Sanctuary for Federalism: Affirming the Separation of Powers Between the States and the Federal Government When Enforcing Immigration Law

Monday, April 30, 2018

As a candidate, President Donald Trump made central to his campaign the notion that those jurisdictions that declared themselves “sanctuary” for illegal immigrants were responsible for “so many needless deaths.”[i] To curtail these “needless deaths,” candidate Trump promised to pressure Congress to pass a bill known as “Kate’s Law” that would withhold federal dollars from jurisdictions declaring for themselves sanctuary status.[ii] “Kate’s Law” takes its name from Kate Steinle, a San Francisco resident who was shot and killed by an illegal immigrant who had unlawfully entered the United States and had been deported several times prior to shooting her. Upon taking office, President Trump upheld his campaign pledge to coerce these jurisdictions to abandon their status as “sanctuary” by issuing an Executive Order on January 25, 2017. Following the lead of the Trump administration, in June 2017, the House of Representatives passed, by a vote of 228 – 195, H.B. 3003, “No Sanctuary for Criminals Act.”[iii] (This bill has been pending in the Senate as of July 10, 2017.)

The underlying issues that come from the actions of the Trump administration and the Republicans in the House of Representatives are 1) can the federal government coerce state executives or local governments to act as agents of the federal government in regards to immigration enforcement and 2) can that coercion be in the form of withholding federal grants for state programs. These issues speak to the very foundation of the system on which the United States sits: federalism. The notion of federalism has been clarified and affirmed by courts ranging from federal circuit courts to the U. S. Supreme Court. These clarifications have routinely put a limit on the federal government’s ability to commandeer state entities when enforcing federal law, and the courts have put specific criteria that must be met when the federal government attempts to tie the withholding of funding to inaction by the states.

The impasse between the federal government, which now seems to be prioritizing immigration law enforcement, and states and localities that have declared themselves “sanctuary” has put a strain on the notion that federalism is “a doctrine of blind and uncomprehending deference to national authority.”[iv] However, this is a strain that need not exist since the proper doctrine of federalism is not blind obedience to the national government, but, rather, it is a delegation of specific powers to one while retaining general autonomy and sovereignty for the other. This paper’s purpose is to explain exactly how a proper definition of the federalism doctrine gives support to states and local municipalities by defining the federalism doctrine, examining how the federal government is attempting to defy that doctrine, and then detailing how the courts have applied the actual federalism doctrine in other areas of the law.

Defining Federalism

The ultimate point to federalism was to provide a check by the state governments on the power exercised by the federal government and vice versa. Alexander Hamilton, coauthor of The Federalist, stated in Federalist No. 28 that “the general government will at all times stand ready to check the usurpation of the state governments, and these will have the same disposition towards the general government.”[v] Because the Constitution specifies
areas that the federal government has jurisdiction over, the states are powerless to act in those areas. Conversely, because those areas are specified and defined, the federal government cannot go outside those boundaries. Immigration law falls within those boundaries in which the federal government may exercise power, but that power does not include the commandeering of state entities without the approval of those states.

The inability to commandeer state entities by the federal government was explained in the 1842 U.S. Supreme Court ruling of *Prigg v. Commonwealth of Pennsylvania*. *Prigg* was a majority opinion written by Associate Justice Joseph Story. The case was about the capture and relocation to Maryland of a runaway slave who found her way into Pennsylvania which had passed numerous state laws that permitted the return of runaway slaves so long as the retrieving agent went through the proper legal process to obtain custody of the slave. In February 1837, Edward Prigg was appointed by Margaret Ashmore of Maryland for the purpose of locating, detaining, and removing a runaway slave, Margaret Morgan, and her children from the state of Pennsylvania.[vi] Prigg was found guilty by a jury of violating Pennsylvania law by removing one of Morgan's children who was born in the state of Pennsylvania and who was recognized by Pennsylvania to be a free person and for which no documentation of servitude was provided.[vii] The issue, as explained by Justice Story's decision, was whether or not the Pennsylvania law was in conflict with areas delegated to the U.S. Congress, such as fugitive slave acts, and thus unconstitutional.

In writing his opinion affirming the delegated authority over fugitive slaves to the federal government, Justice Story dispensed with the notion that the federal government could interfere with the legitimate internal governance of the states and that officers of the states could become an agent of the federal government. “The court (sic) are by no means to be understood, in any manner whatever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states, and have never been conceded to the United States.”[viii] Story continues: “If no man can be an officer of this government without bearing the commission of the president, certainly, no ‘magistrate of the county, city, or town corporate’ can be a judicial officer of the general government.”[ix]

Story's opinion provides the proper perspective to carry into any matter involving the federal government's power over state and local law enforcement. In *Prigg*, the line between the federal and state authorities boldly checks any attempt by the federal government to commandeer agencies of the states to act as federal agents. Without state approval, no state agency can be made to act on behalf of federal officers.

