement. The investigation found that deputies of Sheriff Joe Arpaio routinely conducted "sweeps" in Latino neighborhoods, and that Latino drivers in certain parts of Maricopa County were up to nine times more likely to be stopped than non-Latino drivers. The investigation also found that, by enforcing federal immigration law, the sheriff's office "poisoned the relationship between law enforcement and Latinos, hindering general law enforcement efforts within the Latino community."[xiv] As reported by civil rights organizations, other problems with the 287(g) program include increased financial burden upon local resources (ICE does not pay for costs associated with implementation of the program), lack of effectiveness in identifying violent criminals, threat to community safety and hindrance of community policing, and lack of sufficient federal oversight.[xv]

In addition, the Order's call for such a significant increase in the number of federal immigration officers is (of course) subject to congressional appropriations. Because the Order seeks such a considerable increase in interior enforcement, which, unlike border enforcement, may more significantly disrupt businesses and neighborhoods, remove employees, and affect families and community morale, there is a considerable likelihood that such an appropriation request would be met with Congressional resistance. This stands in addition to the fact that time necessary to hire and train such officers, if funding were appropriated, would be significant.

V. Reinstatement of "Secure Communities" Program

Section 10 of the Order states that "[t]he Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and [ ] reinstitute the immigration program known as "Secure Communities" referenced in that memorandum."

Pursuant to this memorandum, former DHS Secretary Johnson discontinued the Secure Communities Program and instituted the PEP.[xvi] As explained in that memorandum:

> The goal of Secure Communities was to more effectively identify and facilitate the removal of criminal aliens in the custody of state and local law enforcement agencies. But the reality is the program has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws. Governors, 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. A number of federal courts have rejected the authority of state and local law enforcement agencies to detain immigrants pursuant to federal detainers issued under the current Secure Communities program.

As such, the PEP was designed to restore cooperation with state and local enforcement authorities ("SLEAs") and to promote public confidence in ICE enforcement activities. It called for ICE to narrow considerably the circumstances in which federal custody requests or information requests would issue to SLEAs, so that jurisdictions would generally be asked to hold or turn over only persons with serious, specifically enumerated criminal offenses. The PEP[xvii] succeeded in improving at least tentative cooperation from many SLEAs. Consequently, the Order's direction to reinstate "Secure Communities" — even using its controversial name — is likely to be resisted by non-cooperating jurisdictions.[xviii]

VI. Pressure on "Recalcitrant Countries"

Section 12 of the Order provides: "The Secretary of State shall, to the maximum extent permitted by law, ensure that diplomatic efforts and negotiations with foreign states include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States."

This provision was presumably included to address the difficulties that DHS has deporting some individuals, particularly those with certain criminal histories, because the foreign state delays or is otherwise uncooperative in the issuance of identity and travel documents.[xix] These issues have long been under negotiation; however, the Order's requirement that foreign states agree, as a condition precedent, to this provision in the course of any other negotiations may complicate and delay bilateral or multilateral agreements.

VII. Office for Victims of Crimes Committed by Removable Aliens

Section 13 of the Order directs ICE to take "all appropriate and lawful action to establish within U.S. Immigration and Customs Enforcement an office to provide proactive, timely, adequate, and professional services to victims of crimes committed by removable aliens and the

family members of such victims," and further states: "This office shall provide quarterly reports studying the effects of the victimization by criminal aliens present in the United States."

Providing services to crime victims is a sensible objective. However, objections could be made to the manner in which that goal is implemented here. Specifically, the program could be challenged on the ground that the reporting requirement, coupled with Section 16 of Order, which calls for data collection and reporting of incarcerated aliens in the name of "transparency," risks promoting vigilantism and hostility toward even law-abiding immigrant groups. Indeed, academic studies have established that there is essentially no correlation between immigrants and violent crime.[xx]

We welcome any questions or comments.

The analysis was compiled by members of the HNBA's Amicus Brief Committee, including Jonathan DeMella and Peter Karanjia. If interested in joining the committee, please contact Amicus Brief Committee Chair Peter Karanjia at peterkaranjia@dwt.com.

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[i] https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united

[ii] https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf

[iii] *Id.*

[iv] Section 5 of the Order states in part: "The Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4))."

[v] *Printz v. United States*, 521 U.S. 898 (1997) (finding that the Brady Act's attempted commandeering of the sheriffs to perform background checks violated the Tenth Amendment to the United States Constitution).

[vi] *National Federation of Independent Business v. Sebelius*, 567 U.S. ___ (2012), 183 L. Ed. 2d 450, 132 S. Ct. 2566

[vii] "As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608, 183 L. Ed. 2d 450 (2012)

[viii] The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[ix] *County of Santa Clara .v. Donald Trump et al.*, Case 5:17-cv-00574, at 3 (N.D. Ca., February 3, 2017)

[x] Executive Order at Section 9(a).

[xi] *Id.* at 23

[xii] *Id.* at 22.

[xiii] Referring to section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g).

[xiv] https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf

[xv] https://www.americanimmigrationcouncil.org/research/287g-program-flawed-and-obsolete-method-immigration-enforcement

[xvi] https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf

[xvii] The ICE Website currently suggests that the PEP is a former program: "[PEP] was a . . . ICE program from 2015 to 2017." *See* https://www.ice.gov/pep

[xviii] At present, the ICE Website indicates that the "Secure Communities was an immigration enforcement program administered by U.S. Immigration and Customs Enforcement (ICE) from 2008 to 2014," and that "[t]he program was replaced by Priority Enforcement Program (PEP) in July 2015." *See* https://www.ice.gov/secure-communities

[xix] As of January 2016, 23 countries were deemed by ICE to be "recalcitrant countries:" Afghanistan, Algeria, Burundi, Cape Verde, China, Cuba, Eritrea, Gambia, Ghana, Guinea, India, Iran, Iraq, Ivory Coast, Liberia, Libya, Mali, Mauritania, Morocco, Sierra Leone, Somalia, South Sudan, and Zimbabwe. *See* https://www.judiciary.senate.gov/imo/media/doc/2016-02-17%20DHS%20to%20CEG%20(Criminal%20Aliens%20Hearing%20Responses).pdf

[xx] *See, e.g.*, https://insight.kellogg.northwestern.edu/article/does_immigration_increase_crime