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How the States Can Help Trump Make Federalism Great Again

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Over the last eight years, more than two dozen state attorneys general have mustered a veritable legal army to thwart the unconstitutional overreach of the Obama presidency. With the change in administrations, however, these elite forces should not disband, but rather must retool. If the Trump White House is to succeed in restoring constitutional governance, it will need the support, cooperation, and sometimes pressure from the states.

In the short term, state attorneys general can coordinate with the incoming Justice Department to identify the cases and appeals that should be dismissed or settled. Further, these legal officers should roadmap how Congress and the president can rescind unlawful executive actions. Going forward, when progressive states seek to resist federal incursions, conservative states should consider supporting the principles underlying those cases: State capitols, not the central government, should decide local matters. Precedents set during this period will, in the long run, entrench the separation of powers, and ultimately promote individual liberty.

The first order of business for the states on January 20, 2017, will be to discuss with the Justice Department the status of all pending federal–state litigation. These discussions can help to resolve, or settle, a number of current cases and appeals trickling through the judicial system. This practice should not be limited to state-led litigation. For example, with less than 15 days left in the Obama presidency, the solicitor general asked the Supreme Court to reverse a rare judicial victory for the Second Amendment. Following a precedent set by the Obama administration in an EPA case from 2009, on further reflection, the new solicitor general can simply withdraw that petition for a writ of certiorari.

ROLLING BACK REGULATIONS

Over the next six months, congressional Republicans have a unique opportunity to rescind regulations that were published in the waning days of the Obama administration. The Congressional Review Act (CRA), passed in 1996 as part of the Contract with America, allows Congress to disapprove of a regulation that is less than 60 legislative days old. If the president agrees, the regulation is rescinded, and the agency is *permanently* prohibited from regulating on that issue ever again. It salts the earth in the *Code of Federal Regulations*. The CRA has been used only once — by President George W. Bush in 2001 to rescind an inconsequential regulation concerning ergonomics in the workplace. Now, Republicans have a unique opportunity to kill a

bevy of rules that were finalized following May 30, 2016 (counting backwards 60 legislative days from the end of the previous session).

With respect to the CRA, the states can help, big league: by combing through every page of the *Federal Register* since Memorial Day, attorneys general can identify each and every regulation that warrants recision. Most regulations, though onerous, are perfectly lawful. However, those regulations that violate federal law, or intrude upon the separation of powers, or are flat-out unconstitutional, should be jettisoned. There is no need to wait for the courts to act. To provide an even greater help to the overworked staff in Washington, the states should use their sophisticated staff to draft precise disapproval resolutions. Further, the attorneys general should use their leverage to lobby their representatives and senators to get these disapproval resolutions on the congested congressional calendar. The president must sign these disapproval resolutions by the middle of the year, so this unique opportunity has a limited window for success.

For those unlawful regulations that cannot be killed by the CRA — either due to a lack of floor time or a lack of congressional will — there is still hope. Executive-branch agencies can initiate new rulemakings, where they announce that upon further reflection, they've determined that old regulations are contrary to law, and can no longer stand. To assist this process, state attorney generals should thumb through the *Federal Register* over the past eight years, flag *all* arbitrary and capricious regulations, and draft proposed rules to wipe out the Obama-era regimes. This support can help relieve the burden from overworked executive-branch agencies that will likely find little support from the entrenched bureaucracies. Indeed, civil servants may even oppose and resist the incoming administration's agenda through slow-downs, leaks to the media, or flat-out disobedience. Finally, not that he needs it, but the states can give direction to President Trump as he uses his pen and phone (sharpie and twitter?) to systematically unravel President Obama's unlawful executive actions.

LITIGATING FOR THE CAUSE OF FEDERALISM

Beyond the regulatory process, Republican attorneys general should continue to use their elite legal teams to litigate for the cause of federalism — even if it incidentally helps progressive states. For example, California has recently boasted that it seeks to become the new Texas — like orange is the new black — and rely on the principles of federalism to resist incursions from the Trump administration into their sanctuary cities. While conservatives may oppose sanctuary cities as a matter of policy, federalists should never lose sight of the fact that the states — and not the central government — should have control over local law-enforcement matters. (Consider the controversies over efforts by the Justice Department to monitor police departments.) Indeed, legislators in Austin are currently debating a bill to defund Texas municipalities that refuse to assist with federal immigration enforcement. That is the *right* way to handle this sort of issue. When California challenges the Trump administration in court, conservative states should not sit by idly. There is a unique opportunity to advance the cause of federalism, and in the process, benefit from any precedents set by fair-weathered federalists on the Supreme Court.

