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## Sanctuary Cities and the Trump Administration: The Practical Limits of Federal Power

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## ARTICLE

### SANCTUARY CITIES AND THE TRUMP ADMINISTRATION: THE PRACTICAL LIMITS OF FEDERAL POWER

JOSHUA W. DANSBY\*

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ABSTRACT

On January 25, 2017, President Donald J. Trump signed an executive order with the supposed purpose of enhancing public safety of the interior of the United States. Part of the Administration’s plan includes threatening “sanctuary jurisdictions,” also known as “sanctuary cities,” with the loss of federal funds for failing to comply with federal law, specifically 8 U.S.C. § 1373.

There are several problems with this plan: (1) there is no solid definition for what makes a city a “sanctuary;” (2) if we accept the Administration’s allusion that a sanctuary jurisdiction is one that “willfully” refuses to comply with 8 U.S.C. § 1373, practically no city constitutes a sanctuary jurisdiction; (3) 8 U.S.C. § 1373, absent specific spending clause obligations, threatens to run afoul of federalism principles as laid out in the Supreme Court case *Printz v. United States*; (4) the order vests discretionary authority in the Secretary of Homeland Security (Secretary) to designate a jurisdiction as a sanctuary; and (5) the stripping of federal funds from “sanctuary jurisdictions” flirts with the prohibition against federal government coercion via threats of defunding as described in *National Federation of Independent Business v. Sebelius*.

The Administration’s current plan, represented in Executive Order No. 13768, is a vague, unsophisticated, and an unconstitutional attempt to require states and local law enforcement to assist the federal government with enforcing immigration law. Examining the background of federal power with regards to immigration, the author will examine the Administration’s Executive Order in the context of limitations on federal power, as well as determine ways the federal government can receive local law enforcement’s aid without violating any constitutional principles.

## I. INTRODUCTION

Part II of this article considers the origination of the federal government's, and in particular the Executive Branch's, power to enforce immigration laws. This section discusses the roles of the different branches of the federal government concerning immigration; the role federalism plays in placing practical limits on those branches in the area of immigration; and walk through an example of a Federal and Local Government immigration enforcement action. Part III focuses on Executive Order 13768 (E.O. 13768): sanctuary jurisdictions, or cities as they will be referred to synonymously throughout the manuscript.<sup>1</sup> This section analyzes three main issues: (1) the absent definition of "sanctuary city;" (2) whether the definition of "sanctuary jurisdiction" E.O. 13768 appears to purport should be interpreted as a legal and enforceable definition, and, if so, what types of municipal action results in a city being labeled a sanctuary jurisdiction; and (3) the limited number of jurisdictions E.O. 13768's "sanctuary jurisdiction" definition would actually apply to due to local government creativity.

Part IV focuses on the underlying statute on which E.O. 13768 relies in regards to determining which jurisdictions should be labeled sanctuaries, 8 U.S.C. § 1373,<sup>2</sup> and also addresses whether 8 U.S.C. § 1373 can be reconciled with *Printz v. United States*.<sup>3</sup> Further, this section briefly describes the Spending Clause<sup>4</sup> as well as the Office of Justice Program's (OJP) guidance for compliance with 8 U.S.C. § 1373. Part V addresses the consequences of applying E.O. 13768 to sanctuary jurisdictions. This section discusses: (1) the Secretary having seemingly sole authority and discretion to designate a city a sanctuary jurisdiction; and (2) the issue that is illustrated through the case of *National Federation of Independent Business v. Sebelius*.<sup>5</sup> Part VI asserts that the Trump Administration's goal in enacting E.O. 13768, the punishment of localities that adopt laws and policies that make it more difficult for federal immigration enforcement to carry out their duties, is entirely realizable if the Administration simply takes a different approach.

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1. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).
  2. 8 U.S.C. § 1373 (2012); Exec. Order No. 13768, 82 Fed. Reg.
  3. 521 U.S. 898 (1997).
  4. U.S. CONST. art. I, §8, cl. 1.
  5. 567 U.S. 519 (2012).

This Article argues the arbitrary nature of the government action and discretionary nature of the sanctuary jurisdiction designation, both contained in the executive order, could be removed by creating a formal review process through the Department of Justice's (DOJ) Office of the Inspector General's (OIG) Office, similar to the former compliance guidance process regarding 8 U.S.C. § 1373 under the Office of Justice Program. Lastly, the Article addresses the question of whether E.O. 13768 is constitutional.

## II. IMMIGRATION AND THE FEDERAL GOVERNMENT

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. . . . This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," and its inherent power as sovereign to control and conduct relations with foreign nations . . .<sup>6</sup>

Immigration is one of the few areas Congress has plenary power over<sup>7</sup> because immigration is a question of national sovereignty relating to a nation's right to define its borders.<sup>8</sup> As such, courts traditionally give immigration matters a wide berth, as demonstrated by the "border search exception" to the Fourth Amendment, which allows for searches and seizures at the United States border without the typical probable cause determination or warrant requirement.<sup>9</sup> Given its broad powers in the realm of foreign affairs, diplomacy, and security, the Executive Branch

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6. *Arizona v. United States*, 567 U.S. 387, 394–97 (2012) (citations omitted).

7. See Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy?*, CTR. FOR IMMIGRATION STUD. (Feb. 25, 2009), <http://cis.org/plenarypower> [<https://perma.cc/BAH6-H6EF>] ("The ability of Congress and the executive branch to regulate immigration is what has come to be known as the political branches' "plenary power" over immigration.").

8. See *Ting v. United States*, 149 U.S. 698, 705 (1893) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases as upon such conditions as it may see fit to prescribe.") (quoting *Ekiu v. United States*, 142 U.S. 651, 659 (1892)); see also Feere, *supra* note 7 (arguing that the government's power to exclude noncitizens is un-debatable and incident to every independent nation).

9. See *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (asserting warrantless border searches are reasonable under the Constitution as part of the "longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country . . .").

is often granted wide latitude when enforcing immigration laws.<sup>10</sup> However, this plenary power, ironically, is not absolute.<sup>11</sup>

In *Zadvydas v. Davis*,<sup>12</sup> the Supreme Court held that the plenary power doctrine is subject to constitutional limitations and does not justify indefinite detention of foreign-born nationals.<sup>13</sup> The Court reasoned that constitutional protections through the Due Process Clause apply to all persons within the United States, regardless of immigration status.<sup>14</sup> *Zadvydas* established that there are important constitutional limitations to executive and legislative action in the field of immigration and was referenced recently in the Ninth Circuit case of *Washington v. Trump*,<sup>15</sup> which challenged an executive order similar to the one discussed in this article.<sup>16</sup>

While Congress and the Executive Branch may have power over immigration,<sup>17</sup> the federal government relies on state and local cooperation to carry out and enforce the nation's immigration laws. This is a matter of practicality, as state and local law enforcement officers far outnumber federal immigration enforcement personnel.<sup>18</sup> While the federal government may promulgate immigration laws and policies in the United States, both Congress and the Executive Branch are still bound by

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10. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950) (explaining that the admission or exclusion of foreign-born nationals does not solely stem from the legislative power but is also inherent in the executive power to control foreign affairs, and thus the decision to admit or exclude foreign-born nationals could be placed with the President, who may then delegate that authority to an executive officer).

11. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (imposing limitations upon the Attorney General's ability to indefinitely detain unauthorized immigrants).

12. 533 U.S. 678 (2001).

13. *Id.* at 695.

14. *Id.* at 693.

15. 847 F.3d 1151, 1162 (9th Cir. 2017).

16. *Id.* at 1156. The executive order banned for ninety days the entry of certain individuals from seven different countries. *Id.*

17. *Arizona v. U.S.*, 567 U.S. 387, 394–95 (2012) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”).

