The Tenth Amendment — Sanctuary for Sanctuary Cities

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THE ORDER: Five days after taking office, President Trump declared war on American states and municipalities that do not cooperate with Federal immigration authorities. Convening a media event at the Department of Homeland Security (DHS), he signed a new Executive Order titled "Enhancing Public Safety in the Interior of the United States" (Order).[1]

Issued with a related pronouncement labeled "Border Security and Immigration Enforcement Improvements"–which calls for building "a physical wall" across America's southern border and hiring 5,000 more Border Patrol agents–the Order is intended to fulfill one of Trump's signature election promises: to remove illegal aliens from the United States. It reprises popular themes from the President's campaign trail, referencing an imminent risk being visited upon our nation by millions of unauthorized immigrants, ranging from "bad hombres"–drug lords and miscreants who have surreptitiously infiltrated our boundaries–to laborers and graduate students with expired visas:

> Section 1. Purpose. Interior enforcement of our Nation's immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States.[2]

At the apogee of his campaign, Trump promised to deport all 11 million aliens thought to be on American soil illegally. After the election he refocused on the "two to three million" most dangerous of these.[3] The Order instructs the DHS to "prioritize for removal" criminal immigrants. This is a flexible standard. It covers not only those actually convicted of (or charged with) a crime and anyone who has "committed acts that constitute a chargeable criminal offense," but also those who "in the judgment of an immigration officer, otherwise pose a risk to public safety or national security."[4]

That flexibility was broadened in late February, as DHS issued additional policy directives stating that it "will not exempt classes or categories of removable aliens" from deportation, even if their only violation is driving without a license.[5]

Locating and removing such a massive population will require an army of enforcers. The Order directs DHS, through its Immigration and Customs Enforcement agency (ICE), to hire 10,000 additional immigration officers,[6] and looks to augment the federal force with state, county and city police. The Order will "empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law. . . . Such authorization shall be in addition to, rather than in place of, Federal performance of these duties."[7]

The Order targets a single species—jurisdictions which "willfully violate Federal law" and are inflicting "immeasurable harm" upon the American people:

> Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.[8]

The Administration proposes to reverse this unpatriotic behavior through monetary sanctions. It will "ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law."[9]

THE SANCTUARY CITIES: The "sanctuary cities" (and counties and states)—are jurisdictions that have chosen—for logistical, constitutional, humanitarian and fiscal reasons—to decline cooperation with federal immigration activities, including those under the Immigration and Nationality Act of 1952, as amended (INA).[10] As outlined in a 2015 Congressional Research Service report, sanctuary policies include restricting police from inquiring into a person's immigration status; limiting the authority of local police to make arrests for immigration violations; refusing to authorize the sharing of individual immigration data with federal authorities; and declining to honor federal detainer requests that lo-

cal arrestees be held for ICE agents.[11]

There is no specific definition that accords sanctuary status, making the tally of sanctuaries imprecise. According to Center for Immigration Studies (CIS), sanctuary jurisdictions comprise four states that have passed "Trust Act" type legislation (California, Colorado, New Mexico and Connecticut), scores of cities with sanctuary ordinances including New York, Chicago, Los Angeles, San Francisco, Denver and Washington D.C. and hundreds of counties spread across nearly 30 states.[12]

Although "sanctuary cities" and their often-vocal mayors rightfully garner much publicity, the Immigrant Legal Resource Center (ILRC), points out that in reality it is at the county level where INA policies have greater impact.[13] Immigrants to be held under ICE detainers are more often housed at county jails, putting substantial burdens on county sheriffs and jail officials to cooperate (or decline to cooperate) with federal authorities.[14]

According to the ILRC, an ICE compliance report indicates that the vast majority of some 11 million undocumented immigrants in America are located in 168 counties. While 69 of these (primarily in California and Northeast urban centers) do not honor ICE detainer requests, a substantial majority--99 counties located primarily along the Mexican border—do cooperate with ICE.[15] This acquiescence to federal immigration requests is even higher when the national map is assessed. Examining 2,556 counties, the ILRC finds that 1,922 (fully 75%) "will hold immigrants on detainers, willingly violating these individuals' Fourth Amendment rights."[16]

THE SAN FRANCISCO STORY: Among the more notable sanctuary policies is San Francisco's, which openly designates itself as "a City and County of Refuge."[17] San Francisco prohibits the use of its finances or resources to assist in federal immigration efforts or to collect individual immigration data unless required by law or court order:

> SEC. 12H.2. USE OF CITY FUNDS PROHIBITED.
> No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by Federal or State statute, regulation or court decision.[18]

Although "sanctuary cities" and their often-vocal mayors rightfully garner much publicity, the Immigrant Legal Resource Center (ILRC), points out that in reality it is at the county level where INA policies have greater impact.