**Federal Usurpation**

The federal government is seeking two goals through its executive and legislative maneuvers with regard to immigration law and “sanctuary” jurisdictions. First, the federal government seeks assisted enforcement of the Immigration and Naturalization Act (INA) by states and local jurisdictions. Second, any failure to adhere to enforcement requests will result in the withholding of federal funds for certain non-law enforcement related state programs. The language of both the White House and the U.S. House of Representatives echos one another with this “carrot and stick” approach to combating “sanctuary” jurisdictions.

On the executive side, the Trump administration issued Executive Order (EO) 13768 on January 25, 2017 that stated, in part:

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 Secretary, 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. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

(b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, 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.

3. The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.[x]
Federal statute 8 U.S.C. § 1337 referenced by EO 13768 forbids any state or local government from preventing the federal government from enforcing immigration law. Specifically, in § 1337 (a), it is unlawful to “restrict... sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” This means that non-federal agencies cannot act to prevent law enforcement entities of any type from cooperating with the Immigration and Naturalization Service (INS) in locating and apprehension of illegal immigrants. The mechanism by which cooperation between the states or local law enforcement agencies and the INS is promoted is called civil immigration detainers. Federal statute 8 C.F.R. § 287.7 defines civil immigration detainers as “request[s]” that are issued by the federal government to state and local law enforcement agencies for the purposes of “advis[ing] 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.”

The Trump administration attached the threat of withholding federal grant money to the demand for INA compliance. These federal grants could pertain to anything that the states ask for “except as deemed necessary for law enforcement purposes.” As issued, EO 13768 opens up the possibility for highway funds to be withheld from states and local jurisdictions that refuse to comply, while continuing to provide federal grants for state and local enforcement of federal drug laws. EO 13768 called for the Director of the Office of Management and Budget to compile a list of all federal grants received by declared “sanctuary” jurisdictions, alluding to the possibility that funds yet to be received by these jurisdictions could be prevented from reaching them. Many jurisdictions that have declared themselves “sanctuary” could face tremendous budgetary constraints if those federal grants are withheld.

On the legislative side, the House of Representatives moved to put EO 13768 into statutory language through passage of House Bill 3003, the “No Sanctuary for Criminals Act.” Sponsored by Virginia Republican, Representative Bob Goodlatte, and passed by the House of Representatives on June 29, 2017, HB 3003 amends section 642 of 8 U.S.C. 1373. The amended language demands “...no...State, or local government entity, and no individual, may prohibit or in any way restrict, a Federal, State, or local government entity...from complying with the immigration laws...or from assisting or cooperating with Federal law enforcement...regarding the enforcement of these laws.” (Emphasis added.) The law also amends language pertaining to what activities are covered by the above section, such as “[m]aking inquiries to any individual in order to obtain such information” regarding immigration status, “[n]otifying the Federal Government regarding the presence of individuals who are encountered by law enforcement officials or other personnel of a State or political subdivision of a State,” and “[c]omplying with requests for such information from Federal law enforcement.” This new language makes the immigrant detainer requests mandatory as opposed to voluntary as they have been treated in the past.

Representative Goodlatte defended this bill via an issued statement saying that “For years, the lack of immigration enforcement and the spread of sanctuary policies have failed the American people and cost too many deaths of innocent Americans...Their deaths are especially devastating and could have been prevented if our immigration laws had been enforced.” Based on statements like the one issued by Representative Goodlatte and those made by then-candidate Trump, it is clear that those pushing for policies seeking to remove the voluntary nature of Federal-State enforcement of immigration laws think that enforcement cannot be done without the assistance of State and local law enforcement.

State Law Protecting Federalism

A few states, and many local municipalities, have made declining immigration detainer requests policy, which is how the label “sanctuary” became attached to these jurisdictions. In States like California and Connecticut, the practice of refusing to become agents of the federal government in the realm of immigration enforcement was made statutory by California Assembly Bill No. 4 and Connecticut Law Public Act No. 13-155. The language of these bills reflect the affirming language from landmark federal court rulings from the Third Circuit Court of Appeals and the Supreme Court, as well as various state supreme courts, most recently the Massachusetts Supreme Court.

The bills signed into law by the governors of California and Connecticut were explicit in affording any state or local law enforcement agency the authority to deny any request made by federal authorities to assist in anyway the enforcement of federal immigration law. These state laws also carved out very specific exceptions for when state and local law enforcement should assist federal immigration agents. Under no circumstance do the state laws encourage in any way the state and local law enforcement agencies to obstruct federal law enforcement from enforcing federal immigration law.