18. Compare BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 1 (2011), <https://www.bjs.gov/content/pub/pdf/cs1lea08.pdf> [<https://perma.cc/YLW2-RPY5>] (reporting that state and local law enforcement employed approximately 1,133,000 persons in 2008), with BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 2008, at 2 (2012), <https://www.bjs.gov/content/pub/pdf/fleo08.pdf> [<https://perma.cc/BN9B-C2BZ>] (reporting only 55,000 officers employed by DHS).

the federalism principles delineated in the Tenth Amendment.<sup>19</sup> The seminal case demonstrating the limits of commanding state and local cooperation is *Printz v. United States*.<sup>20</sup>

In *Printz*, the Supreme Court determined whether certain provisions of the Brady Handgun Violence Prevention Act violated the Constitution of the United States.<sup>21</sup> The Supreme Court held that the provisions requiring state and local law enforcement to perform duties pursuant to the execution of the Act, such as background checks, violated the Tenth Amendment.<sup>22</sup> In reaching this conclusion the Court analyzed the “historical understanding and practice, the structure of the Constitution, and in the jurisprudence of [the] Court.”<sup>23</sup> The historic understanding of the Constitution revealed that the federal government usually abstained from exercising control over state officials for the vast majority of the nation’s history.<sup>24</sup> The structure of the Constitution demonstrated it was built on principles of federalism or dual sovereignty, which cannot be realized if the federal government could commandeer and order state officials to act against their will.<sup>25</sup> Allowing Congress to “draft” state law enforcement into enforcing federal law would violate Separation of Powers, as the President would be robbed of his ability to appoint or remove administrators to execute the laws.<sup>26</sup> Nor is Congress permitted to enlist the power of the states to circumvent the power of the Executive.<sup>27</sup>

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19. See U.S. CONST. amend. X (“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.”).

20. 521 U.S. 898 (1997).

21. *Id.* at 902 (citing Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (codified as amended at 18 U.S.C. § 922 (1994)); see H.R. REP. NO. 103-344, at 7–10 (1993) (explaining that the bill establishes a “national, five-day waiting period for the purchase of a handgun” and local law enforcement are to use the waiting period to determine whether the purchaser has any felony convictions or is prohibited from purchasing a handgun).

22. *Printz*, 521 U.S. at 902, 933.

23. *Id.* at 905.

24. *Id.* at 905–18 (rebutting each of the government’s assertions that the historical understanding and practice of the Constitution was to require states to perform federal duties).

25. *Id.* at 918–22.

26. *Id.* at 922–23.

27. Cf. *New York v. United States*, 505 U.S. 144, 166 (1992) (holding that the Tenth Amendment is violated when Congress directs states to regulate in a particular way, as the Constitution does not authorize Congress to commandeer the state legislative process by compelling states to enact and enforce a federal regulatory program).

Lastly, prior case law, such as *New York v. United States*,<sup>28</sup> established that even when acting within its constitutional authority to enable or prohibit certain acts, Congress could not force state legislatures to pass laws enabling or prohibiting those same acts.<sup>29</sup>

Because *Printz* determined the federal government cannot commandeer state and local forces into administering laws passed by Congress,<sup>30</sup> we must return back to the idea of cooperation and voluntary compliance.<sup>31</sup> The following is an example of normal federal-local government interaction during immigration enforcement:

A city police officer pulls someone over and arrests him or her for something unrelated to citizenship (such as drunken driving or disorderly conduct). Whether or not the city has a sanctuary policy. . .

. . . he or she is booked into the local county jail, which is usually run by the county sheriff's department.

At the jail, his or her fingerprints are taken and sent to the FBI, which sends the inmates' information to Immigration and Customs Enforcement. U.S. law requires this information sharing between local and federal law enforcement agencies.

If ICE finds that the inmate is undocumented, it submits a detainer request to the county jail. ICE typically asks jails to hold inmates an extra 48 hours after they would otherwise be released so they can get a warrant to begin deportation proceedings.

The Department of Homeland Security has said that complying with these requests is voluntary because keeping someone in jail without a warrant violates the 4th Amendment. So, what happens next depends on county policy.

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28. 505 U.S. 144 (1992).

29. *Printz*, 521 U.S. at 935 (“Congress cannot compel the States to enact or enforce a federal regulatory program . . . Congress cannot circumvent that prohibition by conscripting the State’s officers directly. 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”) (citing *New York v. United States* at 186–87). The Court described such a violation of state sovereignty as “‘merely [an] ac[t] of usurpation.’” *Id.* at 924 (quoting *The Federalist No. 33* at 204).

30. *Id.* at 933 (citing *New York v. United States*, 505 U.S. at 188).

31. *Id.* at 916–18 (describing historical accounts of Presidents soliciting or requesting state executives support of compliance with federal mandates relating to a number of federal matters).



If the county says “No.” If the jail is in a county with a policy of frequently declining these requests, the inmate is released once the criminal case is complete—if he or she is convicted but doesn’t face additional jail time, if charges are dropped or if bail is met.

If the county says “Yes.” If the county typically complies with ICE requests, the inmate would stay in jail while ICE works to obtain an administrative deportation warrant.

If ICE obtains the warrant, they could pick up the inmate and transfer him to a federal prison.

Eventually, the inmate could be deported.<sup>32</sup>

If the undocumented immigrant is released, it will then be up to ICE to find the individual themselves, often resulting in expending more man-hours and resources.<sup>33</sup> In either scenario, once an individual is in ICE custody, he or she will be processed and deported, absent any form of immigration relief the immigrant may be able to claim.<sup>34</sup>

### III. SANCTUARY CITIES

#### A. *Defining a “Sanctuary City”*

With the media, the Trump Administration, and this very manuscript focusing on sanctuary cities, it might be helpful to have a definition of

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32. Darla Cameron, *How Sanctuary Cities Work, and How Trump’s Executive Order Might Affect Them*, WASH. POST (Jan. 18, 2017), <https://www.washingtonpost.com/graphics/national/sanctuary-cities/> [https://perma.cc/KKF9-FN29]; see LENA GRABER & NIKKI MARQUEZ, IMMIGRANT LEGAL RES. CTR., SEARCHING FOR SANCTUARY (2016), <https://www.ilrc.org/local-enforcement-map> [https://perma.cc/3HZP-8EXY] (providing statistics on the counties that honor or do not honor detainer requests).

33. See BEN GITIS & LAURA COLLINS, AM. ACTION FORUM, THE BUDGETARY AND ECONOMIC COSTS OF ADDRESSING UNAUTHORIZED IMMIGRATION: ALTERNATIVE STRATEGIES (2015), <https://www.americanactionforum.org/research/the-budgetary-and-economic-costs-of-addressing-unauthorized-immigration-alt/> [https://perma.cc/SSJ2-D8Q3] (reporting that the costs of investigating and detaining individuals suspected of being removable would be more costly without the help of state and local law enforcement). According to the report, if ICE were to use its own investigators to detain 8.96 million individuals without the help of state and local law enforcement, it would need \$243.3 billion, while a total of \$43.5 billion would be needed if state and local law enforcement cooperated. *Id.*

34. See *Possible Defenses to Deportation of An Undocumented Alien*, NOLO.COM, <https://www.nolo.com/legal-encyclopedia/possible-defenses-deportation-undocumented-alien.html> [https://perma.cc/7RZ5-ESJ9] (discussing the different forms of relief in removal proceedings).

what exactly a “sanctuary city” is. The problem is that there is no set definition, legally or colloquially, for the term.<sup>35</sup>