The San Francisco policy also prohibits local law enforcement from honoring civil immigration detainers unless a magistrate has found probable cause that the detainee has committed a violent felony:

> **SEC. 12I.3. RESTRICTIONS ON LAW ENFORCEMENT OFFICIALS.**
> (a) Except as provided in subsection (b), a law enforcement official shall not detain an individual on the basis of a civil immigration detainer after that individual becomes eligible for release from custody.
> (b) Law enforcement officials may continue to detain an individual in response to a civil immigration detainer for up to 48 hours after that individual becomes eligible for release if the continued detention is consistent with state and federal law, and the individual meets both of the following criteria:
> (1)The individual has been Convicted of a Violent Felony in the seven years immediately prior to the date of the civil immigration detainer; and
> (2)A magistrate has determined that there is probable cause to believe the individual is guilty of a Violent Felony and has ordered the individual to answer to the same pursuant to Penal Code Section 872.[19]

Sanctuaries such as San Francisco were condemned by candidate Trump on the campaign trail. As an example of what can happen when sanctuary cities ignore the law, he repeatedly cited the tragic and much-publicized story of 32-year old Kathryn Steinle, who was fatally shot in the back in July 2015 while walking on a San Francisco pier. She was killed by Juan Francisco Lopez-Sanchez, a Mexican citizen who had already been convicted of seven felonies and deported from the US five times.[20]

Having again apprehended Lopez-Sanchez on American soil, federal authorities turned him over to the San Francisco Sheriff's Department on an outstanding California marijuana possession warrant. ICE issued a detainer notice, requesting notification of Lopez-Sanchez's release and asking that he be held beyond normal release so that ICE could again take him into custody. However, the ICE detainer notice did not reference any active federal warrant, which meant that under San Francisco's policies, no additional hold was triggered for Lopez-Sanchez.

All parties agree that Steinle's death was unforgiveable and could have been avoided with better coordination between federal and local authorities. But many sanctuary jurisdictions defend their non-cooperation policies as actually enhancing public safety overall. They worry that local law enforcement efforts will be undermined if undocumented residents stop reporting crimes or refuse to assist police for fear of deportation. As Houston Sheriff Garcia explained in rebutting a local bill which would have essentially deputized Houston police to act as de facto immigration officers, "In order to meet our goal of keeping the community safe, I need all people with critical information to be willing to come forward and share it with deputies. I am concerned that this bill would keep or push people and their information further into the shadows, which harms public safety."[21]

Localities also cite the additional drain on scarce manpower and facilities if they serve as uncompensated immigration agents of the federal government. This is not a hypothetical problem. While the Order instructs the DHS to seek out "Federal-State Agreements" under the INA which would essentially deputize local law enforcement to perform immigration activities, the INA states that no federal funds are to be spent to reimburse localities for their costs in enforcing detainers.[22]

The legislative history behind San Francisco's sanctuary law reflects just such a concern: its Board of Supervisors determined that complying with immigration detainer requests would require the municipality to redirect scarce local law enforcement personnel and resources—noting that the costs of "responding to a civil immigration detainer can include, but [are] not limited to, extended detention time, the administrative

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costs of tracking and responding to detainers, and the legal liability for erroneously holding an individual who is not subject to a civil immigration detainer," the Board concluded that "[c]ompliance with civil immigration detainers and involvement in civil immigration enforcement diverts limited local resources from programs that are beneficial to the City."[23]

INTERNECINE CONTROVERSY: In states like New York, city and state officials are united in their hostility to the Order and the Administration's threat that the flow of federal funds from Washington D.C. could be stopped in retaliation for local intransigence. New York City Mayor Bill deBlasio stated "We think it's very susceptible to legal challenge. If they make an attempt to pull that money, it will be from NYPD, from security funding to fight terrorism. . . . If an attempt is made to do that, we will go to court immediately for an injunction to stop it."[24] That resistance is echoed by the New York's Attorney General, Eric Schneiderman, whose office produced, just days before the President's signing of the Order, a 20-page primer for New York municipalities titled "Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions."[25] As Schneiderman puts it "Any attempt to bully local governments into abandoning policies that have proven to keep our cities safe is not only unconstitutional, but threatens the safety of our citizens."[26]

But such symmetry is not seen everywhere. In Texas, Governor Greg Abbott has demanded that newly-elected Sheriff Sally Hernandez of Travis County (home to state capital Austin) recant her announced refusal to honor ICE detainer notices except in cases of violent criminals, and has threatened her with curtailment of $1.8 million in funds.[27]

And various state legislatures, unhampered by principles of federalism that constrain the national government, are exercising their prerogative to preempt municipal sanctuary policies. In Virginia, where current law gives local police wide discretion regarding detainers, and despite a veto last year by Governor Terry McAuliffe, the Republican-controlled House of Delegates passed a bill on January 27, 2017 again seeking to require that state and local jailers hold detainees under ICE detainer notices.[28]

Texas is pushing through a more explosive piece of state preemption, which would waive sovereign immunity and hold municipalities liable for all felony-related damages resulting from any person freed from custody while subject to an ICE detainer request—for ten years following release.[29]