California Assembly Bill No. 4 was signed into law in 2013 and authorized state and local law enforcement agencies to refuse federal immigration detainer requests regarding civil immigration enforcement. The language of the bill specifically “prohibits a law enforcement official...from detaining an individual on the basis of a United States Immigration and Customs Enforcement hold after that individual becomes eligible for release from
The basis for this law is explained by detailing California’s concern for its large immigrant community who may be victims of or witnesses to crimes. The concern is that, if the immigrant residents fear that the local authorities can detain them simply on the basis of their immigrant status, they will be less likely to report violent crimes in their community. Furthermore, acquiescence to immigration detainers by state and local law enforcement puts California’s immigrant population at risk of being detained without having broken any state or local law and transferred to federal immigration authorities, which can lead to these individuals having no recourse to gain lawful status. California determined that protecting their immigrant community from violent crimes and false imprisonment outweighs the need for assistance in enforcing immigration law by federal authorities, unless certain specific exceptions are met.

Connecticut’s Public Act No. 13-155 pertains to immigration detainers targeting violators of civil immigration law, unless those individuals have been “convicted of a felony, [are] subject to pending criminal charges…where bond has not been posted, have an outstanding arrest warrant in this state (Connecticut), [are] identified as known gang members in the database of the National Crime Information Center or any similar database…[are] identified as possible match[es] in the federal Terrorist Screening Database or similar database, [are] subject to final orders of deportation or removal issued by a federal immigration authority, or present an unacceptable risk to public safety.” For those immigration detainer requests that are granted, the Connecticut law includes a timeframe for when federal immigration authorities can have individuals that are held by Connecticut law enforcement released to federal custody. Under both state laws, state and local law enforcement can continue to act as agents on behalf of federal immigration authorities when enforcing the criminal immigration statutes.

**Does Compliance Necessitate Compulsion?**

In both, EO 13768 and HB 3003, the implication is that jurisdictions that do not respond to civil immigration detainers are not in compliance with the Immigration and Naturalization Act. However, to be in compliance with the INA, a state or municipality merely need to not prohibit immigration agencies from enforcing the law. Courts, from the state level to the Supreme Court, have consistently held that responding to civil immigration detainers is a voluntary act and not something that the can be mandated by the federal government. These holdings rest on the principle of federalism that is made clear by the Tenth Amendment to the Constitution and the threats to the Fourth Amendment’s preclusion against unlawful detention.

In *Lunn v. Commonwealth*, the Massachusetts Supreme Court decided a case involving a civil immigration detainer issued against an individual that had been released from jail by the local authorities. The request asked that the Massachusetts state authorities hold the target 48 hours past the point when he was released upon court order. The federal government’s argument for holding the suspect past his release was that state and local law enforcement officers “have ‘inherent authority’ to carry out the detention requests made in Federal civil immigration detainers—essentially, to make arrests for Federal civil immigration matters as a form of cooperation with the Federal authorities.”

The aspect of the government’s argument that the Massachusetts Supreme Court had to resolve was the notion that local law enforcement could make arrests for federal immigration agents. The Massachusetts Supreme Court held that acquiescing to the federal request would constitute an arrest and, as such, “the common law and statutes of this Commonwealth are what establish and limit the power of Massachusetts officers to arrest. There is no history of ‘implicit’ or ‘inherent’ arrest authority having been recognized in Massachusetts that is greater than what is recognized by our common law and the enactments of our Legislature.” The court equated detention solely on the basis of a civil immigration detainer with an arrest and pointed out that the federal government made similar comparisons. Because of this equation, the court held that this would compel Massachusetts to “employ their resources to administer and enforce Federal programs,” and, thus, violated the Tenth Amendment.