The problem with the Executive Order that authorizes funding to be stripped from sanctuary cities is that the Order does not define the term.<sup>36</sup> If there is no set definition of what constitutes a “sanctuary city,” then the administrator is left only two options: arbitrary enforcement of the order, or no enforcement at all.<sup>37</sup> This is not to say that it would be impossible to create a definition, or that there are no common characteristics that typify “sanctuary cities.”<sup>38</sup> Such characteristics may include: not discriminating between undocumented and documented immigrants for taxpayer funded services;<sup>39</sup> a tendency of not honoring ICE detainer requests;<sup>40</sup> or prohibiting law enforcement and other employees from inquiring about an individual’s immigration status while providing

35. See Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (failing to provide a definition of a “sanctuary jurisdiction,” other than one that “willfully” refuses to comply with 8 U.S.C. § 1373 (2012)); see also Rose Cuison Villazor, *What is a Sanctuary*, 61 SMU L. REV. 133, 135 (exploring the changing understanding and characterization of the term “sanctuary cities” and its outward perception as interchangeably beneficial or tainted); Alan Gomez, *A Multimillion-Dollar Question: What’s a Sanctuary City’?*, USA TODAY (Apr. 26, 2017, 6:14 PM), <https://www.usatoday.com/story/news/world/2017/04/26/multi-million-dollar-question-whats-sanctuary-city/100947440/> [<https://perma.cc/DK3K-G6UY>] (explaining there is no legal definition of “sanctuary city” and that the DOJ refused to comment when asked to define a “sanctuary city”).

36. Exec. Order No. 13768, 82 Fed. Reg.

37. See *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 535 (N.D. Cal. 2017) (explaining that E.O. 13768 fails to articulate clear standards for the Secretary, which can lead to “arbitrary and discriminatory enforcement” of the order). Specifically, the preliminary injunction opinion stated that the order failed to designate a clear definition of what a “sanctuary jurisdiction” is, thus providing the Secretary with unfettered discretion in its enforcement. *Id.*; see also *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 U.S. Dist. LEXIS 173376, at \*3 (W.D. Wash. Oct. 19, 2017) (stating that E.O. 13768 “does not define ‘sanctuary jurisdiction’ and does not expand upon what constitutes ‘willfully refus[ing]to comply’ with Section 1373.”).

38. See Inez Friedman-Boyce et al., *Legal Analysis: Sanctuary Cities: Distinguishing Rhetoric from Reality*, 61 B.B.J. 8, 8 (2017) (explaining a common objective of sanctuary jurisdictions is to “promote public safety and confidence in local law enforcement.”); see also Jennifer M. Hansen, Comment, *The Unintended Effects of State and Local Enforcement of Immigration Law*, 10 SCHOLAR 289, 298–99 (2008) (highlighting some common characteristics sanctuary cities employ).

39. Jerry Shaw, *3 Characteristic of Sanctuary Cities’ Policies*, NEWSMAX (Oct. 16, 2015, 1:35 AM), <https://www.newsmax.com/fastfeatures/sanctuary-cities-policies/2015/10/16/id/696495/> [<https://perma.cc/X3PS-8XM8>].

40. Friedman-Boyce et al., *supra* note 38, at 8 (2017); Alan Berube, *Sanctuary Cities and Trump’s Executive Order*, BROOKINGS (Feb. 24, 2017), <https://www.brookings.edu/blog/unpacked/2017/02/24/sanctuary-cities-and-trumps-executive-order/> [<https://perma.cc/S2TD-R566>].

benefits and services.<sup>41</sup> However, once you make a list of common characteristics, how many characteristics must be met to warrant the designation of sanctuary city? Are some characteristics weighed differently than others? All of these questions regarding the definition of “sanctuary cities” are relevant to enforcing E.O. 13768.

To further understand the importance of this issue, consider Seattle and Tacoma, Washington. Seattle is widely considered a sanctuary city by the media, the Administration, and the city itself.<sup>42</sup> Mayor Edward Murray signed an executive order declaring Seattle a “Welcoming City,”<sup>43</sup> a term often used to describe a “sanctuary city,” and has filed suit questioning the constitutionality of E.O. 13768 and the Trump administration’s threat to defund “sanctuary jurisdictions.”<sup>44</sup> Tacoma declared itself a “Welcoming City” in 2015.<sup>45</sup> However, Tacoma draws a distinction between “Welcoming” and “Sanctuary,” refusing to go as far as to say that they are a “sanctuary city.”<sup>46</sup>

With cities designating themselves as sanctuary cities, and no uniform definition for the term, one might think the Administration would be inclined to take a city’s word for whether they are a sanctuary city or not. However, Seattle and Tacoma share the common characteristics of

41. Hansen, *supra* note 38, at 299; Candice Ruud, *Tacoma Council Forms Immigrant and Refugee Task Force, Stops Shy of Sanctuary City*, News Trib. (Feb. 1, 2017, 3:15 PM), <http://www.thenewtribune.com/news/politics-government/article129986129.html> [<https://perma.cc/8BAJ-XDRX>] (last updated Feb. 1, 2017, 7:05 PM).

42. *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 U.S. Dist. LEXIS 173376, at \*5 (W.D. Wash. Oct. 19, 2017) (“Both Seattle and Portland (‘Plaintiffs’ or ‘Cities’) pride themselves on their status as welcoming and internationally minded cities.”); Res. 31730, 2017 City Council (Wash. 2017).

43. Res. 31730, 2017 City Council (Wash. 2017); *see* Exec. Order No. 2016-08 (Nov. 23, 2016), [http://murray.seattle.gov/wp-content/uploads/2016/11/Executive-Order-2016-08\\_Welcoming-City.pdf](http://murray.seattle.gov/wp-content/uploads/2016/11/Executive-Order-2016-08_Welcoming-City.pdf) [<https://perma.cc/DG3V-UFTQ>]; *see also* *City Council Affirms Seattle as a Welcoming City*, KING5.COM (Jan. 31, 2017, 6:33 AM), <http://www.king5.com/article/news/local/seattle/city-council-affirms-seattle-as-a-welcoming-city/394694059> [<https://perma.cc/KK9N-8SVC>] (“Seattle is officially a Welcoming City, by order of Mayor Ed Murray and affirmed by the Seattle City Council Monday.”).

44. Compl. for Declaratory Relief, *City of Seattle v. Trump*, No. 2:17-cv-00497 (W.D. Wash. Mar. 29, 2017), ECF No. 1; *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 U.S. Dist. LEXIS 173376 (W.D. Wash. Oct. 19, 2017).

45. Ruud, *supra* note 41.

46. *See id.* (“But the Tacoma council won’t, at least for now, go so far as sanctuary city status.”).

sanctuary cities previously described.<sup>47</sup> When Tacoma’s mayor urged the city council not to pass a resolution declaring Tacoma a “Sanctuary City,” she said: “[m]y position right now is we don’t have to declare ourselves a sanctuary city because in essence, it’s not what we say in a press release, it’s about what we do every single day. . . . In Tacoma, that money matters, and I do not want to put the city in a position to sacrifice federal funding[.]”<sup>48</sup> Regardless of whether or not a city has policies in place that E.O. 13768 is targeting, cities are purposely not naming themselves sanctuary cities in an attempt to skirt the Administration’s gaze.<sup>49</sup> While the form over substance approach may seem ridiculous, without an established definition for “sanctuary jurisdictions,” a city arbitrarily labelling itself a sanctuary city is akin to the arbitrary designation process localities are expecting the federal government to undertake when enforcing E.O. 13768.<sup>50</sup>

#### B. “Sanctuary Jurisdictions” under Executive Order 13768

With the confusion E.O. 13768 has caused, and cities questioning how their status as a “sanctuary” will be determined (and the subsequent fate of its federal funding), it is of some comfort that the Order at least alludes to a definition.<sup>51</sup> “In furtherance of this policy, the Attorney

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47. See Res. 31730, 2017 City Council (Wash. 2017) (implementing policies, such as making city services accessible to all, regardless of immigration status; honoring detainer requests only when they are accompanied by a criminal warrant; and directing city employees not to inquire into immigration status when people seek city services).