Although some localities are doubling-down on their resistance, as seen in a flurry of newly-minted sanctuary ordinances, not all jurisdictions have stood resolute. On January 25, 2017, Miami-Dade County became the first major municipality to accede to the President's financial threat, as Mayor Carlos Gimenez announced that the County would no longer serve as a sanctuary jurisdiction and would henceforth cooperate with Federal authorities.[30] Wary of losing out on $355 million in federal funding the County is slated to receive for 2017, Mayor Gimenez speedily signed his own order, directing his corrections department to begin honoring all requests by ICE to hold immigration suspects in Miami-Dade County jails—while again requesting that ICE pay Miami-Dade's additional incarceration costs.[31]

"WILLFUL VIOLATION": The Order, and the President's conversation on the topic, may encourage public perception that sanctuary jurisdictions refuse to cooperate with federal law enforcement, period. The fact is that all state and local law enforcement entities nationwide send the fingerprints of anyone arrested for a criminal act to the Federal Bureau of Investigation (FBI). Since 2008, under the INA's "Secure Communities" program and its successor, the "Priority Enforcement Program," the FBI has been forwarding its analyses of those fingerprints to DHS and ICE, which link criminal and immigration data--and look to localities for assistance.

The Order focuses on two specific practices of sanctuaries—reluctance to communicate with federal authorities about unlawful immigrants and failure to hold them as may be requested by ICE in a detainer notice. As discussed below, it is far from clear that either of these practices constitutes "willful violation" of the law.

1. Communication with Federal Authorities: One of the Order's goals is to obtain greater information regarding the whereabouts of undocumented immigrants. It refers to communication directives contained in 8 U.S.C 1373 (Section 1373), and threatens sanctions for non-compliance:

> Sec. 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.
>
> (a) In furtherance of this policy, the Attorney General and the [DHS] Secretary, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants. . . . The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373 . . . .[32]

Contrary to what the public might expect, Section 1373 does not require states or localities to obtain--or even relay--information from private individuals about their immigration status. It simply forbids prohibiting or restricting the provision of such data to federal authorities:

> **§1373. Communication between government agencies and the Immigration and Naturalization Service**
> (a)In general
> 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.[33] (emphasis added).

Section 1373 has been applied against a facially–violative policy only once. Ironically, in 1996, New York City and then-Mayor Rudy Giuliani challenged the law as unconstitutional because it invalidated a City Executive Order which had expressly prohibited City officers or employees from transmitting information about any individual's immigration status to federal authorities. In *City of New York v. United States*[34] the Second Circuit held that because Section 1373 did not force New York to transmit data but merely prevented the city from restricting transmission, it was a valid exercise of Congressional preemption: "We therefore hold that states do not retain under the Tenth Amendment an untram-

meled right to forbid all voluntary cooperation by state or local officials with particular federal programs."[35]

City of New York has not been tested at the Supreme Court, and the two cases citing it have not dealt specifically with communication of immigration data.[36] The decision would not appear to cover policies in San Francisco and many other sanctuaries, which do not authorize the collection of such citizenship and immigration data to begin with.

The Order's threat to punish such jurisdictions based on Section 1373's prohibitions relating to *transmittal* of data would seem to be subject to serious legal challenge. And, as discussed below, various sanctuary cities are again attacking the very constitutionality of Section 1373 in light of the Order, on the grounds that it impermissibly interferes with state sovereignty and the state's delegation of authority to its municipalities.[37]

2. Enforcement of ICE Detainers: The second alleged "willful violation" cited in the Order is the refusal of sanctuary jurisdictions to honor ICE detainer notices and hold arrested illegal immigrants in local jails for the DHS. Again, the typical citizen might assume that local law enforcement officers are obligated, *carte blanche,* to detain illegal immigrants when requested by the federal government–a misperception that the Administration has done little to correct. The public might therefore be puzzled to discover that the Order's only sanction for ignoring detainers is a "name and shame" threat, publicizing crimes committed by released detainees and identifying the releasing locality:

> (b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall . . . on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.[38]

Confusion about detainers is not limited to the average American. The language of the detainer regulations under the INA is hardly crystal-clear, and has led to considerable uncertainty at all levels of government. Contained in Section 287 of the INA, the detainer language is a grammatical conundrum. It can be construed to make compliance voluntary or mandatory:

> **(a)** *Detainers in general.* Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. . . . **The detainer is a request** that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.
>
> (d) *Temporary detention at Department request.* Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency **shall maintain custody** of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department. (*emphasis added*)[39]

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The Section 287 draftsmen might be justifiably criticized for pairing the term "request" with the term "shall." That duality bred confusion in many states and localities about whether compliance with federal detainers was optional or mandated.

