Injunctive Relief: A Remedy Of Last Resort For Exec. Orders

By **Steven Gordon**
September 26, 2018, 12:22 PM EDT


Steven Gordon

In August 2018, a divided panel of the Ninth Circuit ruled in City and County of San Francisco v. Trump that President Donald Trump exceeded his constitutional authority by issuing an executive order penalizing "sanctuary cities" that refuse to cooperate with federal immigration officials.[1] The panel majority upheld a district court injunction prohibiting enforcement of the executive order with respect to the two plaintiffs in the case, San Francisco and Santa Clara County, but remanded the case for additional fact-finding on whether a nationwide injunction was appropriate. The dissent opined that the case was not ripe for decision and should have been dismissed. Further, it disputed the majority's conclusion that the executive order was unconstitutional on its face.

The focus of this article is not on whether the panel majority or the dissent is correct on the merits. Rather, it examines the decision to illustrate the impact that the remedy of injunctive relief has on judicial review of executive orders. As discussed below, if the potential remedy in this case had been a declaratory judgment rather than injunctive relief, then much of the division within the panel might have been avoided, or at least muted, and the resulting decision would have been more in keeping with the deference that federal courts owe to a coordinate branch of government in reviewing its actions.

The Sanctuary Cities Executive Order

The executive order at issue provides that "the Attorney General and the Secretary [of the U.S. Department of Homeland Security], 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." Section 1373, in turn, provides that no state or local government may prohibit or restrict the maintenance or exchange of information regarding immigration status.

The Ninth Circuit's Decision

The ultimate legal issue before the court was whether this executive order is unconstitutional on its face. The panel majority started its analysis by establishing that the president does not have unilateral authority to refuse to expend funds appropriated by Congress — a proposition that the dissent did not contest. Beyond that, however, the panel disagreed on almost every other issue in the case.

The foremost debate among the panel was over the meaning of the order's language. The majority asserted that "by its plain terms, the Executive Order directs the agencies of the Executive Branch to withhold funds appropriated by Congress in order to further the Administration's policy objective of punishing cities and counties that adopt so-called

‘sanctuary’ policies.”[2] The majority brushed aside the caveat in the executive order stating that any actions taken by the attorney general or the DHS secretary must be “consistent with law.” They asserted that this “savings clause does not and cannot override [the unconstitutional] meaning [of the order].”[3] The dissent disagreed sharply. It read the executive order simply to “direct[] that those officials [the Attorney General and the DHS Secretary] shall assure that a law of the United States [Section 1373] shall ‘be faithfully executed.’”[4]

The panel also debated the weight to be given the administration’s public statements about the order. The day the order went into effect, the president’s press secretary said “We’re going to strip federal grant money from sanctuary states and cities that harbor illegal immigrants.” A White House press release said that the order would “ensure that immigration laws are enforced throughout the United States, including halting federal funding for sanctuary cities.” And the Attorney General stated that noncompliance with § 1373 would result in “withholding grants, termination of grants, and disbarment or ineligibility for future grants.”[5] The majority opined that these statements “confirm what we have learned from the text of the Executive Order — that the Administration intends to cripple jurisdictions that do not assist in enforcing federal immigration policy.”[6] The dissent accused the majority of reasoning “that the plain language of the Executive Order should be ignored in favor of comments made dehors the order itself, none of which have resulted in the taking of any illegal action pursuant to the order.”[7]

Next, the panel debated the effect of a memorandum issued by the attorney general after the district court had issued a preliminary injunction in this case. This memorandum stated that the executive order would be applied only to grants administered by the U.S. Department of Justice and DHS and does not call for the imposition of grant conditions that would violate any applicable constitutional or statutory limitation. The panel majority declined to give deference to this memorandum, asserting that it was inconsistent with the terms of the order, which “plainly commands the Attorney General and the Secretary to withdraw essentially all grants.”[8] The dissent, in contrast, found that the memorandum reinforced the executive order’s requirement that any steps taken must be consistent with law.[9]

