

## Federal coercion and ‘sanctuary cities’

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“But what good came of it at last?”

Quoth little Peterkin.

“Why that I cannot tell,” said he, “But ’twas a famous victory.”

— Robert Southey, “The Battle of Blenheim” (1798)

Southey, a pacifist, wrote his antiwar poem long after the 1704 battle for which the Duke of Marlborough was awarded Blenheim Palace, where his great-great-great-great-great-great grandson Winston Churchill would be born.

We, however, do not need to wait 94 years to doubt whether the Trump administration’s action against “sanctuary cities” is much ado about not much. Four months have sufficed to reveal it ’twas a constitutionally dubious gesture.

The executive order was perpetrated in a helter-skelter, harum-scarum, slapdash manner five days after the Inauguration, before the administration was humming like a well-tuned Lamborghini. The order says sanctuary cities have caused “immeasurable harm” to “the very fabric of our republic,” a thunderous judgment offered without evidence of the shredded fabric or even a definition of “sanctuary city.”

They are cities that limit the cooperation of local law enforcement personnel with federal immigration enforcement efforts. There are defensible reasons for some non-cooperation: e.g., preserving cooperative relations between local police and immigrant communities, which facilitates crime-fighting. But many such cities anoint themselves sanctuaries as an act of self-congratulatory virtue-signaling and to pander to immigrant communities.

The executive order is either a superfluous nullity or it is constitutional vandalism. It says cities “that fail to comply with applicable federal law” shall “not receive federal funds, except as mandated by law.” A U.S. district judge in northern California has held that the executive order is “toothless” if it pertains to merely a few federal grants, and even they do not unambiguously state in their texts that funding is conditional on active cooperation with federal immigration enforcement. If, however, the order extends to other federal grants, it violates the separation of

powers: The spending power is vested in Congress, so presidents cannot unilaterally insert new conditions on funding.

Several senior White House officials, operating in pre-Lamborghini mode, denounced this judge's decision as another excess by the much-reversed 9th U.S. Circuit Court of Appeals. Actually, although this court might hear an appeal of the judge's decision, it had nothing to do with the decision.

It is federal law that a state "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." This does not, however, prevent any government entity from voluntarily withholding information.

Furthermore, the Supreme Court has held that the 10th Amendment ("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") means that the federal government may not "commandeer" state and local officials to enforce federal laws. The function of the anti-commandeering doctrine is, in the words of Justice Antonin Scalia, the "preservation of the states as independent and autonomous political entities."

Last Sunday, Texas Republican Gov. Greg Abbott signed legislation setting criminal and civil penalties for state and local officials who refuse to comply with federal immigration laws and detention requests. As policy, this may or may not be wise; as an exercise of the state's police power, it is not constitutionally problematic. But regarding the federal executive order, professor Ilya Somin, of George Mason University's Antonin Scalia Law School, says:

"Trump's order is exactly the kind of high-handed federal coercion of states and undermining of separation of powers that outraged conservatives under (President) Obama. In fact, Obama did not go as far as Trump seems to do here. Obama never claimed sweeping authority to impose new conditions on federal grants beyond those specifically imposed by Congress."

Neither the Trump administration's semi-demi-ukase against sanctuary cities, nor the judge's ruling against it, has significant discernible consequences. The executive order illustrates the descent of American governance into theatricality.

In the satirical British television series "Yes, Prime Minister," a politician exclaims: "Something must be done, this is something, therefore we must do it." The executive order is barely anything at all, beyond, in the words of the Cato Institute's Ilya Shapiro, "just one more episode of Trumpian signaling." It is government inspired by "Animal House," in which movie the character Otter says: "I think this situation absolutely requires a really futile and stupid gesture be done on somebody's part!"