In *Galarza v. Szalczyk*, the Third Circuit decided a case out of Pennsylvania that involved a citizen of New Jersey arrested for suspicion of conspiracy to sell cocaine in Pennsylvania. During the suspect’s detention for alleged controlled substance charges, an Allentown, PA law enforcement officer contacted ICE, as is procedure in Allentown, because of suspicion that Galarza was an “alien subject to deportation.” The District Court allowed Galarza’s case against ICE agent Mark Szalczyk to go forward for violations to Galarza’s Fourth Amendment protections and the Equal Protection Clause. Galarza claimed that the civil immigration detainer issued against him by Agent Szalczyk caused Galarza to be detained by Lehigh County Prison longer than he otherwise would have, which included being held over a weekend, after being exonerated for the alleged controlled substance violations. The District Court dismissed the case against Lehigh County because the detention period encompassed a weekend, which was allowed by federal statute 8 C.F.R. 287.7, and was the
The Third Circuit addressed interpreting the statute in terms of whether or not the statute mandates compliance or if it is a voluntary cooperation between federal immigration officials and state and local law enforcement. Lehigh County argued that the language of the statute signified that § 287.7 was mandatory. However, the Third Circuit took Galarza’s interpretation of the statute to be the correct interpretation. “The words ‘shall maintain custody,’ in the context of the regulation as a whole, appear next to the use of the word ‘request’ throughout the regulation. Given that the title of § 287.7(d) is ‘Temporary detention at Department request’ and that § 287.7(a) generally defines a detainer as a ‘request,’ it is hard to read the use of the word ‘shall’ in the timing section to change the nature of the entire regulation.” The Court relied on case law and on the intent of Congress to reach the conclusion that the language of § 287.7 was meant to mean that adherence to the statute by state and local agencies was voluntary.

Based on the holdings of Lunn and of Galarza, the Trump administration’s and Representative Goodlatte’s assertions that failure to respond to civil immigration detainers is noncompliance with the INA is a misreading of § 287.7 because the language of the statute signifies that there is an option to participate instead of a mandate to respond.

The U.S. Supreme Court has weighed in with two key decisions related to understanding the voluntary language of federal laws as it pertains to state and local law enforcement acting as an agent of the federal government. In Printz v. United States, the question before the court was whether language in the amended section of the Gun Control Act of 1968, known as the Brady Act, could command local law enforcement to conduct background checks on behalf of the U.S. Attorney General who was charged by the Brady Act with creating a national system for conducting background checks of individuals seeking to purchase handguns. In Printz, the petitioners argued against the idea that the federal government could compel states to administer federal programs and that such attempts by the federal government were relatively new; however, the U.S. government responded that there is a long history of the federal government directing state governments in just such a manner.

In reviewing the historic examples provided by the government, the Supreme Court stated that each instance “at most...was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions.” However, as spelled out in the Constitution, this imposition on judges is not translated to “imply a power of Congress to impress the state executive into its service.” The Supreme Court went further by dispelling the idea that state governments were “incorporated into the operations of the national government” by being “rendered auxiliary to the enforcement of its laws” by explaining that such a theory would negate the need for there to be language in laws directing state governments to act on behalf of the federal government. The Supreme Court wrapped up Printz by explaining that there has never been precedent for federal direction of state legislatures and that the only duty owed by the states to the federal government is that the states do not construct legislation that would obstruct the operations of the federal government. The Court’s reasoning in Printz distinguishes the obligation placed on state judges by federal law and the ability to place similar obligations on other state agencies.

In their essence, the questions in the preceding cases examine the relationship between the federal and state governments. This relationship was handed down by the Founding generation to the generations since in the form of federalism. The states and the federal government were said to be co-equals in as much as the design of the Constitution depended on “indestructible Union, composed of indestructible States.” Finally, examination of the debates surrounding the relationship between the federal government and the states during the Founding period concludes by declaring that the Congress can regulate areas in which it is constitutionally authorized to act, but Congress cannot compel states to regulate in those same areas. Immigration law is no exception, and the states have acted correctly in determining that civil immigration detainers are voluntary in nature and subject to their discretion.

Can Federal Grants be the Cudgel used Against the States?

The spending power of the federal government is vested in the legislature, and it is here, not the executive, that determinations on how federal grants are issued are made. This is a fundamental tenet of the separation of powers between the various branches of the federal government, particularly between the executive and the legislature. As such, the language in EO 13768 that acts as a threat to those jurisdictions deemed to be “sanctuary” for illegal aliens and in a state of noncompliance with the executive order’s demands related to civil immigration detainers is prima facia unconstitutional because the executive branch can only dispense with revenue allocated at the direction of the legislature.

Given the legislature’s possession of the spending power, HB 3003’s two sections pertaining to withholding federal grants to those states or local municipalities require examination. House Bill 3003 Sections 2(d)(1)(A) and
2(d)(1)(B) explicitly discuss denying noncompliant jurisdictions grants in specific and general terms. The first of these two sections deals with specific federal grants: “Any of the funds that would otherwise be allocated to the State or political subdivision under section 241(i) of the Immigration and Nationality Act (8 U.S.C. 1231(i)), the ‘Cops on the Beat program under part Q of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 379dd et seq.), or the Edward Byrne Memorial Justice Assistance Grant Program under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).”[xlii] The next section is more open ended in its proscription of federal grants to violators: “Any other grant administered by the Department of Justice or the Department of Homeland Security that is substantially related to law enforcement, terrorism, national security, immigration, or naturalization.”[xliii] Using the spending power to compel state action, while a power of Congress, is not an absolute power granted to the federal government. Two cases from the U.S. Supreme Court explain the limitations placed on the spending power, New York v. United States and South Dakota v. Dole.