48. Ruud, *supra* note 41.

49. See, e.g., *id.* (urging the city council not to declare Tacoma a sanctuary city due to potential loss of federal funding); Ruben Vives et al., *Fresno Mayor Vows His Town Won’t Become ‘Sanctuary City,’ Bucking California Trend*, L.A. TIMES (Jan. 25, 2017, 6:35 PM), <http://www.latimes.com/local/lanow/la-me-sanctuary-city-california-20170125-story.html> [https://perma.cc/2T23-7MEM] (quoting Fresno Mayor Lee Brand, “I’m not going to make Fresno a sanctuary city because I don’t want to make Fresno ineligible from receiving potentially millions of dollars in infrastructure and other types of projects . . .”). Threatening to defund states for non-compliance with federal laws is not new. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 542 (2012) (discussing the Affordable Care Act’s requirement that if a state fails to comply with the new coverage requirements, it may lose federal funding).

50. See Ruud, *supra* note 41 (“[A] city with the tax base of Tacoma . . . can’t afford to lose the roughly \$85 million in federal funding it gets each year. That’s the risk that run’s with self-identifying as a sanctuary city . . .”).

51. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (failing to provide a definition of a “sanctuary jurisdiction,” other than one that “willfully” refuses to comply with 8 U.S.C. § 1373 (2012)); see also Villazor, *supra* note 35 at 135 (exploring the changing

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 . . . .”<sup>52</sup> A plain reading of this Order seems to imply that the definition of a “sanctuary jurisdiction” the Administration is going to apply to a city or jurisdiction is one that “willfully refuses to comply with 8 U.S.C. § 1373.”<sup>53</sup> Very simply, 8 U.S.C. § 1373 prohibits any federal, state, or local official from prohibiting or restricting “any government entity or official from sending to, or receiving from, the [Department of Homeland Security] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”<sup>54</sup> More specifically, 8 U.S.C. § 1373 prohibits the prevention or restriction of any government entity or official to do the following with regard to immigration information:

- (1) Sending such information to, or requesting or receiving information from, the [DHS];
- (2) Maintaining such information.
- (3) Exchanging such information with any other Federal, State, or local government entity.<sup>55</sup>

A city that passes a law prohibiting law enforcement or city employees from contacting DHS regarding an individual’s immigration status would be deemed a “sanctuary jurisdiction,” using E.O. 13768’s definition, provided the city did so with knowledge that the law would cut against 8 U.S.C. § 1373 (or willfully refused to comply with 8 U.S.C. 1373). Such a determination would result in the city’s federal grant funding being cut.<sup>56</sup> This process sounds simple enough until one realizes application

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understanding and characterization of the term “sanctuary cities” and its outward perception as interchangeably beneficial or tainted).

52. Exec. Order No. 13768, 82 Fed. Reg.

53. *Id.* (citing 8 U.S.C. § 1373 (2012))

54. The statute specifically identifies the Immigration and Naturalization Service (INS) as the agency whose reception of citizenship may not be encumbered. The INS no longer exists, and the majority of its functions were transferred to the Department of Homeland Security (DHS) in 2003. Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135, 2192, 2205 (2002) (codified as amended at 6 U.S.C. §§ 251, 291). 28 U.S.C. § 1373(a) (2012).

55. 28 U.S.C. § 1373 (b) (2012).

56. Exec. Order No. 13768, 82 Fed. Reg. at 8801. Recently, the DOJ sent letters to twenty-nine jurisdictions regarding their non-compliance with 8 U.S.C. § 1373. *Justice Department Sends*

of E.O. 13768's definition to municipalities across the United States would result in practically no jurisdiction being considered a "sanctuary jurisdiction," rendering the Order toothless.

C. *8 U.S.C. § 1373 and Jurisdictions that "Willfully Refuse to Comply" with the Provision*

Neither Seattle nor Tacoma passed an ordinance or policy prohibiting city employees or law enforcement officials from sending or receiving information regarding an individual's citizenship or immigration status to DHS.<sup>57</sup> However, both cities have policies prohibiting law enforcement and city employees from inquiring into an individual's citizenship and immigration status while applying for or providing municipal services.<sup>58</sup> Since local law enforcement and governmental employees are required not to inquire into the citizenship and immigration status of individuals, it is impossible for them to willfully refuse to comply with 8 U.S.C. § 1373 because they cannot be prevented from exchanging information with DHS that they do not have. While E.O. 13768 came after the vast majority of these municipalities promulgated their policies,<sup>59</sup> it seems the cities effectively "outsmarted" the Administration's Order.

Even if an expanded definition of "sanctuary jurisdiction" under E.O. 13768 included consideration of the aforementioned characteristics of

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*Letter to 29 Jurisdictions Regarding Their Compliance With 8 U.S.C. 1373*, DEP'T OF JUST (Nov. 15, 2017), <https://www.justice.gov/opa/pr/justice-department-sends-letters-29-jurisdictions-regarding-their-compliance-8-usc-1373> [<https://perma.cc/T44F-AKMV>]. The DOJ reminded the jurisdictions of the potential for defunding and allotted certain time for the jurisdictions to demonstrate their policies comply with 8 U.S.C. § 1373. *Id.*

57. *See* Res. 31730, 2017 City Council (Wash. 2017) (implementing policies, such as making city services accessible to all, regardless of immigration status and directing city employees not to inquire into immigration status when people seek city services, but no such policy *prohibiting* employees from sending or receiving information regarding an individual's immigration status) (emphasis added).

58. *Id.*; *see also* Seattle Police Manual, tit. 6, § 6.020 (2011), <https://www.seattle.gov/police-manual/title-6> [<https://perma.cc/78AS-EPQH>] ("[O]fficers will not request specific documents for the sole purpose of determining someone's immigration or alien status . . .").

59. The Executive Order was implemented on January 25, 2017. Exec. Order No. 13768, 82 Fed. The mayor of Seattle reaffirmed existing policy regarding the protection of immigrants on November 23, 2016 and affirmed by the City Council on February 2, 2017. Exec. Order No. 2016-08 (Nov. 23, 2016); Res. 31730, 2017 City Council (Wash. 2017). Tacoma declared itself a "Welcoming City" in 2015. Ruud, *supra* note 41.

sanctuary cities, enforcing the Order would still cause a host of problems. Whether a municipality chooses to inquire into immigration status for benefits and services is irrelevant for purposes of E.O. 13768; offering or restricting benefits and services is an issue of state and local law. 8 U.S.C. § 1373 concerns the receiving and sharing of information with DHS rather than local administration of benefits and services.<sup>60</sup> Furthermore, an executive order or federal statute should not require a municipality to honor detainer requests or risk losing federal funding.<sup>61</sup> ICE detainer requests ask state and local law enforcement agencies to hold an immigrant for forty-eight hours.<sup>62</sup> This request from federal authorities to localities may lead to Fourth Amendment violations if the ICE detainer request is not based on probable cause, the inmate is released by a judge, or bail was set and posted.<sup>63</sup> Not only is E.O. 13768 problematic in terms of its ambiguous definition of “sanctuary cities,” enforcement of the order contributes to constitutional violations.