In addition to debating the meaning of the executive order, the panel disagreed about whether the case was ripe for review. The dissent argued that the case was not ripe. In its view, there is no basis for finding that the order is facially unconstitutional and only “unsupported speculation that it will be implemented in an unconstitutional manner.” Were the order to be applied unlawfully in the future, “that will be the time to so state and rule accordingly.”[10] The majority, in sharp contrast, found the case to be ripe “[g]iven the severe potential for harm and the likelihood of prosecution.”[11]

The Separation of Powers May Make Declaratory Relief Preferable to an Injunction

Because of the constitutional separation of powers, it is a delicate business for the judiciary to tell the president what he can and cannot do. This sensitivity is at its peak where a court is reviewing an executive order issued by the president, himself, as opposed to a law that Congress enacted and the president signed or an administrative action by one of the many federal agencies under the president’s purview. The U.S. Supreme Court has said that federal courts generally lack jurisdiction to enjoin the president, personally, in the

performance of his official duties, although they can enjoin the actions of his subordinates.[12] Indeed, the Ninth Circuit recently reversed a lower court's ruling in another case involving review of an executive order — the so-called travel ban — to the extent that it purported to enjoin the president as well as subordinate officials from enforcing the ban.[13] But, even if the president is carved out from the enjoined parties, it remains extraordinary for a court to rule that an executive order is unconstitutional and cannot be enforced. While federal courts clearly have the authority to find an executive order unconstitutional and enjoin its enforcement, they ought to be reluctant to take these steps unless there is no other alternative.

Furthermore, the Supreme Court has emphasized that the issuance of any injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course" and that federal courts should "pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[14] As an alternative to "the strong medicine of the injunction," the Supreme Court suggested that lower courts instead consider granting declaratory relief.[15]

"The Federal Declaratory Judgment Act was intended to provide an alternative to injunctions against state officials."[16] Federal courts have long preferred to employ declaratory relief whenever possible rather than to enjoin the actions of state officials. They have reasoned that, "in all cases implicating state/federal relations, federal courts ought to intrude into state affairs no more than is absolutely necessary" and that "principles of federalism compel the conclusion that … injunctions … should be matters of the last order, not the first."[17] Declaratory relief is preferable because "[t]here is no question but that the passive remedy of a declaratory judgment is far less intrusive into state functions than injunctive relief that affirmatively commands specific future behavior under the threat of the court's contempt powers."[18]

Similarly, the Supreme Court has suggested that granting declaratory relief may sometimes be preferable to an injunction against federal officials, as well.[19] The policy reasons for preferring declaratory relief when a court reviews an executive order are equally weighty as when it reviews the actions of state officials. Just as federalism concerns favor declaratory relief when a federal court reviews state laws or actions, separation of powers concerns favor declaratory relief when a court reviews an executive order, and make injunctive relief the remedy of last resort.

Declaratory Relief Can Facilitate Judicial Review of Executive Orders

Framing judicial review of executive orders in terms of declaratory relief may also limit or simplify the issues that the court must decide. For instance, a court must find that the plaintiff faces irreparable harm in order to grant injunctive relief whereas the threshold for granting declaratory relief is lower.[20] Further, in cases where the import of an executive order is contested, a court need not finally decide its intended meaning in order to grant declaratory relief. The court can simply declare that the executive order is constitutional under one construction but not another. In contrast, while a court could also adopt a limiting construction of an executive order in the context of considering a claim for injunctive relief, the result would be a denial of relief rather than the grant of relief.

In this case, for example, the need to justify the extraordinary remedy of an injunction may well have influenced the majority's controversial conclusions that (1) the plain terms of the executive order direct that appropriated funds be illegally withheld from sanctuary cities to punish them; (2) "the Administration intends to cripple jurisdictions that do not assist in enforcing federal immigration policy"; and (3) the attorney general's limiting construction of the executive order should be disregarded. Had the issue instead been whether declaratory relief should be granted, there would have been no need to stake out these debatable positions and provoke a spirited dissent on each of them. It would have been sufficient for the court to conclude that the president does not have unilateral authority to refuse to withhold grant funds appropriated by Congress and to declare that the executive order cannot constitutionally be construed to direct such actions. All three members of the panel evidently agreed on this point. And this form of relief would have been just as effective as an injunction for the parties involved in this suit.