The issue in New York was whether the federal government could compel the New York state legislature to take and dispose radioactive waste from the producers of that waste by a date certain or become “liable for all damages suffered by the generator or owner as a result of the State’s failure to promptly take possession.”[xliv] The relevant portion of the Court’s New York reasoning was that “Congress may attach conditions on the receipt of federal funds.”[xlv] New York further explained that “such conditions must (among other requirements) bear some relationship to the purpose of the federal spending, otherwise, of course, the spending power could render academic the Constitution’s other grants and limits of federal authority.”[xlvi] The reasoning relied on by the Court in New York was put forth by the Court’s explanation of the limits on the federal government’s spending power in South Dakota v. Dole.

In South Dakota, a decision about denying federal highway grants to states that did not raise the legal drinking age to 21 years, the Court expounded on the conditions placed on the federal government’s spending power:[xlvi]

1) The “spending power must be in pursuit of the ‘general welfare.’” 2) The spending must be offered in such a way so as to allow states to decide to take the funding “knowingly, cognizant of the consequences of their participation.” 3) The federal grants must be related to the federal interest served by state enforcement of the federal program in question. 4) There may be other constitutional reasons preventing such conditions from being placed on federal grants.[xlvii]

The first requirement handed down by South Dakota provides a broad spectrum in which the federal government can justify any condition Congress might place on grants offered to states or municipalities. The second condition makes clear that any state receiving federal grants are subject to stipulations placed on those grants by the federal government and that those stipulations be clearly understood by the recipient state. The fourth condition is not really a condition so much as an open ended avenue for courts to make determinations on the validity of the federal government’s stipulations placed on grants. The condition by which HB 3003’s spending provisions will be measured is number three.

The Court in South Dakota noted that the cases from which the third condition was based did not offer “significant elaboration,”[xlviii] but nonetheless, the court saw the validity of “condition[s] imposed by Congress” on grants “directly related to one of the main purposes” of the federal program.[xlix] Of the two provisions related to federal funds that could come into issue for the federal government is Section 2(d)(1)(B) because of its vague language and inclusion of areas that seemingly present no relation to immigration or civil immigration detainers. This section connects compliance with detainer requests with grants related to such ambiguous terms as “law enforcement,” “terrorism,” and “national security.”[l]

While HB 3003 may survive court scrutiny with Section 2(d)(1)(A) naming specific programs that are related to immigration, and the second provision of this section of the bill being put at issue by the third condition developed in South Dakota, the Court’s ruling does offer language that could put the entire argument about conditions on federal grants to rest. “We think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.”[li] Given the shaky grounds on which the detention of suspected aliens by state or local law enforcement officials rests, the use of federal funds to compel states or local law enforcement agencies to detain persons for any length of time without due process should place the legality of HB 3003 in jeopardy.

Conclusion

President Donald Trump and other Republicans in Congress who are determined to curtail the number of illegal aliens in the country have devised plans to use a “carrot and stick” method for enlisting the assistance of state
and local law enforcement agencies. There is no doubt that the federal government has jurisdiction over the immigration laws of the United States, but this jurisdiction does not extend to the federal government the authority to compel state and local governments to use resources to assist. The federal government can increase funding to hire more personnel for immigration enforcement agencies, it can change the laws to reclassify what it means to be an illegal alien, and it can even work with states to foster cooperation with regard to immigration enforcement. However, what the federal government cannot do is direct state and local jurisdictions to act on behalf of the federal government nor can it coerce them through threat of withholding federal grants. This is the essence of federalism.

One of the ideas behind federalism is the separation of powers between the federal government and the various state governments. Backed by court rulings at various levels and at various times, the notion of federalism precludes any coercion against states and local municipalities that declare themselves to be “sanctuary” for illegal aliens. More precise, these local jurisdictions have made it known that they will no longer volunteer their law enforcement agencies or expend their resources to act on behalf of the federal government regarding civil immigration detainers. In defending the voluntary nature of civil immigration detainers, these states and local municipalities have become “sanctuaries” for federalism.


[viii] Prigg, 41 U.S. at 561.

[ix] Prigg, 41 U.S. at 582.


[xi] Id.

[xii] Id.


[xv] No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. § 2(a)(2)


[xviii] Id.

[xix] Id.

[xx] Id.