First, California will likely assert that it is unconstitutional for the Trump administration to withhold federal funds from sanctuary cities. Once, and only once, has the Supreme Court held that clawing back federal funding violates the principles of federalism. Under the Affordable

Care Act (ACA), if a state refused to expand its Medicaid rolls, the federal government threatened to withhold *all* of its Medicaid funding. For example, the Obama administration warned Arizona that it stood to lose nearly $8 billion of federal funding, which was nearly a quarter of its state budget. The Court observed that across the board, "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." In other words, states stood to lose on average 10 percent of their budgets for failing to comply with Obamacare. The ACA's "financial 'inducement,'" explained Chief Justice Roberts, "is much more than 'relatively mild encouragement' — it is a gun to the head." Because "pressure turned into compulsion," the Court concluded that the ACA's Medicaid expansion was unconstitutional.

This precedent, however, does not mean that *every* effort to withhold money from noncompliant states is unconstitutional. Congress routinely dangles aid to encourage states to comply with federal programs. For example, South Dakota challenged a law that would withhold 5 percent of otherwise available federal highway funds if the state refused to raise its drinking age to 21. In 1987, the Supreme Court upheld this law, finding that "Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose." However, the amount at issue was miniscule. In *NFIB v. Sebelius*, the Court pointed out that "the federal funds at stake," roughly $4 million, "constituted less than half of one percent of South Dakota's budget at the time."

If sanctuary cities seek to halt President Trump's withdrawal of funding, and the amount falls somewhere between 0.5 percent and 10 percent, the Supreme Court will have to make new precedent. It will not be sufficient to rely solely on *NFIB v. Sebelius*. In that case, Chief Justice Roberts admitted that there was "no need to fix a line" between "persuasion" and "coercion." Yet, to rule against Trump, Justices Ginsburg and Sotomayor (who dissented in *NFIB*) will have to go along with a *new* rule that withholding an amount of money*less than* that at issue in the Obamacare case is now coercive. Conservative states, rather than waiting on the sidelines, should gladly point out to the Court this necessary departure from *NFIB*. And more specifically, they can flag all of the other federal programs, which threaten to withhold comparably small amounts, are now at risk of invalidation in subsequent litigation. In the long run, a unanimous decision that puts more teeth into the spending-clause jurisprudence inures to the benefit of red states. Attorneys general in flyover country should gladly hoist these coastal fair-weathered federalists on their own petards.

Second, California may assert that Congress did not provide adequate notice before changing the criteria for receipt of federal funds. The Supreme Court has held that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." The federal government cannot "surpris[e] participating States with postacceptance or 'retroactive' conditions." Like the states opposing Obamacare's Medicaid expansion, California could assert that it was "surprise[ed]" by the Trump administration's imposition of "'retroactive' conditions," which "transform[ed]" the policy "so dramatically." Once again, conservative states should support this fight, and urge the Supreme Court to reaffirm the so-called clear-statement rule. Such a precedent would provide an important precedent for attorneys general to challenge executive-branch agencies that suddenly, and unexpectedly, impose massive new conditions on the states, without any adequate notice. By pointing out the implications of ruling for fair-

weathered federalists, conservative attorneys general can establish another important check on federal power.

To use a contemporary example, the Department of Education recently reinterpreted Title IX, a 40-year-old law that prohibits sex discrimination in educational institutions, to require all public schools to allow students to use bathrooms based on their gender identity. This term the Supreme Court will consider the validity of this new policy (if it is not first withdrawn by the Trump administration). West Virginia, joined by 20 other states, filed a brief urging the Supreme Court to reject the agency's rewriting of federal law, which imposed transformative conditions on the states. If the Supreme Court would be willing to strike down the Trump administration's changes with respect to immigration funding, then the Obama administration's dramatic changes to Title IX cannot stand.

Third, California may resist any efforts to cooperate with federal immigration officials — and perhaps could even impede their work. For example, several cities already refuse to transfer to the federal government certain criminal aliens who are not lawfully present — ignoring so-called detainers — unless a federal court orders the release. Here, progressives are rallying behind Justice Scalia's opinion in *United States v. Printz*, which held that Congress cannot commandeer state officials to perform firearm background checks. (Ironically, a gaggle of blue states filed a brief in *Printz* supporting the constitutionality of the Clinton administration's conscriptive gun-control law.)