Some jurisdictions took the lead in clarifying the issue. In 2012 Kamala Harris, then California's Attorney General, issued a memorandum entitled "Responsibilities of Local Law Enforcement Agencies under Secure Communities" program. Harris stated that Secure Communities "does not require California law enforcement agencies to determine an individual's immigration status or to enforce federal immigration laws."[40] She was wary of the fact that immigration detainers could be issued by any border patrol agent-and other categories of ICE employee-"without review of a judicial officer and without meeting traditional evidentiary standards."[41] She concluded that "individual federal detainers are requests, not commands, to local law enforcement agencies, who make their own determination as to whether to use their resources to hold suspected unlawfully present immigrants."[42]

While California determined early on that detainer notices did not command state or local cooperation, other jurisdictions had a different interpretation of Section 287. In fact, during 2012 and 2013 federal district courts in Pennsylvania and Tennessee decided that the detainer language was mandatory, requiring local compliance.[43]

The opposite view began to emerge in 2014 from the Third Circuit, in *Galarza v. Szalczyk*,[44] which involved an erroneous ICE-initiated detention of a United States citizen in the Lehigh County (Pennsylvania) jail. That court found that the plaintiff's Fourth and Fourteenth Amendment rights had been violated by his unwarranted incarceration under a federal detainer notice.

The following month, an Oregon federal district court reached a similar conclusion. In *Miranda-Olivares v. Clackamas County*,[45] Clackamas County, Oregon (County) interpreted an I-247 Detainer Notice to require continued incarceration of Maria Miranda-Olivares (Olivares) who had been arrested for violating a domestic abuse restraining order. Fined $5,000 for contempt, she ordinarily would have been able to post $500 bail and immediately leave detention. However, the County read the ICE detainer as mandatory, meaning she would be jailed for 48 additional hours after her normal release date, irrespective of bail.

Ultimately the County sentenced Olivares to time served, then held her under the detainer until ICE authorities arrived. She sued under § 1983, seeking damages based on the County's policy of enforcing a non-mandatory provision that needlessly incarcerated her for more than two weeks, violating her Fourth Amendment rights. The County sought to avoid *Monell* liability on the grounds that the detainer was mandatory. The court disagreed:

> Assuming, as the County argues, that the Immigration and Nationality Act (INA), 8 USC §§ 1101, *et seq*, occupies and preempts the field of detaining and removing illegal aliens, then the INA would bar the County

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> from exercising any discretion on the subject . . . However, as explained below, the federal regulation in question, 8 CFR § 287.7, does not mandate detention by local law enforcement, but only requests compliance in detaining suspected aliens. As the Second Circuit posited, albeit without deciding, "if a municipality decides to enforce a statute that it is authorized, but not required, to enforce, it may have created a municipal policy," subjecting it to *Monell* liability. (*citation omitted*).
>
> In this case, any injury Miranda-Olivares suffered was the direct result of the County exercising its custom and practice to hold her beyond the date she was eligible for release based solely on the ICE detainer.[46]

Almost immediately after the decision, nine Oregon counties announced that they would no longer honor all ICE requests to hold detainees, joining a growing trend.[47]

That analysis is now permeating other circuits. On January 17, 2017, in *Mercado v. Dallas County*,[48] the Federal District Court for the Northern District of Texas refused to dismiss a § 1983 claim brought by a group of Hispanic men who, like the plaintiff in *Clackamas County,* had been frustrated from posting bond and were held in pretrial detention when they would otherwise have been free to go.

Dallas County had interpreted the INA detainer language as a command to hold the men. In doing so, it was required to draw the (unsupportable) conclusion that the infraction alleged by ICE—violation of immigration law—was a criminal offense, which would give rise to the element of probable cause needed to justify detention. But the Supreme Court has, since at least 2010, made it clear that immigration violations are civil infractions, not criminal,[49] compelling the Northern District of Texas to deny Dallas County's motion to dismiss.

These Fourth Amendment violations have been costly. In *Galarza*, Lehigh County and the United States settled with the plaintiff for $95,000 while the City of Allentown paid him another $50,000. In *Olivares*, Clackamas County settled for $30,100.[50]

In 2015, DHS replaced its "Secure Communities" program, which had increasingly become the subject of criticism and constitutional challenge, with its "Priority Enforcement Program" (PEP).[51] Significantly, PEP no longer authorized the issuance of a detainer merely for an arrestee—the subject of the ICE request must have been *convicted* of a "high priority" offense.[52] Under PEP, Form I-247 was replaced with successor forms—each of which prominently employ the words "request" and "voluntary:"

> Form I-247N "Request for Voluntary Notification of Release of Suspected Priority Alien" **requests** the local law enforcement agency (LEA) to notify ICE of the pending release of a "suspected priority removable" detainee at least 48 hours prior to release, if possible. It does not request or authorize holding an individual beyond the point at which he or she would otherwise be released and requires ICE to identify the enforcement priority under which the individual falls.
>
> Form I-247D "Immigration Detainer-Request for Voluntary Action" **requests** that the LEA hold the priority individual for up to 48 hours beyond the time when he or she would have otherwise been released. ICE must identify the enforcement priority under which the individual falls and the basis for its determination of probable cause. The LEA must serve a copy of the request on the individual in order for it to take effect. (*emphasis added*).