Analyzing this case in terms of declaratory rather than injunctive relief also might have altered the panel's debate over whether the case is ripe for judicial review. It is unsettled whether the standard of ripeness differs as between declaratory judgments and injunctions.[21] But one federal circuit has opined that the Declaratory Judgment Act allows adjudication "in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy."[22] And another circuit court has ruled that whether a dispute is sufficiently ripe to warrant declaratory relief is a discretionary decision that is reviewed for abuse of discretion.[23] Had the district court in this case granted declaratory rather than injunctive relief, the panel might have agreed that the lower court did not abuse its discretion by finding the dispute ripe for review. At a minimum, it seems likely that any dispute over ripeness would have been more muted had the remedy at issue been declaratory relief instead of an injunction.

Declaratory Relief Minimizes Confrontation Between Coordinate Branches

Finally, for several reasons, a grant of declaratory relief is less likely to provoke a confrontation between coordinate branches of the federal government than a grant of injunctive relief. If a court concludes that an executive order is unconstitutional, it is less intrusive for the court to so declare and to trust that the executive branch will comply with that ruling, rather than to enjoin the executive branch, upon pain of contempt, from enforcing the order.

Perhaps even more important, the use of declaratory relief may enable the court to avoid striking down a suspect executive order by instead limiting the application of that order. And the use of such a narrowing construction may also enable the court to avoid opining on the president's motives or intent in issuing the executive order — an exercise which could appear partisan and provoke friction between the branches.

Further, a grant of declaratory relief in the form of a limiting construction does not place the executive branch in a position where it must appeal the court's ruling in order to vindicate the legitimacy of the executive order. It can choose to accept the court's construction without thereby conceding that the executive order was illegitimate, an option that is not available if enforcement of the executive order is enjoined. As a result, the outcome of the judicial review process appears less confrontational and is less likely to be perceived as a political battle between the two branches.

In this case, for example, it is evident that the Trump administration would have acquiesced in a grant of declaratory relief that embodied the limiting construction of the executive order that the attorney general had already adopted. But it is predictable that the administration will appeal the Ninth Circuit's affirmance of injunctive relief striking down the executive order, which is predicated on an opinion that castigates the terms of, and the motives behind, the order.

Conclusion

Trump's executive orders, and the review of those orders by federal courts, have provoked a great deal of controversy. While some amount of controversy is unavoidable, it is desirable that the courts' rulings not create needless friction with a coordinate branch, or add to the appearance of a confrontation between the two branches. Toward this end, courts should, when possible, analyze challenges to executive orders by considering whether declaratory relief — rather than injunctive relief — is appropriate.

Steven D. Gordon is a partner at Holland & Knight LLP.

[1] City and County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018).

[2] Id. at 1233.

[3] Id. at 1240.

[4] Id. at 1247.

[5] Id. at 1237.

[6] Id. at 1243.

[7] Id. at 1249.

[8] Id. at 1242.

[9] Id. at 1247.

[10] Id. at 1250 & n. 15.

[11] Id. at 1238.

[12] See Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992).

[13] See Hawaii v. Trump, 859 F.3d 741, 788 (9th Cir. 2017).

[14] Winter v. Natural Res. Def. Council Inc., 555 U.S. 7, 24 (2008) (internal quotation marks and citation omitted).

[15] Id. at 33 (quoting Steffel v. Thompson, 415 U.S. 452, 466 (1974)).

[16] Steffel v. Thompson, 415 U.S. at 467.

[17] Morrow v. Harwell, 768 F.2d 619, 628 (5th Cir. 1985).

[18] Id. at 627.

[19] See Winter v. Natural Res. Def. Council, Inc., 555 U.S at 33.

[20] See Verizon New England Inc. v. Int'l Broth. of Elec. Workers, 651 F.3d 176, 189 (1st Cir. 2011).

[21] See Samuel L. Bray, The Myth of the Mild Declaratory Judgment, 63 Duke L.J. 1091, 1133-37, 1146-48 (2014).

[22] United States v. Doherty, 786 F.2d 491, 498 (2d Cir. 1986) (Friendly, J.).

[23] See Brandt v. Village of Winnetka, Ill., 612 F.3d 647, 650 (7th Cir. 2010).