

TIME

5 Ways Trump's Anti-Sanctuary City Orders Are Unconstitutional

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Attorney General Jeff Sessions recently announced that he will begin punishing states and local governments who refuse to help the federal government enforce its immigration laws — known as sanctuary cities — by taking away federal grants. Sessions even mentioned using a “claw-back” to retake money already given to local governments. Two federal judges are already examining if they should be put on hold.

The order is plainly unconstitutional. It undermines federalism in several ways.

1. States can't be forced to help enforce federal law. In 1996, Congress enacted 8 U.S.C. § 1373, which attempts to stop states and cities from enacting policies that would block state employees from helping the federal government enforce its immigration laws. Yet the next year, the Supreme Court ruled that the federal government cannot force states and cities to help enforce any federal law. As the late Justice Antonin Scalia wrote in the court's opinion for Printz v. United States, states can be enticed to do so willingly, but they can't be “commandeered.” States and cities do not have to obey — which directly contradicts Sessions' requirement.
2. The White House can't make new requirements. The executive order purports to create new conditions on federal grants to state governments. But the Administration has no authority to do so. The Supreme Court, in Pennhurst State School and Hospital v. Halderman (1981), held that only Congress could impose conditions on federal grants to states — not a President.
3. Even if Congress added the requirements, these are unclear. Even where Congress imposes conditions on spending, it must “speak with a clear voice” and make the condition “unambiguous” so that states know what they are agreeing to by taking the money. Sessions' “claw-back” threat spotlights how unclear the immigration-enforcement requirements — if they exist at all — are for the thousands of federal programs and grants potentially affected. Didn't the states and cities have to qualify to get the money in the first place?
4. It's too late to add new requirements. After a new large spending program is created, even Congress can't later add new major conditions. The Supreme Court considered this problem with Obamacare's Medicaid requirement that either a state expand Medicaid or lose even its

preexisting Medicaid funds in 2012's NFIB v. Sebelius. Seven justices found this unconstitutional. So even if Congress wanted to impose these conditions on current substantial funding, it couldn't. It could only impose them on new funding.

5. The requirements have nothing to do with many of the threatened programs. Any condition attached to spending must be germane to the purpose of that spending. In South Dakota v. Dole (1987), the Supreme Court allowed Congress to condition a small portion of the federal highway funds on the requirement that the state enact a minimum drinking age of 21. The Court found this constitutional because this was related to the purpose of the funds. Even Congress cannot use highway funds to force states to change education policy. If the Administration limits the order to the Department of Justice programs that Sessions talked about, they might be considered germane. But Trump's executive order adds conditions to all federal grants, and the vast majority of them have purposes — like education or environmental protection — entirely unrelated to immigration. We will see how far the executive order reaches.

What Should Be Done Instead

Before Sessions' announcement to begin enforcement, San Francisco and Santa Clara County were seeking to prevent these actions from going into effect. They have asked for a nationwide preliminary injunction, which a federal judge will consider on April 5 and April 12. Seattle is also seeking to stop these actions, but likely will take longer for the courts to consider. Now that the Administration has started enforcing the order, the courts seems likely to issue the injunction and block it.

Immigration reform is an important issue for the President, and an important reason for his election. But there are other ways of accomplishing this objective. For instance, the President could send federal agents to sanctuary cities to enforce federal law. Or he could ask Congress to pass a new law that tailors new law-enforcement grants to these purposes.

As it stands, a President could use these kinds of threats to coerce states in all kinds of ways, including against policies dear to his fellow conservatives. Trump will not be in office forever, but the precedents he sets will live on. Accordingly, this threat to constitutional governance should be reconsidered or struck down.

After all, the people elected Donald Trump to “drain the swamp” by taking power away from Washington and returning it to the states, not the other way around.

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