#### IV. 8 U.S.C. § 1373

At first blush, 8 U.S.C. § 1373 seems like a perfectly valid intergovernmental information-sharing statute. The federal law requires state and local governments to refrain from prohibiting any government entity or official from sharing citizenship or immigration information with DHS.<sup>64</sup> However, a federal statute that prohibits state and local

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60. 8 U.S.C. § 1373 (2012).

61. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577–78 (2012) (“Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.”); *Printz v. United States*, 521 U.S. 898, 933 (1997) (striking down federal legislation that commandeers states for federal purposes).

62. *See* 8 C.F.R. § 287.7 (2011) (authorizing any immigration officer to issue a Form I-247 Immigration Detainer–Notice of Action (detainer request) to any other law enforcement agency).

63. *See, e.g.*, *Orellana v. Nobles Cnty.*, 230 F. Supp. 3d 934, 944, 946 (D. Minn. 2017) (finding that the inmate’s incarceration after he posted bail was solely based on an ICE detainer, and amounted to a violation of the Fourth Amendment because the detainer was not based on probable cause); *El Cenizo v. Texas*, 264 F. Supp. 3d 744, 809 (W.D. Tex. 2017) (“And the Court has found that enforcement of mandatory detainer provisions will inevitably lead to Fourth Amendment violations.”); *Santoyo v. United States*, No. 5:16-CV-855-OLG, 2017 U.S. Dist. LEXIS 106253, at \*24-25 (W.D. Tex. June 5, 2017) (finding that Santoyo’s detention pursuant an ICE detainer was not based on probable cause).

64. 8 U.S.C. § 1373 (2012).

governments from exercising authority over their own law enforcement officials is unconstitutional without the Spending Clause.<sup>65</sup>

A. *8 U.S.C. § 1373 and Federalism*

The holding of *Printz* states that an attempt by the federal government to appropriate state and local officials for a federal purpose violates the Tenth Amendment of the United States Constitution.<sup>66</sup> 8 U.S.C. § 1373 does not require any affirmative action on part of state or local officials, it simply prohibits them from restricting any government official from exchanging information with DHS.<sup>67</sup> Thus, compelling state and local officials to communicate citizenship and immigration information to the federal government would be a violation of the Tenth Amendment.<sup>68</sup> The Administration may argue that state and local officials in possession of citizenship and immigration information may voluntarily communicate that information to DHS, which poses the following question: while state and local officials may voluntarily share information with DHS, does the voluntary nature of the action negate the fact that EO 13768 prohibits state and local legislators from exercising authority over their own law enforcement officers?

State legislatures, county governments, and city councils pass laws that provide oversight and rules for their employees and officials.<sup>69</sup> Section 1373 tells state and local legislatures that they cannot, in effect, legislate.<sup>70</sup> While it has long been recognized that the regulation of immigration is a federal power, it has also been established that state law touching on immigration issues without relating to the regulation and

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65. *E.g.*, *Printz v. United States*, 521 U.S. 898 (1997).

66. *Id.* at 933.

67. 8 U.S.C. § 1373 (2012).

68. *Printz*, 521 U.S. at 933.

69. *See, e.g.*, Louis Lawrence Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Government Employees?*, 7 J.L. & POL. 243, 244 (1991) (reviewing the regulation of state and local government employee political activity by state and local laws, constitutions, and charters); Francis M. Dougherty, Annotation, *Validity, Construction, and Effect of State Statutes Restricting Political Activities of Public Officers and Employees*, 51 A.L.R. 4th 702, § 2[a] (1987) (providing a comprehensive overview of cases in which state statutes and local governmental enactments regulate or restrict the political activities of public officers and employees were upheld where they served governmental interests in maintaining employee discipline and efficacy).

70. 8 U.S.C. § 1373 (2012).



enforcement of federal laws may be valid.<sup>71</sup> Thus, while a state or local law that expressly forbids employees and officials from communicating immigration and citizenship information to DHS would undoubtedly make the federal government's job more difficult, it would not necessarily be unlawful.<sup>72</sup> Ultimately, immigration enforcement is the federal government's job.<sup>73</sup> The fact that a state or local immigration law makes the enforcement of federal immigration laws more difficult is an insufficient justification to ignore the Tenth Amendment.<sup>74</sup>

### B. *The Spending Clause*

The legal foundation for 8 U.S.C. § 1373 rests on cooperation and contract through the power of the Spending Clause.<sup>75</sup> “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . .”<sup>76</sup> The Spending Clause, along with the Commerce Clause, is one of the federal government's most powerful means to pass legislation.<sup>77</sup> The language of the Spending Clause has been interpreted to mean that the federal government can create a national law, which it might not be able to pass under the authority of the

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71. See *DeCanas v. Bica*, 424 U.S. 351, 354, 357–59 (1976) (holding that federal immigration and naturalization laws did not preempt state laws where regulating conditions for admissions of foreign nationals were congruent with federal law; such state laws were not held to be unconstitutional because of consistent state regulatory power).

72. See *id.* at 357–58 n.5.

73. *Id.* at 354.

74. See U.S. CONST. amend. X (“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.”).

75. See U.S. CONST. art. I, § 8 cl. 1 (iterating Congress' power to levy taxes); STAFF OF J. COMM. ON TAX'N, 198TH CONG., 1ST SESS., REVIEW OF THE PRESENT-LAW TAX AND IMMIGRATION TREATMENT OF RELINQUISHMENT OF CITIZENSHIP AND TERMINATION OF LONG-TERM RESIDENCY 2–11 (Comm. Print 2003) (recommending the immigration provision, codified at 8 U.S.C § 1373 (2012), be passed to enable governmental interagency access to the Immigration and Naturalization Service's databases for the purposes of enforcing tax rules).

76. U.S. CONST. art. I, § 8, cl. 1.

77. See generally Michael S. Elliott, Comment, *The Commerce of Physician-Assisted Suicide: Can Congress Regulate a “Legitimate Medical Purpose”?*, 43 WILLAMETTE L. REV 399, 403, 416 (2007) (stating that the two bases of congressional power are the Commerce and Spending Clauses).

Commerce Clause, if they attach federal monies to it.<sup>78</sup> The reasoning behind this is that the states may voluntarily accept the federal money, and thus comply with the new law, or they may decline to act and lose the funds.<sup>79</sup> When brute force through the Commerce Clause does not work, Congress can always try bribery via the Spending Clause.<sup>80</sup> This concept is perhaps best illustrated in the case of *South Dakota v. Dole*.<sup>81</sup>

In *South Dakota v. Dole*, South Dakota challenged a federal law that authorized the withholding of 5% of the federal funds given to states for highway transportation, if they declined to adopt a minimum drinking age of twenty-one on the basis that the law infringed upon states' rights.<sup>82</sup> The Supreme Court held the statute was a valid exercise of Congress's authority under the Spending Clause and established a five-part test to consider the constitutionality of such acts: (1) The spending must promote "the general welfare;" (2) The condition must be unambiguous; (3) The condition should relate "to the federal interest in particular national projects or programs;" (4) The condition imposed on the states must not, in itself, be unconstitutional; and (5) The condition must not be coercive.<sup>83</sup>

Section 1373 was passed with the Spending Clause as Congress's basis for the law, and as such, states and localities complying with the statute are doing so not because of a command from the federal government, but because they receive money from the federal government.<sup>84</sup> 8 U.S.C. § 1373 may well pass the five rule test as a valid exercise of Congress's

78. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (stating legislation enacted under Congress' spending powers is similar to a contract; in return for federal funds, the states agree to comply with federal regulations).

79. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012) ("Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer.").

80. *See Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (claiming Congress has repeatedly used its Spending Power to further its broad policy objectives by conditioning receipt of federal funds upon compliance with federal legislation and that the U.S. Supreme Court has continually upheld this technique against constitutional challenge in order to induce state governments to cooperate with federal policies).