(As a parenthetical, it should be noted that the Order also requires an immediate reversion to the controversial "Secure Communities" program).[53]

The revised DHS documents and the federal court decisions referenced above indicate without doubt that "sanctuary jurisdictions" need not hold all detainees on behalf of Federal immigration authorit ies. More significantly, such a practice risks violating the Fourth Amendment.

In sum, despite the rhetoric accompanying the Order, the vast majority of sanctuary jurisdictions are not "willfully violating" any federal law by refusing to collect data about immigrants or to hold immigration violators without probable cause. As one ILRC spokesman stated, "The narrative that has been out there is that these jurisdictions are standing up to the government and are out of compliance with the law, but in fact they are within the law."[54] Los Angeles Mayor Garcetti issued a press release along similar lines: "The idea that we do not cooperate with the federal government is simply at odds with the facts. We regularly cooperate with immigration authorities — particularly in cases that involve serious crimes — and always comply with constitutional detainer requests."[55]

THE EMPIRICAL EVIDENCE: The Order states that America is at significant risk from undocumented immigrants—and the sanctuaries that shelter them. The facts are not cut and dried. CIS provides a 2014 DHS report tracking 8,811 detainer requests that were ignored by 276 jurisdictions in 42 states and the District of Columbia.[56] Of that total, 6,397 (73%) had no further arrests for criminal activity, while 2,414 (27%) were subsequently arrested, most often for drug possession and driving while intoxicated.[57] The DHS report cited six significant felonies subsequently committed by this group, although none for murder.[58]

Those statistics will no doubt encourage debate. It is seems likely that at least some of these felonies could have been avoided had the detainers-if constitutional- been honored. This discussion is a subset of the larger query—the relationship, if any, between sanctuary policies and violent crime in general. The President has repeatedly asserted that sanctuary cities "breed crime," without substantiation. While some sources do report such a correlation, a larger number appear to see no crime increase in sanctuaries.[59] And at least one frequently– cited study concludes that sanctuary policies actually engender safer, more prosperous communities:

> The data are clear: Crime is statistically significantly lower in sanctuary counties compared to non-sanctuary counties. Moreover, economies are stronger in sanctuary counties—from higher median household income, less poverty, and less reliance one public assistance to higher labor force participation, higher labor-to-employment ratios, and lower unemployment.[60]

THE CONSTITUTIONAL ANALYSIS: In attacking sanctuary jurisdictions, the Administration is instigating yet another argument about the parameters of federalism. True, the national government exercises the sole authority to determine who may

enter—and who may be deported from—American soil. As the Supreme Court articulated in a case preempting Arizona's "S.B. 1070" which purported to vest certain immigration responsibilities in state and local law enforcement, "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."[61]

However, that power does not authorize Congress or the President to "commandeer" state resources to perform immigration activities on behalf of the federal government. The states' prerogative to resist federal demands to expend their own dollars, manpower or facilities on immigration matters flows from the Tenth Amendment, which 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."[62]

Two anti-commandeering precedents are particularly illustrative. In *New York v. United States*,[63] the Court invalidated a federal statute requiring that states enact legislation providing for the disposal of their radioactive waste. In *Printz v. United States*,[64] the Court struck down a provision of the Brady Handgun Violence Prevention Act that required state and local law enforcement officers to perform background checks on prospective firearm purchasers. (In an interesting challenge for the Trump Administration, these decisions were championed by the conservative wing of the Court, with Antonin Scalia having authored *Printz*-making it questionable whether similar commandeering efforts over sanctuary cities would succeed today, even with Justice Gorsuch on the bench).

Just as the Constitution prevents federal authorities from coercing state assistance in immigration matters, it also prohibits the federal government from penalizing noncompliant jurisdictions through the deprivation of funds unrelated to the subject of the noncompliance. The cancellation of all (or even a significant percentage of) federal funding to a sanctuary jurisdiction would almost certainly be challenged as "coercive" activity by Congress, not permissible under the Constitution's allocation of power to the legislative branch under the Spending Clause in Article I.[65]

In sum, despite the rhetoric accompanying the Order, the vast majority of sanctuary jurisdictions are not "willfully violating" any federal law by refusing to collect data about immigrants or to hold immigration violators without probable cause.

This point was recently highlighted in *National Federation of Independent Businesses (NFIB) v. Sibelius*,[66] where the Court, with Justice Roberts writing the majority opinion, derailed the federal government's plan to withhold all Medicaid funding from states that refused to agree with an extension of Medicaid under the Affordable Care Act. The Chief Justice described such a threat as a coercive "gun to the head" of the states. *NFIB* involved a potential loss to the states of ten percent of their overall budgets if they did not accede to the Obama Administration's push for Medicaid expansion. Sanctuary jurisdictions could stand to lose even larger proportions of their budgets if the Order curtailed all federal funding.

NFIB also provided two additional hurdles that would obstruct wholesale federal defunding. First, Washington must apprise states and localities, in advance, if the funding they are requesting will be subject to any conditions. Second, those conditions must bear a logical nexus to the funding being threatened.