But there is another precedent for California to contend with. Arizona's S.B. 1070, commonly referred to as the "show your papers" law, gave local law enforcement the power to arrest aliens who were in violation of federal immigration law. The Supreme Court invalidated this provision of S.B. 1070, finding that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Federal control over immigration, the Court held, is "so pervasive . . . that Congress left no room for the States to supplement it." In other words, state immigration policies that interfere with the comprehensive federal immigration scheme are preempted. If Arizona is not allowed to adopt a policy that arguably *helps* federal law enforcement (by arresting those subject to removal), then California certainly cannot adopt a policy that explicitly *impedes* federal law enforcement. This precedent does not help sanctuary cities. (For more irony, California filed a brief supporting the Obama administration, and opposing Arizona.)

There is a tension, however, between these two cases. Under *Printz*, local officials cannot be conscripted to enforce federal law-enforcement duties. At the same time, a state law or policy that serves as an "obstacle" to Congress's federal immigration scheme violates the holding of *Arizona*. Conservative attorneys general should cheerfully point out this tension to the courts. For California to prevail, the Supreme Court will have to shake things up. *Printz*'s commandeering doctrine will be expanded, thus reigning in the power of the central government; *Arizona*'s preemption analysis will be curtailed, which expands a state's internal police powers. This rejiggering of precedent would be a boon to federalism.

Fourth, California may attempt to sue the Trump administration's for its failure to enforce various laws. If that paradigm sounds familiar it should: Texas challenged the legality of the Obama administration's non-enforcement of the immigration laws, known as DAPA. This suit, however, was not unprecedented. In 2005, Massachusetts (joined by California) sued the

Environmental Protection Agency for failing to regulate greenhouse gasses. The Supreme Court held that because the Massachusetts coastline could be eroded by the effects of climate change, the state was sufficiently injured to sue in federal court. Citing the basis of *Massachusetts v. EPA*, the lower courts held that Texas had standing to challenge DAPA. (The Supreme Court ultimately deadlocked on this issue 4-4.)

While California supported President Obama's illegal executive actions on immigration (filing a brief in support of DAPA), it may not be so keen when the Trump administration decides to exercise its discretion with respect to environmental, financial, and other regulatory prosecutions. If progressive states attempt to challenge executive non-enforcement of the law — beyond the context of climate change — conservative states should consider supporting the principle that courts can enforce the president's duty to faithfully execute the law. They should point out that it is not sufficient to merely reply on *Massachusetts*, but will need to make new precedent — a precedent that could one day prevent a future a wholesale suspension of the immigration laws.

Fifth, blue states will likely adopt a powerful tool used by red states to reign in federal policy: the nationwide injunction. Over the past three years, federal district judges (mostly in Texas) have single-handedly halted President Obama's unlawful policies concerning immigration, labor law, and financial regulations. Using these injunctions, the judges have bound executive-branch officials in all 50 states — even those that welcomed the executive policy. For example, California urged Judge Andrew Hanen in Brownsville that President Obama's immigration orders should be allowed to go into effect in states that wanted it. No dice, the court held.

Soon enough, these dynamics will flip, as federal judges in San Francisco, Brooklyn, and Chicago, are confronted with requests for nationwide injunctions to halt the Trump administration. As the progressives reverse course, Republican attorney generals should maintain their consistency. More often than not, federal officials will *overreach*, rather than *underreach*. The nationwide injunction is one of the only remedies available to quickly halt illegal actions before they take effect — and become entrenched. So long as the president takes executive action, especially outside the formal notice-and-comment process of rulemaking, courts should be able to quickly put a hold on violations of law. This is a policy that attorneys general of all stripes should unwaveringly support.

WHY FEDERALISM MATTERS

I am not Pollyannaish. It is easy enough for a law professor to extoll the value of federalism, but on the ground, elected attorneys general may face a backlash if they actively challenge the Trump administration in court. Three important values should guide this important decision. First, Donald Trump will only be president for the next four to eight years. Sooner, rather than later, a progressive will be in the White House. The precedents that are established now will serve as a check on the havoc a President Elizabeth Warren cold unleash on the states. Second, there is a powerful value to gaining buy-in from the liberal justices — especially those who will serve for decades to come — for the principles of federalism. True, Justices Kagan or Sotomayor may be able to distinguish California's present challenges with Texas's future challenges — but the feebleness of those flip-flops will be visible to all.

Finally, and most importantly, state officials take an oath to the Constitution, not to the Republican party. They bear the unique responsibility for enforcing the Tenth Amendment, in all

of its dimensions: “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.” The mission of reining in the federal government’s powers, and restoring the Constitution’s separation of powers, should continue for the next four years, eight years, and beyond.

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