81. 483 U.S. 203 (1987).

82. *Id.* at 205 (citing 23 U.S.C. § 158 (1984)).

83. *Id.* at 207.

84. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

Spending Clause power, but whether or not E.O. 13768 is constitutional remains to be seen.

*C. 8 U.S.C. § 1373 Compliance*

Prior to E.O. 13768, the Office of Justice Programs (OJP) of the Department of Justice (DOJ) issued guidelines to ensure grantees receiving funding knew the standards by which compliance with 8 U.S.C. § 1373 would be measured:

If OJP becomes aware of credible evidence of a violation of Section 1373, the recipient must agree to undertake a review to validate its compliance with 8 U.S.C. § 1373. If the recipient determines that it is in compliance with Section 1373 at the time of review, then it must submit documentation that contains a validation to that effect and includes an official legal opinion from counsel (including related legal analysis) adequately supporting the validation. If the recipient determines that it is not in compliance with Section 1373 at the time of review, then it must take sufficient and effective steps to bring it into compliance and submit documentation that details the steps taken, contains a validation that the recipient has come into compliance, and includes an official legal opinion from counsel (including related legal analysis) adequately supporting the validation. Failure to remedy any violations could result in a referral to the Department of Justice Office of the Inspector General, the withholding of grant funds or ineligibility for future OJP grants or subgrants, or other administrative, civil, or criminal penalties, as appropriate.<sup>85</sup>

EO 13768 states that the Secretary retains authority and discretion to designate a jurisdiction a sanctuary jurisdiction and those jurisdictions refusing to comply with 8 U.S.C. § 1373, or sanctuary jurisdictions, shall not be eligible for federal grants at the Secretary and Attorney General's discretion.<sup>86</sup> Thus, the confusion many localities feel is understandable, as it appears EO 13768 replaced the existing compliance policy with a vague and highly unpredictable process for analyzing whether cities may be stripped of funding.

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85. OFF. OF JUST. PROGRAMS, ADDITIONAL GUIDANCE REGARDING COMPLIANCE WITH 8 U.S.C. § 1373 (2016), <https://www.bja.gov/funding/Additional-BA-Guidance-on-Section-1373-October-6-2016.pdf> [<https://perma.cc/EK7F-S79J>] [hereinafter ADDITIONAL GUIDANCE].

86. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

## V. DEFUNDING SANCTUARY JURISDICTIONS

E.O. 13768's provisions relating to the stripping of federal funds from "sanctuary" jurisdictions are unconstitutional.<sup>87</sup> The combination of vague and conflicting standards used to determine a "sanctuary jurisdiction"; the discretion vested in the Secretary of DHS or Attorney General to determine whether a jurisdiction is a "sanctuary"; and the impermissibly coercive nature of E.O. 13768 results in an Order that cannot stand.<sup>88</sup>

A. *Due Process and Discretion*

Under the old OJP guidelines, localities were given a chance to prove they were in compliance with 8 U.S.C. § 1373 or show that they were rectifying noncompliance prior to their federal funds being withheld.<sup>89</sup> In contrast, E.O. 13768 leaves the stripping of federal funds entirely in the hands of one individual, the Secretary of Homeland Security.<sup>90</sup> This raises a due process concern analyzed in *Mathews v. Eldridge*.<sup>91</sup>

In *Mathews*, Eldridge had his Social Security benefits terminated without an evidentiary hearing prior to termination, which would have afforded him an opportunity to argue for the continuation of his benefits.<sup>92</sup> The Supreme Court ultimately held that individuals have a statutorily granted property right in Social Security benefits implicating

87. See *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 533 (N.D. Cal. 2017) (enjoining Executive Order 13768 which threatens a jurisdiction with losing all federal grants because it violates the Tenth Amendment by coercively compelling that jurisdiction to enforce federal immigration policies); see also *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (finding that financial inducement to comply with federal law can be "so coercive as to pass the point at which 'pressure turns into compulsion'").

88. *Trump*, 250 F. Supp. 3d at 533 (stating the standardless language of E.O. 13768 creates potential for arbitrary enforcement).

89. See ADDITIONAL GUIDANCE, *supra* note 85 (outlining the process by which recipients can remedy noncompliance); see also *Justice Department Provides Last Chance for Cities to Show 1373 Compliance*, DEP'T OF JUST. (Oct. 12, 2017), <https://www.justice.gov/opa/pr/justice-department-provides-last-chance-cities-show-1373-compliance> [<https://perma.cc/E7SH-X3NJ>] (listing jurisdictions identified by the DOJ's inspector General as having laws that potentially violate 8 U.S.C. § 1373, and requiring that they show proof of compliance).

90. Exec. Order No. 13768, 82 Fed. Reg. at 8801.

91. 424 U.S. 319, 323 (1976) (deciding whether "the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit pay the recipient be afforded an opportunity for an evidentiary hearing").

92. *Id.* at 324.

the Due Process Clause and the following factors have to be weighed when there is a question of due process of governmental action:

(1) the interests of the individual in retaining their property and the injury threatened by the official action; (2) the risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards; and (3) the costs and administrative burden of the additional process, and the interests of the government in efficient adjudication.<sup>93</sup>

Similar to Social Security benefits, localities use federal grants to supplement their income and balance their budgets.<sup>94</sup> Federal grants are defined as

. . . legal instrument reflecting the relationship between the United States Government and a State, a local government, or other entity when 1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and 2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.<sup>95</sup>

Through the federal grant programs, local governments and states receive money through a statutorily created property interest in the funds that are extended to them.<sup>96</sup> Considering federal grants under the first of the *Mathews* factors, the interest of the jurisdictions in retaining the money and the injury resulting from such monies being officially withheld would

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93. *Id.* at 321, 332.

94. See Robert S. Catz, *Due Process and Federal Grant Termination: Challenging Agency Discretion Through a Reasons Requirement*, 59 WASH. U. L. Q. 1067, 1123 (1982) (indicating federal grant programs are the result of “express congressional decision that public funds should be advanced . . . in order to achieve a public purpose.”); Iris J. Lav & Michael Leachman, *At Risk: Federal Grants to State and Local Governments: Programs for Low-and Moderate-Income Families Could Be Bear the Brunt of Cuts*, CTR. ON BUDGET & POL’Y PRIORITIES (Mar. 13, 2017), <https://www.cbpp.org/research/state-budget-and-tax/at-risk-federal-grants-to-state-and-local-governments> [<https://perma.cc/2HPL-L7VS>] (“Federal funds that go to state and local governments as grants help finance critical programs and services on which residents of every state rely.”).

95. Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. § 6304 (2012).

96. See *Mathews*, 424 U.S. at 332 (“[T]he interest . . . in continued receipt of . . . benefits is a statutorily created “property” interest protected by the Fifth Amendment.”).

be great.<sup>97</sup> Not only do localities come to rely upon the federal funds as part of their budget, but often federal grants fund transit, social services, and economic development.<sup>98</sup>

The procedures outlined in E.O. 13768 do not increase the risk of error, they assure it.<sup>99</sup> Granting the Secretary authority and discretion to designate a locality a sanctuary jurisdiction is the epitome of arbitrary government action.<sup>100</sup> Even if the Secretary were to be guided by the definition and standards by which to evaluate the designation of a “sanctuary jurisdiction,” the Order states that a “sanctuary city” is one that willfully refuses to comply with 8 U.S.C. § 1373.<sup>101</sup> How will “willfully refus[ing] to comply with 8 U.S.C. 1373”<sup>102</sup> be interpreted if a jurisdiction that complies with the statute can produce the same result as a jurisdiction that does not comply?<sup>103</sup> Large cities with large immigrant populations, such as Seattle, Los Angeles, Chicago, and New York City will be left wondering whether their city will be designated as a “sanctuary jurisdiction,” because of non-compliance with 8 U.S.C. § 1373, or because the Secretary, whose position is at-will, was instructed

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97. *See id.* at 321 (explaining that when there is a question of due process of governmental action in terminating benefits, the interests of the individual in retaining their property and the injury threatened by the official action must be weighed).