These legal parameters have not dulled the President's enthusiasm for using fiscal measures as a carrot and a stick. The *Los Angeles Times* recounts this explication in a prime time White House broadcast on February 6, 2017:

> "If we have to, we'll defund," Trump said. "We give tremendous amounts of money to California. California in many ways is out of control, as you know."[67]

If the Constitution will not permit cutting all federal funding to noncompliant jurisdictions, what monies could the Order actually withhold from sanctuaries without involving Congress?

One source[68] lists only three modest federally-funded programs, each administered by the Department of Justice, which could actually be blocked without Congressional approval: The Edward Byrne Memorial Justice Assistance Grant Program (JAG); the Community Oriented Policing Services (COPS); and the State Criminal Alien Assistance Program (SCAAP):

- JAG monies defray various state and local law enforcement expenses, including crime prevention, drug treatment and education programs. In 2016, $274.9 million in JAG funds were allocated to the U.S. states and territories, according to the Bureau of Justice Statistics.[69] Provision of JAG grants is conditioned upon a state's certification that it, and sub-grantees within the state including municipalities, are complying with applicable law including Section 1373.

- COPS grants are intended to build trust between communities and law enforcement, by developing innovative policing strategies and funding training and technical assistance to community members and local government. Over the past 5 years, COPS grants have averaged about $200 million per year.[70]

- SCAAP helps fund local police departments with the costs of housing undocumented immigrants. Although SCAAP was awarded $210 million in 2016, the program's website indicates that no funding is being sought for 2017 and the program is not being renewed.[71]

It therefore appears that, even if the Order were properly targeted at a handful of jurisdictions that might be found to violate Section 1373, the President's unilateral authority to cut funding covers only a miniscule dollar amount. For example, New York City's annual budget is roughly $80 billion, of which some ten percent is provided by the federal government; however only $60 million of that total comes from the grant programs referenced above—a scant .75 percent of the City's budget.[72]

THE SANCTUARIES FIGHT BACK: There is nothing to suggest that the Administration will voluntarily limit its funding cuts. Not willing to passively await whatever pressure the White House may next exert, various jurisdictions have launched immediate preemptive

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strikes against the Order.[73] One of the earliest was San Francisco's, in a 29-page Complaint for Declaratory and Injunctive Relief dated January 31, 2017 (Complaint).[74] As the Complaint puts it:

> This lawsuit is about state sovereignty and a local government's autonomy to devote resources to local priorities and to control the exercise of its own police powers, rather than being forced to carry out the agenda of the Federal government . . . The Executive Order purports otherwise to wrest this autonomy from state and local governments, and a court order is needed to resolve this controversy.[75]

> San Francisco declares that it fully complies with all federal detainer laws in refusing to honor ICE notices unless accompanied by indicia of probable cause. And it specifically cites Board of Supervisors' concerns that responding to civil immigration detainers "diverts limited local resources from programs that are beneficial to the City."[76]

San Francisco also asserts compliance with Section 1373, because nowhere does its policy restrict or prohibit employees from communicating about "citizenship or immigration status." The Complaint further argues that recent DOJ guidance has subtly been attempting to enlarge the scope of Section 1373 to include communication about detainer matters (including when a non-violent criminal is about to be released from municipal custody) within the rubric of "citizenship and immigration status."[77]

Beyond its criticism of Section 1373's secretly expanding breadth, San Francisco launches a frontal assault—that Section 1373 is itself unconstitutional by virtue of its undue interference in the internal workings of municipal government: "By preventing state and local governments from directing employees how to handle information about citizenship and immigration status, Section 1373 makes it impossible for local jurisdictions freely to choose and clearly to establish how they will handle this information."[78]

The Complaint focuses directly on the financial sanctions threatened in the Order. San Francisco relies on more than $1.2 billion in federal monies annually, for Medicare and Medicaid, for nutrition, welfare, foster care and child support programs, and for infrastructure, transportation, veterans programs, public health and more. Only a small fraction of such funding relates to immigration or law enforcement. Most of those federal payments are in the form of reimbursements—San Francisco funds such services to its residents up front and seeks reimbursement from the federal government.

Although one analysis of the lawsuit has questioned whether it is ripe for consideration, given that San Francisco purports to comply with Section 1373 and the government has not yet taken any specific actions against it,[79] San Francisco would strongly disagree. It argues that doubt about future reimbursement creates an immediate Hobson's choice: should it curtail spending on services for which future reimbursement might be slashed? The dilemma is heightened because San Francisco's annual budgeting process must be completed by March.[80]

In its prayer for relief, San Francisco seeks a declaration that it complies with Section 1373, and asks to enjoin enforcing Section 1373 or using it as a condition for receiving federal funds. As referenced above, it also challenges the very constitutionality of Section 1373 on Tenth Amendment grounds.

