

Third Circuit Court

Case: *City of Philadelphia v. Attorney General*, No. 18-2648

Judges: Ambro, Scirica, Rendell*

Date: Feb. 15, 2019

Tags: Sanctuary Cities, Anti-Commandeering Doctrine, sovereignty, immigration, ICE, criminal release date, immigration detainer, program grant, law enforcement, Philadelphia, 8 U.S.C. § 1373

Gravamen/Question(s) at issue: Does the Attorney General have statutory authority to impose conditions on a grant received by a participating city that effectively prohibits the city government from *restricting* certain behaviors of its employees?

Holdings: No, Congress did not grant the A.G. such authority, so the extra conditions were unlawfully imposed.

- District Court's order to enjoin is upheld; order to require judicial warrant is vacated.

Rationale: The language of the statute grants some limited discretionary authority to the A.G., but not this much.

- While there's a provision for the withholding of money in two narrowly defined circumstances, the A.G. can't withhold the WHOLE GRANT. (20)

Facts: Federal Edward Byrne Memorial Justice Assistance Grant Program awards money to cities for law enforcement. Philadelphia has received this grant since 2006. "Last year, however, the Justice Department notified the City that it was withholding its FY2017 award because the City was not in compliance with three newly implemented conditions"(6). These conditions were:

1. Grantees must certify compliance with **8 U.S.C. § 1373**
2. Grantees must permit DHS to access detention facilities in order to interview alien
3. Grantees must provide at least 48 hours advance notice to DHS re. release date and time of an alien in custody when requested

City of Philadelphia limits how much information City officials will share about immigrants to federal government, whether DHS can access aliens in prison, and whether aliens will be released to ICE. Their reasoning is that these policies help foster trust between law enforcement and immigrant community.

Prior Appeals & Trial Court Input:

- **District Court (2018):** granted city summary judgment to enjoin AG from withholding the funds. Added a provision that if DHS wants an alien in city custody, they have to get a judicial warrant.

Appeals to Statute & Precedent:

- **5 U.S.C. § 706(2)(C):** Administrative Procedure Act
- **8 U.S.C. § 1373:** “prohibits state and local gov’ts from restricting the sharing of information relating to an individual’s immigration status ... with federal immigration officials.” (9)
- **8. C.F.R. § 287:** immigration detainer
- **34 U.S.C. §§ 10151-10158:** Byrne JAG statute
- **34 U.S.C. § 10102(a):** provision defining duties of the Assistant Attorney General for the Office of Justice Programs: “including placing special conditions on all grants”
- ***La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986):** “Where, as here, the Executive Branch claims authority not granted to it in the Constitution, it ‘literally has no power to act ... unless and until Congress confers power upon it.’” (6)
- ***U.S. v. Lopez*, 514 U.S. 549, 561 n.3 (1995):** “States possess primary authority for defining and enforcing the criminal law” (internal quotes omitted).
- ***Arizona v. U.S.*, 567 U.S. 387, 398 (2012):** “both the National and State Governments have elements of sovereignty the other is bound to respect.”
- ***Galarza v. Szalzyk*, 745 F.3d 634, 642 (3d Cir. 2014):** “Detainers are not mandatory.”

Dicta:

- “The City attacked the government’s ability to impose the Challenged Conditions on several statutory and constitutional fronts. But we need only reach the threshold statutory question.” (6)
- Federal gov’t has jurisdiction over immigration; cities & states over criminal law. “These powers intersect when a state or city arrests an individual whom ICE would also like to apprehend for removal proceedings.” (10)
- “A detainer is a *request*, not a *demand*.” (11, *emph. original*)
- “In a thoughtful and well-reasoned opinion, the Court found that the City was likely to succeed on all of its claims, and enjoined the Department from denying its FY2017 application.” (14)
- “An executive agency that acts without statutory authority violates the Administrative Procedure Act ..., and may run afoul of the constitutional separation of powers.” (17)
- “He pursues this argument in the least depth, however, and for good reason. Such authorization is nowhere to be found in the text of the statute.” (18)
- Re. discussion of what moneys can be withheld from the grant, and when:
“The A.G. does not rely on these provisions, but we think that consideration of them is necessary to make our analysis complete. The limited scope of authority granted by these provisions stands in stark contrast to the broad authority the A.G. seeks.” (20 n.8)

- “We discuss these provisions primarily to highlight what they do not authorize: the power to withhold *all* of a grantee’s funds for *any* reason the A.G. chooses.” (21)
- Congress could have made a provision for the A.G. to make sweeping decisions “to withhold all funds for any reason”—but if it had done so, it wouldn’t have specified all of the reasons the A.G. might need to withhold portions of the grant.
- Re. provision in another statute for limited discretion to A.G., “including placing special conditions on all grants”:
“But the A.G.’s argument runs headlong into an obstacle: the word ‘including.’ In the A.G.’s view, the Special Conditions Clause confers upon the A.A.G. new authority, not found elsewhere in the Code, to establish conditions on grants. This clause, however, is preceded by the word ‘including,’ which is used to denote something that is within a larger whole.” (23) (cites to dictionary!)
- “Moreover, hiding such a broad power—the power to place *any* special conditions on *all* grants—in a statute outlining ministerial duties for an Assistant Attorney General would be akin to hiding an elephant in a mousehole. And Congress ‘does not, one might say, hide elephants in mouseholes.’ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).” (25)
- “The AG has not pointed to any historical precedent for the kind of unconditional requirement it now seeks to impose.” (29)
- “The AG asserts that the Applicable Laws Clause authorizes him to condition Byrne JAG funds on compliance with any law in the U.S. Code. But that reading of the Clause would destabilize the formula nature of the grant. Allowing the AG to withhold all funds because a jurisdiction does not certify compliance with any federal law of the AG’s choosing undermines the predictability and consistency embedded in the program’s design, thus turning the formula grant into a discretionary one.” (29-30)

Attorneys’ Arguments:

- **Neal Katyal for City:** A.G. acted *ultra vires* in imposing conditions; “the Conditions were enacted arbitrarily and capriciously in violation of the APA; they violated the Spending Clause of the Constitution; the Certification Condition and Section 1373 violate the Tenth Amendment.” (14)
- **A.G.:** The language of the statute gives authority to A.G. to share “data reporting and coordination with affected agencies” (19). (Not THAT kind of data, tho.)
 - “His theory is that notice of an alien’s release from custody constitutes ‘information’ that the Attorney General may ‘reasonably require’ and access to prison facilities constitutes ‘appropriate coordination’ with an affected agency. But this interpretation stretches those provisions too far.” (19)

Commentary:

- **My notes from the oral argument (11/7/18) are in my seashell law notebook, pp.116-122.**
- Byrne JAG is a “formula grant” – acc. to population and violent crime stats. “Once approved, grantees may spend those funds within any of the eight statutorily enumerated areas.” (8)
- **Illegal Immigration Reform and Immigrant Responsibility Act (1996):** replaced all “deportation” with “removal.”
- **Immigration detainer:** “Once ICE identifies a removable alien who is in state or local custody, it cannot simply wrest that individual from custody. Instead, it may issue a detainer” – notice to other LEA that it wants to take the alien into custody after alien’s release.
 - Detainers can ask for 48 hours notice & up to 48 hours extra detention for ICE to pick them up.
- Other cities with same issues: Chicago, San Francisco, NYC, plus states (NY, CT, NJ, RI, WA, MA, VA). All legal challenges have ended with A.G. being enjoined from withholding the Byrne JAG grant.