98. *E.g.*, Allison Sundell, *Mayor Asks City Council to Not Declare Tacoma Sanctuary City*, KING5 NEWS (Feb. 1, 2017, 4:44 AM), <http://www.king5.com/news/local/tacoma/mayor-asks-city-council-to-not-declare-tacoma-a-sanctuary-city/395224991> [<https://perma.cc/97CQ-5QUK>] (explaining Tacoma’s dependence on federal funds for transportation, welfare services and other economic development programs).

99. Eli Rosenber, *Federal Judge Blocks Trump’s Executive Order on Denying Funding to Sanctuary Cities*, WASH. POST (Nov. 21, 2017) [https://www.washingtonpost.com/news/politics/wp/2017/11/21/federal-judge-blocks-trumps-executive-order-on-denying-funding-to-sanctuary-cities/?hpid=hp\\_hp-top-table-main-trump-immigration%3Aexecutive-order%3Ahomepage%2Ft&utm\\_term=.6b79e8331487](https://www.washingtonpost.com/news/politics/wp/2017/11/21/federal-judge-blocks-trumps-executive-order-on-denying-funding-to-sanctuary-cities/?hpid=hp_hp-top-table-main-trump-immigration%3Aexecutive-order%3Ahomepage%2Ft&utm_term=.6b79e8331487) [<https://perma.cc/23FU-GALW>] (quoting law professor Heidi Li Feldman of Georgetown University, “[L]iterally every way the executive branch could violate the Constitution with regard to municipalities, this administration has.”).

100. *See County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1217 (N.D. Cal. 2017) (“The Executive Order also fails to provide clear standards to the Secretary and the Attorney General to prevent ‘arbitrary and discriminatory enforcement.’” (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 92 (1972)).

101. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

102. *Id.*

103. A complying jurisdiction may choose not to ask residents about immigration or citizenship status and therefore is under no obligation to submit information that it does not have to DHS. A non-complying jurisdiction may willfully refuse to comply with Section 1373 and prevent submission of information to DHS. In both instances, DHS has not received any information.

to make the designation by the President of the United States because the city made fun of his proclivity for golfing.

The second *Mathews* factor considers the adequacy of existing processes to prevent erroneous deprivation of a particular interest and the value (or cost) of an alternative procedural option to make a similar conclusion.<sup>104</sup> In the absence of a workable definition, the designation of a jurisdiction as a sanctuary and subsequently eligible for defunding is a discretionary decision vested in the Secretary and Attorney General.<sup>105</sup> This is a declaration, not a process. This type of process, or lack thereof, runs afoul of the second *Mathews* factor and the Administration cannot vest such discretionary authority in an individual that would lead to arbitrary discrimination.<sup>106</sup> Such discretionary decision-making may be based on “incorrect or misleading factual premises” or in this case, an arbitrary interpretation of what “sanctuary jurisdiction” means.<sup>107</sup>

The last factor of the *Mathews* test considers “the Government’s interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>108</sup> Section 9 of the Executive Order asserts no government interest in making a jurisdiction ineligible to receive federal grants.<sup>109</sup> The value and import of the state interest at stake (federal funding), at a minimum would warrant an opportunity to respond to the deprivation of such interest and outweigh whatever countervailing interest the federal government might assert.<sup>110</sup> The presumptive value to the federal

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104. *Mathews*, 424 U.S. at 334–35.

105. Exec. Order No. 13768, 82 Fed. Reg. at 8801.

106. *See Green v. McElroy*, 360 U.S. 474, 507 (1959) (“Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process.”); *Catz*, *supra* note 94 at 1089 (“The essence of due process is that legally generated expectations of continued receipt of government benefits may not be summarily denied by arbitrary administrative action.”).

107. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

108. 424 U.S. at 335.

109. Exec. Order No. 13768, 82 Fed. Reg. at 8799.

110. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (“The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.”). *Cf. Mackey v. Montrym*, 443 U.S. 1, 18 (1979) (finding the state’s interest in public safety warranted the immediate suspension of a driver’s license following an individual’s refusal to submit to a breathalyzer test upon arrest for suspected drunk driving.); *Parham v. J.R.*, 442 U.S. 584 (1979) (indicating the procedures relied on to admit children

government of additional procedural processes to comply with due process standards is presumably minimal considering the 2016 OJP guidelines.<sup>111</sup> In the past, the federal government developed additional procedures for other agency determinations, and it is not unreasonable for the federal government to assume the burden of providing constitutional due process standards in the determination of “sanctuary jurisdiction.” In practice, the Administration’s Order will fail the Due Process analysis under *Mathews v. Eldridge*.

#### B. National Federation of Independent Business v. Sebelius

In *National Federation of Independent Business v. Sebelius*,<sup>112</sup> the Supreme Court for the first time held that Congress used its power under the Spending Clause in a way that was impermissibly coercive.<sup>113</sup> As part of the Patient Protection and Affordable Care Act (ACA), Congress passed a provision requiring states to expand Medicaid coverage in order to receive federal Medicaid funding, or else lose Medicaid funding altogether.<sup>114</sup> The Court reasoned that Congress had presented the states with a *fait accompli*.<sup>115</sup> Congress’s threat of withholding Medicaid funding for non-compliance with ACA would mean the decimation of state budgets,<sup>116</sup> violating the fifth element of *Dole*’s test as an impermissible coercive use of the Spending Clause.<sup>117</sup>

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to state mental hospitals were adequate to support the state’s interest of avoiding erroneous admittance of patients compared to an adversarial hearing requested by a class of patients).

111. See ADDITIONAL GUIDANCE *supra* note 85. The procedures detailed in the guidance memo require only the submittal of documentation by a grant recipient showing either compliance with § 1373 or alternatively a legal opinion adequately supporting a claim that a recipient has taken steps to return to compliant status. *Id.*

112. 567 U.S. 519 (2012).

113. *Id.* at 581, 585 (comparing a federal law’s threat to reduce federal highway funding by 5% for failure to raise the drinking age to twenty-one as financial encouragement in comparison to the ACA’s threat of 100% reduction as financially coerciveness).

114. *Id.* at 585 (“Section 1396c gives the Secretary of Health and Human Services the authority . . . withhold *all* ‘further [Medicaid] payments . . . to the State’ if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion.”) (citing 42 U.S.C. § 1396c).

115. *Id.* at 581 (“[T]he financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”)

116. See *id.* at 581–82 (“Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs.”).

117. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).



Similarly, the failure of E.O. 13768 to specify which federal grants would be withheld from non-compliant jurisdictions leaves the implication that *all federal monies* may be withheld, resulting in an impermissible coercive use of Congress's spending powers.<sup>118</sup> The City of Tacoma refused to call itself a "sanctuary city," because they did not want to jeopardize the \$85 million in federal grants they receive almost every year.<sup>119</sup> Federal grants provide 10% of New York City's \$80.5 billion budget.<sup>120</sup> The Spending Clause is based on the idea that states and the federal government are dual sovereigns and as such, freedom of choice is essential.<sup>121</sup> Accept my condition or lose 10% of your budget is not negotiation; it is robbery.

