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Facts about Sanctuary and Federal Funds

January 2017

On January 25, 2017, President Trump released an Executive Order directing the cutoff of federal dollars to any “sanctuary” jurisdiction or entity.

Many legal experts believe the order most likely exceeds executive authority and is unconstitutional for the following reasons:

1. Sanctuary is not policy that has a specific legal meaning. It is a phrase used by colleges, schools, cities, states to affirm that they will abide by the U.S. Constitution that requires warrants and subpoenas based on cause for any arrest or search for documents.
2. Sanctuary is also a name given to decisions by law enforcement agencies that they will not voluntarily take on immigration enforcement duties. Immigration enforcement is a federal matter.
3. An Executive Order cannot supersede Constitutional protections and the Congressionally established separation of duties between federal and state-local enforcement.
4. The Supreme Court has ruled on several occasions that under the Tenth Amendment the Federal government cannot require state and local officials to carry out any federal regulatory program. “[T]he 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.”¹

Constitutional and Legal Limits on Coercive Use of Federal Funds

1. Conditioning federal funds *requires Congressional action* through Congress’s spending power.
2. It requires strict adherence to legal limits developed by the Supreme Court to protect the states.²

¹ *Printz v. United States* (1997).

² See *South Dakota v. Dole* (1987).

3. The Supreme Court requires that a “state voluntarily and knowingly accepts the terms” beforehand.³ This means that courts will likely strike down attempts to cut off pre-existing federal grants because an entity has a “sanctuary” policy.
4. The conditions *cannot compel a state to do anything unconstitutional*.
5. The conditions *must be substantively related* to the interest or purposes of the federal funds at stake.

Supreme Court Chief Justice Roberts has written that the relationship between a condition and the funding purpose must be more than “attenuated or tangential.”

This means that, if Congress places conditions on new federal grants requiring state and municipal cooperation in immigration enforcement and deportation, Congress must show that the purposes of the funding is related to state or municipal immigration enforcement.

For example: requiring state and municipal cooperation in immigration enforcement in order to receive federal transportation dollars may not hold up in court.

6. Finally, according to the Supreme Court, the federal conditions cannot be coercive.

When does “pressure turn into coercion”? Here the Court has not laid out a precise “test”, but it is clear that the **amount** of funding at stake **matters**.⁴ Across-the-board exclusion of a state or municipality from all federal funding may well qualify as coercive by any definition.

³ *National Federation of Independent Business v. Sebelius* (2012), quoting *Pennhurst State School and Hospital v. Halderman* (1981).

⁴ See *National Federation of Independent Business v. Sebelius* (2012).