AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES AND POWERS

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Supplementary Material

Chapter 11: The Contemporary Era – Powers of the National Government/Taxing and Spending Power

**County of Santa Clara v. Trump, 250 F. Supp. 3d** 497 (ND Ca. 2017)

*Shortly after his inauguration as president, Donald Trump issued an executive order aimed at curbing “sanctuary cities,” cities that have an announced policy of non-cooperation with federal immigration enforcement. The executive order directed the attorney general and Secretary of Homeland Security to deny federal grants to political jurisdictions that did not share information with federal immigration officials.*

*Santa Clara County in California had adopted sanctuary city policies that barred county employees from sharing information with Immigration and Customs Enforcement (ICE) or engaging in immigration enforcement or complying with most civil detainer requests from ICE (by which local authorities would detain individuals wanted for immigration violations until they could be taken into federal custody). The county filed suit in federal district court seeking an injunction blocking the implementation of the executive order on the grounds that it violated constitutional principles of federalism and separation of powers. The court granted a preliminary injunction, finding that the executive order caused the county constitutional injuries.*

JUDGE ORRICK.

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In the 2015-2016 fiscal year, Santa Clara received approximately $1.7 billion in federal and federally dependent funds, making up roughly 35% of the County's total revenues. . . .

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The Counties contend that they have standing to challenge the Executive Order because the Order threatens to defund, or otherwise bring enforcement action against, states and local jurisdictions that are "sanctuary jurisdictions." . . .

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The Government's primary defense is that the Order does not change the law, but merely directs the Attorney General and Secretary to enforce existing law. In its briefing, the Government emphasized Section 9(a)'s provision that it will be implemented "to the extent consistent with law." It argued that to the extent the Order directs the Attorney General and Secretary to newly condition federal funds on compliance with Section 1373, it could not lawfully do so and so it does not. . . .

Where a construction of a statute "would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." . . . The primary purpose of the doctrine is to "minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections."

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With regards to the merits of the Government's construction, the Order is not readily susceptible to the Government's narrow interpretation. Indeed, "[t]o read [the Order] as the Government desires requires rewriting, not just reinterpretation."

While the Government urges that the Order "does not purport to give the Secretary or Attorney General the unilateral authority" to impose new conditions on federal grants, that is exactly what the Order purports to do. It directs the Attorney General and the Secretary to ensure that "sanctuary jurisdictions" are "*not eligible to receive*" federal grants. EO § 9(a) (emphasis added). Whether a jurisdiction is eligible to receive federal grants is determined by the conditions on those grants and the characteristics, acts, and choices of the jurisdiction. Section 9(a)'s language directing the Attorney General and Secretary to ensure that jurisdictions that "willfully refuse to comply" with Section 1373 are "not eligible" for federal grants therefore purports to delegate to the Attorney General and the Secretary the authority to place a new condition on federal grants, compliance with Section 1373. And as Government counsel agreed at the hearing, the power to place conditions on funds belongs exclusively to Congress.

The Government attempts to read out all of Section 9(a)'s unconstitutional directives to render it an ominous, misleading, and ultimately toothless threat. It urges that Section 9(a) can be saved by reading the defunding provision narrowly and "consistent with law," so that all it does is direct the Attorney General and Secretary to enforce existing grant conditions. But this interpretation is in conflict with the Order's express language and is plainly not what the Order says. The defunding provision is entirely inconsistent with law in its stated purpose and directives because it instructs the Attorney General and the Secretary to do something that only Congress has the authority to do-place new conditions on federal funds. If Section 9(a) does not direct the Attorney General and Secretary to place new conditions on federal funds then it only authorizes them to do something they already have the power to do, enforce existing grant requirements. Effectively, the Government argues that Section 9(a) is "valid" and does not raise constitutional issues as long as it does nothing at all. But a construction so narrow that it renders a legal action legally meaningless cannot possibly be reasonable and is clearly inconsistent with the Order's broad intent.

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. . . . At the hearing, Government counsel explained that the Order is an example of the President's use of the bully pulpit and, even if read narrowly to have no legal effect, serves the purpose of highlighting the President's focus on immigration enforcement. While the President is entitled to highlight his policy priorities, an Executive Order carries the force of law. Adopting the Government's proposed reading would transform an Order that purports to create real legal obligations into a mere policy statement and would work to mislead individuals who are not able to conclude, by reading Section 9(a) itself, that it is fully self-cancelling and carries no legal weight.

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The statements of the President, his press secretary and the Attorney General belie the Government's argument in the briefing that the Order does not change the law. They have repeatedly indicated an intent to defund sanctuary jurisdictions in compliance with the Executive Order. The Counties' concerns that the Government will enforce the defunding provision are well supported by the Government's public statements and actions, all of which are consistent with enforcing the Order.