Lastly, E.O. 13768 also violates the second element of the *Dole* test because the condition to receive federal grants must be unambiguous.<sup>122</sup> Localities still do not fully understand the meaning of "willfully refuses to comply with 8 U.S.C. 1373." This could mean that the Secretary or Attorney General arbitrarily determines whether a jurisdiction is willfully refusing to comply with 8 U.S.C. § 1373, and therefore is a sanctuary. This could also mean that the Secretary or Attorney General may base his or her determination on an analysis of a jurisdiction's showing of compliance with the 8 U.S.C. § 1373. And finally, it is unclear how a violation of the statute would be defined and what consideration would be given to a remedial process like that set out in the 2016 OJP guidelines.<sup>123</sup>

## VI. REVISING EXECUTIVE ORDER 13768

To slightly repackage Justice Breyer's statement in *Zadvydas*, while the President may have the power to do what he wishes, he must choose

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118. See Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (stating "jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants" but failing to specify which Federal grants).

119. Ruud, *supra* note 41.

120. Cameron, *supra* note 32.

121. See *Dole*, 483 U.S. at 207 (stating that if Congress desires to condition states on federal grants through its spending power, it must allow "States to exercise their choice knowingly.").

122. *Id.* at 207.

123. See ADDITIONAL GUIDANCE, *supra* note 85 ("[T]he recipient must take sufficient and effective steps to bring it into compliance and submit documentation that details the steps taken, contains a validation that the recipient has come into compliance, and includes an official legal opinion from counsel (including related legal analysis) adequately supporting the validation.").

“a constitutionally permissive means of implementing that power.”<sup>124</sup> E.O. 13768 is not a permissive implementation or use of that power. To cure E.O. 13768, the Administration must attend to the due process issue by not leaving the designation of a municipality as a sanctuary jurisdiction that results in the deprivation of federal grants up to an individual’s discretion.<sup>125</sup> The Administration must also clarify which federal funds, and in what quantity may be withheld for non-compliance to ensure a state is encouraged to comply without feeling there is a gun to its head.<sup>126</sup>

A. *Defining “Sanctuary Jurisdiction” as a City that Fails Formal DOJ OIG Review Process*

The Administration should establish a more reliable way of determining which jurisdictions are sanctuaries, and thus potentially eligible for federal defunding. To do this, the Administration should make clear that the designation of “sanctuary jurisdiction” is not one that an individual, such as the Secretary, makes, but a conclusion of a formal review process conducted by the OIG of DOJ. Similar to the OJP 2016 guidelines, if OIG receives credible evidence that a jurisdiction is not complying with 8 U.S.C. § 1373, then that jurisdiction should be afforded the opportunity to conduct a review and complete documentation proving they are compliant with 8 U.S.C. § 1373; or, in the alternative, the jurisdiction should be given a “cure” period during which they will update OIG with the steps taken to achieve compliance.<sup>127</sup> If a jurisdiction is still not in compliance, then, at a minimum, a pre-termination hearing should be held giving the jurisdiction a chance to request additional time to comply or alternatively make an affirmative showing they are in compliance with 8 U.S.C. § 1373. This process should be informed by the well-established principles of substantive and procedural due process as illustrated in precedent administrative law

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124. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (quoting *INS v. Chadha*, 462 U.S. 919, 941–942 (1983)).

125. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

126. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012).

127. See ADDITIONAL GUIDANCE, *supra* note 85 (establishing a process under which recipients of JAG and SCAAP funds can remedy noncompliance of 8 U.S.C. § 1373 only after the OJP has received credible evidence that the recipient is in violation of this section and the recipient has undergone a review).

authorities<sup>128</sup> and allow petitioning grantees to rely on other decisions decided by the OIG to help build a sense of stability and precedent.

B. *Narrow Federal Defunding of Sanctuary Jurisdictions to Law Enforcement Programming*

The Administration should be guided by the principles established in *Dole* where the Supreme Court found that it was not coercive to withhold 5% of federal funds for highway transportation work because it was related to the purpose of the Act and would not have an intolerable effect on state budgets.<sup>129</sup> The Administration could limit the scope of the federal funds to be withheld to fields that relate to the Order and underlying statute: immigration and law enforcement grants.<sup>130</sup> The Administration could also tailor the amount of federal funds to be withheld, focusing on the SCAAP and JAG grants referenced in OJP's 2016 8 U.S.C. § 1373 compliance guidelines, instead of targeting all federal grants.<sup>131</sup> If the Administration does not address the due process issues and the ambiguous meaning of "sanctuary jurisdiction," the Order could still fail the second rule of *Dole*.<sup>132</sup>

## VII. CONCLUSION

It is not enough to ask "what?" One must ask "how?" The Trump Administration's Executive Order 13768 is unconstitutional. The Administration's goal of incentivizing municipalities to assist, or at least not hinder federal immigration enforcement's efforts, is perfectly legal. While the federal government's immigration power is great, it is limited by the bounds of Due Process, the Tenth Amendment, and the Spending

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128. See e.g. *Goldberg v. Kelly*, 397 U.S. 254, 263–64 (1970) ("[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process.") *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (discussing the administrative hearing process that resulted in the termination of Social Security Disability benefits).

129. See *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987) (finding that withholding a small percentage of the states' funds was only a "mild encouragement for the States to enact higher minimum drinking ages . . .").

130. *Id.* at 207–09 (relating the purpose behind granting of highway funds ("safe interstate travel") as the purpose underpinning the condition imposed by the congressional act requiring the minimum drinking age be twenty-one for all states receiving highway fund grants ("condition[ing] the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.")).

131. ADDITIONAL GUIDANCE, *supra* note 85.

132. *Dole*, 483 U.S. at 207.

Clause. E.O. 13768 is an aggressive power-grab by the Executive Branch of the federal government, communicating to state and local governments the singular message: “comply or face the consequences.” While the President may have the power to do what he wishes, he must choose “a constitutionally permissive means of implementing that power.”<sup>133</sup> E.O. 13768 fails this test and should be struck down as a violation of Due Process, the Tenth Amendment, and the Spending Clause.

#### SUBSEQUENT DEVELOPMENTS

On November 20, 2017, Judge William Orrick granted the City of San Francisco and the County of Santa Clara’s motion for summary judgment, imposing a permanent injunction on enforcement of E.O. 13768. Judge Orrick concluded the Order violated the principle of separation of powers established in the Constitution; the unambiguous requirement, the nexus requirement, and the legitimate choice requirement of the Spending Clause; and the Tenth Amendment by compelling states to enforce regulatory programs through coercion.<sup>134</sup> Further, Judge Orrick found the order was unconstitutionally vague in violation of the Fifth Amendment’s Due Process Clause and the order violated the Fifth Amendment’s procedural due process requirements.<sup>135</sup> Numerous other jurisdictions issued similar nationwide, permanent injunctions against the executive order on various grounds.<sup>136</sup> In December of 2017, the Trump Administration filed an appeal to the 9th Circuit, challenging the permanent injunction issued in the Northern District of California.<sup>137</sup> Oral arguments were held on April 11, 2018 in San Francisco.

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133. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (quoting *INS v. Chadha*, 462 U.S. 919, 941–942 (1983)).

134. *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1214–16 (N.D. Cal. Nov. 20, 2017).

135. *Id.*

136. *See e.g.* *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 U.S. Dist. LEXIS 173376 (W.D. Wash. Oct. 19, 2017); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. Sept. 15, 2017); *City of Philadelphia v. Sessions*, No. 17-3894, 2017 WL 5489476 (E.D. Pa. Nov. 15, 2017).

137. *County of Santa Clara v. Trump*, No. 17-17480 (9th Cir. Filed Dec. 14, 2017).