CONCLUSION: President Trump's January 25, 2017 Order targeting "sanctuary jurisdictions" is a foreseeable follow-up to the campaign theme that energized his voters. But despite its ambitious declarations, the Order appears to lack serious legal horsepower. While condemned by the Administration, the refusal of sanctuary jurisdictions to collect immigration data does not, per se, violate Section 1373, and their snubbing of unsupported civil immigration detainer notices has already been validated in the courts.

More significantly, the right of states and municipalities to protect their personnel and resources from performing federal government functions is itself protected by a substantial sanctuary—the Tenth Amendment. Given the scale and vehemence with which the Order is targeting sanctuary cities, the Administration appears headed for a difficult courtroom battle against federalism itself.

Notes

1. Executive Order, "Enhancing Public Safety in the Interior of the United States," January 25, 2017; Exec. Order No. 13,768, 82 Fed. Reg. 8799; https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united
2. Executive Order, *supra* note 1 at Section 1.
3. http://www.nationalreview.com/article/442244/immigration-enforcement-criminal-illegal-aliens-should-be-deported
4. *Id.* at Section 5(g).
5. Q&A: DHS Implementation of the Executive Order on Border Security and Immigration Enforcement, Feb. 21, 2106, https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-border-security-and-immigration-enforcement.
6. *Id.* at Section 7.
7. *Id.* at Section 8.
8. *Id.*
9. *Id.*
10. 8 U.S.C. §§1101 *et seq.*
11. Michael John Garcia and Kate M. Manuel, "State and Local 'Sanctuary' Policies Limiting Participation in Immigration Enforcement," Congressional Research Service, July 10, 2015 https://fas.org/sgp/crs/ homesec/R43457.pdf
12. Jessica Vaughn, "Sanctuary Cities Continue to Obstruct Enforcement, Threaten Public Safety," Center for Immigration Studies, December 14, 2016; http://cis.org/Sanctuary-Cities-Map
13. "Searching for Sanctuary," Immigration Law Resource Center, December 2016, https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf
14. *Id.*
15. Darla Cameron, "How Sanctuary Cities Work, and How Trump's Executive Order Might Affect Them," Washington Post, Jan. 25, 2017, https://www.washingtonpost.com/graphics/national/sanctuary-cities/
16. "Searching for Sanctuary," *supra* note 11.
17. Immigration Status, SF Admin Code, Chapter 12H (1989), https://law.resource.org/pub/us/code/city/ca/ SanFrancisco/Administrative%20Code/chapter12h.pdf
18. *Id.*
19. *Id.*
20. https://www.nytimes.com/2015/07/08/us/san-francisco-murder-case-exposes-lapses-in-immigration-enforcement.html?_r=0

