



Written by [Warren Mass](#) on January 17, 2018

## DHS Secretary Nielsen Says Her Agency Considering Charges Against Sanctuary City Leaders

Speaking to the Senate Judiciary Committee on January 16, Secretary of Homeland Security Kirstjen Nielsen (shown) said that DHS has asked federal prosecutors to consider the possibility of bringing criminal charges against leaders of so-called sanctuary cities. Such cities refuse to cooperate with federal immigration authorities by honoring detainer requests from Immigration and Customs Enforcement (ICE) to hold detainees in their custody who are in this country illegally until ICE agents can apprehend them. “The Department of Justice is reviewing what avenues may be available,” Nielsen told the committee.



Nielsen’s statement reinforced what the acting ICE director, Tom Homan, said during a January 2 appearance on the Fox News Channel’s *Your World With Neil Cavuto*, namely, that politicians should be held “personally accountable” for crimes committed by illegal immigrants. “We’ve got to start charging some of these politicians with crimes,” Homan said.

Homan said previously in a statement to the *Washington Times* last July that he wanted to see local officials charged as complicit in human smuggling if they shielded illegal aliens through their sanctuary policies.

Though neither Nielsen nor Homan mentioned a specific plan for bringing criminal charges against officials in so-called sanctuary cities who refuse to comply with 8 U.S.C. 1373 (the federal law that says local government officials may not interfere with communications between their entity and ICE regarding the immigration status of detainees) they might consider charging such officials with “misprision of felony.” 18 U.S. Code § 4 defines “misprision of felony” as follows:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

In order for an official to be charged with “misprision of felony” for failure to turn over an illegal alien, the alien must be guilty of a felony. Not all illegal aliens are felons, but some are. In addition to being charged with non-immigration-related crimes that are felonies, an alien who has been legally removed from the United States commits a felony if he reenters the country illegally one or more times.

Since the number of aliens who have illegally reentered the United States again after being deported is considerable, pursuing “misprision of felony” charges against officials in sanctuary jurisdictions should certainly be considered an option.



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President Trump issued an executive order (13768, “Enhancing Public Safety in the Interior of the United States”) a year ago this month to deny some federal grants to so-called sanctuary cities, but U.S. District Judge William Orrick for the Northern District of California blocked the order provisionally last April. The parts of that order that Orrick objected to fell under Section 9: “Sanctuary Jurisdictions. 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.”

8 U.S.C. 1373 states, in part:

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 order went on to state the penalty for noncompliance:

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.

Orrick issued a permanent injunction on November 20 in response to lawsuits filed by the city and county of San Francisco and Santa Clara County, in California.

“The Counties have demonstrated that the Executive Order has caused and will cause them constitutional injuries by violating the separation of powers doctrine and depriving them of their Tenth and Fifth Amendment rights,” U.S. District Judge William Orrick for the Northern District of California wrote in his order.

As we observed in our article about Orrick’s original ruling in April, while it is true that the Constitution vests spending powers in Congress, Orrick’s reliance on the 10th Amendment to justify his ruling is novel, at best. The amendment reads: “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.”

We noted that the 10th Amendment has long been cherished by strict constitutionalists in matters involving states’ rights. However, Orrick’s statement that the amendment “requires that conditions on federal funds be unambiguous and timely made” appears to be a product of his own imagination — not the 10th Amendment. Furthermore, the Trump executive order does not authorize any spending, but merely restricts how federal funds may be used.

It would make more sense to claim that the 10th Amendment does not authorize federal grants to local jurisdictions at all — rather than to assert that it prohibits the federal government from denying those grants.

As stated previously, Trump’s executive order, “Enhancing Public Safety in the Interior of the United States,” was issued to enforce compliance with a federal law: 8 U.S.C. 1373. The Trump administration has appealed Orrick’s decision blocking that order to the 9th U.S. Circuit Court of Appeals, but there has been no ruling on that appeal as we write.

Photo of Kirstjen Nielsen: DHS Office of Public Affairs

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