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The Counties' claims implicate a constitutional interest, the rights of states and local governments to determine their own local policies and enforcement priorities pursuant to the Tenth Amendment. . . .

The Counties have demonstrated that their sanctuary policies reflect their local judgment of what policies and practices are most effective for maintaining public safety and community health. Because they argue that the Executive Order seeks to undermine this judgment by attempting to compel them to change their policies and enforce the Federal government's immigration laws in violation of the Tenth Amendment, their claims implicate a constitutional interest. . . .

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The Counties argue that the Executive Order is unconstitutional because it seeks to wield powers that belong exclusively to Congress, the spending powers. Article I of the Constitution grants Congress the federal spending powers. "Incident to this power, *Congress* may attach conditions on the receipt of federal funds, and has repeatedly employed the power `to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" . . .

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After a bill becomes law, the President is required to "take Care that the Law be faithfully executed." Where Congress has failed to give the President discretion in allocating funds, the President has no constitutional authority to withhold such funds and violates his obligation to faithfully execute the laws duly enacted by Congress if he does so. *City of New York v. Clinton* (1998). . . .

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Section 9 is particularly problematic as Congress has repeatedly, and frequently, declined to broadly condition federal funds or grants on compliance with Section 1373 or other federal immigration laws as the Executive Order purports to do. . . . The Order's attempt to place new conditions on federal funds is an improper attempt to wield Congress's exclusive spending power and is a violation of the Constitution's separation of powers principles.

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When Congress places conditions on federal funds "it must do so unambiguously" so that states and local jurisdictions contemplating whether to accept such funds can "exercise their choice knowingly, cognizant of the consequences of their participation." *South Dakota v. Dole* (1987). Because states must opt-in to a federal program willingly, fully aware of the associated conditions, Congress cannot implement new conditions after-the-fact. *National Federation of Independent Businesses v. Sebelius* (2012). "The legitimacy of Congress's exercise of the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the contract" at the time Congress offers the money.

The Executive Order purports to retroactively condition all "federal grants" on compliance with Section 1373. As this condition was not an unambiguous condition that the states and local jurisdictions voluntarily and knowingly accepted at the time Congress appropriated these funds, it cannot be imposed now by the Order. In addition, while the Order's language refers to all federal grants, the Government's lawyers say it only applies to three grants issued through the Departments of Justice and Homeland Security. If the funds at stake are not clear, the Counties cannot voluntarily and knowingly choose to accept the conditions on those funds.

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The conditions placed on congressional spending must have some nexus with the purpose of the implicated funds. "Congress may condition grants under the spending power only in ways reasonable related to the purpose of the federal program." This means that funds conditioned on compliance with Section 1373 must have some nexus to immigration enforcement.

The Executive Order's attempt to condition all federal grants on compliance with Section 1373 clearly runs afoul of the nexus requirement: there is no nexus between Section 1373 and most categories of federal funding, including without limitation funding related to Medicare, Medicaid, transportation, child welfare services, immunization and vaccination programs, and emergency preparedness. . . .

Finally, Congress cannot use the spending power in a way that compels local jurisdictions to adopt certain policies. Congress cannot offer "financial inducement... so coercive as to pass the point at which pressure turns to compulsion." Legislation that "coerces a State to adopt a federal regulatory system as its own" "runs contrary to our system of federalism." States must have a "legitimate choice whether to accept the federal conditions in exchange for federal funds."

In *NFIB,* the Supreme Court concluded that the Affordable Care Act's threat of denying Medicaid funds, which constituted over 10 percent of the State's overall budget, was unconstitutionally coercive and represented a "gun to the head." The Executive Order threatens to deny sanctuary jurisdictions all federal grants, hundreds of millions of dollars on which the Counties rely. The threat is unconstitutionally coercive.

The Counties argue that Section 9(a) violates the Tenth Amendment because it attempts to conscript states and local jurisdictions into carrying out federal immigration law. The Counties are likely to succeed on this claim as well.

"The Federal Government may not compel the States to enact or administer a federal regulatory program." "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States* (1997). "That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own."

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Even if the Order does not condition federal grants on honoring detainer requests, it certainly seeks to compel states and local jurisdictions to comply with civil detainers by directing the Attorney General to "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." Although the Order provides no further clarification on what this "enforcement" might entail or what policies might "hinder[] the enforcement of Federal law," Attorney General Sessions, who is tasked with implementing this provision, has equated failure to honor civil detainer requests with policies that "frustrate th[e] enforcement of immigration laws." Reading the Order in light of the Attorney General's public statements, it threatens "enforcement action" against any jurisdiction that refuses to comply with detainer requests or otherwise fails to enforce federal immigration law. While this threat of "enforcement" is left vague and unexplained, "enforcement" by its own definition means to "compel[] compliance." By seeking to compel states and local jurisdictions to honor civil detainer requests by threatening enforcement action, the Executive Order violates the Tenth Amendment's provisions against conscription.

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