21. http://www.houstonpress.com/news/stop-calling-houston-a-sanctuary-city-6729418
22. Order, *supra* note 1 at Section 8; Immigration and Nationality Act, Section 287(e).
23. Complaint, City and County of San Francisco v. Trump, Jan. 31, 2017; http://www.sfcityattorney.org/wp-content/uploads/2017/01/Complaint.pdf
24. http://www.cnn.com/2017/01/26/politics/sanctuary-cities-bill-de-blasio-trump-court/index.html
25. https://www.scribd.com/document/337017252/Guidance-concerning-local-Authority-particpation-in-Immigration-enforcement-1-19-17#from_embed
26. http://money.cnn.com/2017/01/27/news/economy/funding-sanctuary-cities/
27. https://www.texastribune.org/2017/01/23/abbott-demands-hernandez-reverse-new-sanctuary-pol/; thus far, there is no confirmation that such de-funding has been carried out.
28. http://wtvr.com/2017/01/27/house-passes-bill-targeting-undocumented-immigrants/
29. S.B.4 purports to add a new Section 101.0216 to the Texas Civil Practice and Remedies Code http://www.legis.state.tx.us/tlodocs/85R/billtext/pdf/SB00004E.pdf#navpanes=0
30. http://www.usatoday.com/story/news/2017/01/26/first-sanctuary-city-caves-donald-trump-demands/97111048/
31. *Id.*
32. Executive Order, *supra* note 1, at Section 9.
33. https://www.gpo.gov/fdsys/pkg/USCODE-2011-title8/pdf/USCODE-2011-title8-chap12-subchapII-partIX-sec1373.pdf
34. City of New York V. United States, 179 F.3d 29 (2d Cir. 1996), *cert. denied* 129 S. Ct. 932 (2000).
35. *Id.*, 179 F.3d 29 at 35.
36. *See* United States v. Campbell, 111 F.Supp.3d 340 (W.D.N.Y. 2015) and New York Soc'y. of Professional Engr's, Inc. v. City of New York, 78 A.D. 3d 477 (N.Y. App. Div. 1st Dep't. 2010), (citing City of New York v. United States' holding regarding presumption of legislative validity).
37. *See for example*, lawsuits challenging the Order by San Francisco, and Chelsea and Lawrence, Massachusetts, *infra* notes 70 and 71.
38. *Id* at Section 9; http://www.washingtontimes.com/news/2017/jan/26/donald-trump-creates-name-and-shame-list-embarrass/.
39. 8 CFR 287.7 –"Detainer provisions under section 287(d)(3) of the Act."
40. https://www.aclunc.org/docs/immigration/ag_info_bulletin.pdf
41. *Id.*
42. *Id.*
43. Davila v. North Regional Joint Police Board., 979 F. Supp. 2d 612 (W.D. Pa. 2013) ("[t]he Court is not aware of, nor is the plaintiff able to cite to, a case that has held a local government entity's decision to rely on and comply with this federal regulation to be unconstitutional on its face"); Rios-Quiroz v. Williamson County, no. 3-11-1168 (M.D. Tenn. Sept. 10, 2012) (finding the detainer provision to be "mandatory"); Ramirez-Mendoza v. Maury County, no. 1:12-CV-00014 (M.D. Tenn. Jan. 25, 2013).
44. Galarza v. Szalczyk, No. 12v-3991 (3d Cir. Mar. 4, 2014).
45. Miranda-Olivares v. Clackamas County, No. 3:12-cv-02317-S (D. Ore. Apr. 11, 2014).
46. *Id.*
47. http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/04/federal_ruling_sparks_halt_on.html
48. Mercado v. Dallas County, no. 3-15-cv. 3481-D (ND Tex. Jan. 17, 2017).
49. Padilla v. Kentucky, 559 U.S. 356 (2010).
50. Tom K. Wong, The Politics of Immigration: Partisanship, Changing Demographics and the American National Identity (Oxford University Press, 2016).
51. https://www.ice.gov/pep
52. Michael John Garcia and Kate M. Manuel, "State and Local "Sanctuary" Policies Limiting Participation in Immigration Enforcement," *supra* note 10.
53. Executive Order, *supra* note 1 at section 10.
54. http://money.cnn.com/2017/01/27/news/economy/funding-sanctuary-cities/
55. https://www.lamayor.org/mayor-garcetti-president-trumps-executive-order-immigration
56. http://cis.org/sites/cis.org/files/Declined%20detainers%20report_0.pdf
57. *Id.*
58. *Id.*
59. Loren Collingwood, Benjamin Gonales O'brien and Stephen El-Khatib, "Sanctuary cities do not experience an increase in crime," The Washington Post, Oct. 3, 2016, https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/03/sanctuary-cities-do-not-experience-an-increase-in-crime/?utm_term=.2bed1c9d861e
60. Tom K. Wong, "The Effects of Sanctuary Policies on Crime and the Economy," Center for American Progress (Jan. 26, 2017), https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/
61. Arizona v. United States, 132 S. Ct. 2492, 2497 (2012).
62. U.S. Const., amend. X.
63. New York v. United States, 505 U.S. 144 (1992).
64. Printz v. United States, 521 U.S. 898, 935 (1997).
65. U.S. Const., art. 1, sec. 8.
66. National Federation of Independent Businesses v. Sibelius, 132 S. Ct. 2566 (2012).
67. Michael A. Memoli, "Trump calls California 'out of control,' says withholding federal funds 'would be a weapon' against sanctuary cities," Los Angeles Times, Feb. 6, 2017, http://www.latimes.com/politics/essential /la-pol-ca-essential-politics-updates-trump-calls-california-out-of-1486332113-htmlstory.html
68. http://ktla.com/2017/01/27/trumps-threat-to-take-federal-funding-away-from-sanctuary-cities-may-have-started-fight-he-cant-win/
69. https://www.bjs.gov/content/pub/pdf/jagp16.pdf
70. https://cops.usdoj.gov/about
71. https://ojp.gov/about/pdfs/BJA_SCAAP%20Prog%20Summary_For%20FY%2017%20PresBud.pdf
72. Cameron, *supra* note 13.
73. In addition to several California cities, Chelsea and Lawrence, Massachusetts have sued the Trump Administration over the Order, https://www.bostonglobe.com/metro/2017/02/08/chelsea-lawrence-sue-trump-over-sanctuary-city-penalties/tXbFN0dM6Wy88gHEjwxdYO/story.html
74. Complaint, City and County of San Francisco v. Trump, Jan. 31, 2017; http://www.sfcityattorney.org/wp-content/uploads/2017/01/Complaint.pdf
75. Complaint, *supra* note 61, at par. 9.
76. *Id.* at par. 34.
77. *Id.* at par 41-46.
78. *Id.* at par. 77.
79. Vikram David Amar and Michael Schaps, "How Strong is San Francisco's 'Sanctuary City' Lawsuit Against the Trump Administration?," https://verdict.justia.com/2017/02/10/strong-san-franciscos-sanctuary-city-lawsuit-trump-administration?utm_source=Justia+Law&utm_campaign=05aa0b566b-summary_newsletters_jurisdictions&utm_medium=email&utm_term=0_92aabbfa32-05aa0b566b-406431949
80. *Id.* at par. 87 and 89.