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Constitutional Law I

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THOMAS L. AMBRO, CIRCUIT JUDGE:

This appeal comes from the United States District Court of the Eastern District of Philadelphia. The District Court granted the City of Philadelphia (the “City”)’s request for a preliminary injunction and concluded that the City is likely to succeed on the merits of their argument that the United States Department of Justice (“DOJ”) exceeded its powers by requiring states and local governments to comply with federal immigration law as a condition of receiving federal funds.

We affirm the lower court’s decision that Congress did not delegate the legislative authority to the Department of Justice to impose additional conditions on federal grants. Further, we hold that the Department of Justice’s refusal to disburse grant funds appropriated by Congress unless state and local governments comply with its conditions amounts to an unconstitutional line-item veto in violation of the Presentment Clause, undermines Congress’s ability to carry out its duties under the Spending Clause, and threatens the constitutional principle of separation of powers at the heart of our constitutional order.

***I. BACKGROUND***

In 2005, Congress created the “Edward Byrne Memorial Justice Assistance Grant” (the “Byrne JAG Program”) to provide federal criminal justice funding to state and local governments. Under the program, the Department of Justice is authorized to “make grants to States and units of local government . . . to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice, including for any one or more of [certain enumerated] programs.” 34 U.S. § 10152(a)(1).

In 2015, the Department of Justice issued a notice to grant applicants that they must comply with 8 U.S.C. § 1573(a) of the Immigration and Nationality Act (“INA”) which requires federal, state and local governments to furnish information to federal immigration officials about the immigration status of individuals as a condition of receiving federal funding. In July 2017, the Department of Justice introduced three new conditions for grant recipients:

- (1) The Access Condition: Grantees must permit “personnel of . . . the Department of Homeland Security (“DHS”) to access any correctional or detention facility in order to meet with an alien . . . and inquire as to his or her right to be or remain in the United States.”
- (2) The Notice Condition: Grantees must “provide at least 48 hours’ advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction’s custody when DHS requests such notice in order to take custody of the alien pursuant to the INA.”
- (3) The Certification Condition: Grantees must submit a “Certification of Compliance with 8 U.S.C. § 1373” which must be executed by the chief legal officer of the state or local government.

The City of Philadelphia applied for a Byrne JAG Grant in 2017 but was advised by the Department of Justice that it was not eligible for funding because “at least two Philadelphia policies do not comply with Section 1373.” On August 30, 2017, the City filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking a permanent

injunction prohibiting the U.S. Attorney General from enforcing the three new conditions to reject its application for a Byrne JAG Program grant. The District Court granted the preliminary injunction and held the City is likely to succeed on the merits. The Department of Justice appealed to the United States Court of Appeals for the Third Circuit. Now we consider.

## ***II. ISSUES PRESENTED***

The City of Philadelphia alleges that the conditions imposed by the Department of Justice violate the constitutional principle of separation of powers between Congress and the President because (1) Congress, not the President, has the constitutional authority to determine what conditions to place upon federal spending; (2) the Executive Branch may not decline to disburse funds designated for a particular program without violating the Presentment Clause, and (3) it violates the Spending Clause because it exceeds the constitutional limitations on the federal government's power to condition receipt of federal funds. The Attorney General counters that the Department of Justice has the authority to impose the conditions because (1) not only may Congress itself attach conditions on the receipt of federal funding, but it also may *delegate* the Executive Branch the authority to attach additional conditions on funding, and (2) the conditions are entirely consistent with the constitutional requirements of the Spending Clause.

## ***III. SPENDING CLAUSE***

The first argument presented by the City of Philadelphia is that the Department of Justice conditions violate the separation of powers because Congress, not the President, has the constitutional authority to determine what conditions to place upon federal spending. The Spending Clause of the Constitution provides that “[C]ongress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common

Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. Const. art. I, § 8, cl. 1. The President is required to “take Care that the Law be faithfully executed.” U.S. Const. art. II, § 3, cl. 5.

The Supreme Court has long recognized that “the power of Congress to authorize the expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution” and policy objectives “may nevertheless be attained through the use of the spending power” beyond enumerated legislative powers. *United States v. Butler*, 297 U.S. 1, 66 (1936). In *South Dakota v. Dole*, 483 203 (1987), the Court recognized that Congress has an implied power to “[a]ttach conditions on the receipt of federal funds and further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” *Dole*, 483 U.S. 203 at 206-207.

At the same time, Congress' spending power to condition receipt of federal funds is not absolute and is subject to a number of limitations. The Court has developed a four-part inquiry for evaluating the constitutionality of conditions attached to federal spending programs. First, the spending power must be exercised in pursuit of the general welfare. Second, conditions for states must be unambiguous so they can exercise choices knowingly and with awareness of the consequences. Third, the conditions must be related to a federal interest in the program or project. And fourth, the conditions must not induce unconstitutional action. *Dole*, 483 U.S. at 207-208.

The issue here is not whether Congress permissibly exercised its spending power to enact the Byrne JAG Program, but whether Congress delegated its legislative authority to the

Department of Justice to impose the additional conditions on grant recipients. The City of Philadelphia alleges that Congress did not.

#### IV. DELEGATION OF LEGISLATIVE AUTHORITY

The nondelegation doctrine is rooted in the principle of the separation of powers. The Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const., art I, § 1. Further, Congress is authorized "to make all laws which shall be necessary and proper for carrying into execution" its legislative powers. Art. I, § 8. The President is required to "take Care that the Law be faithfully executed." U.S. Const. art. II, § 3, cl. 5. As a general rule, "Congress is not permitted to abdicate or to transfer to others the *essential* legislative functions with which it is thus vested." *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) (emphasis added).

The key cases involving the nondelegation principle arose from the New Deal era when President Franklin D. Roosevelt sought to expand the power of the national government to solve the Great Depression. In *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court struck down provisions of the National Industrial Recovery Act, which conferred the President with a code-making authority to regulate industries, as an invalid delegation of legislative power from Congress to the President. However, with the rise of modern federal agencies, agency rule-making and administrative law, the Supreme Court has recognized that Congress has an implied power to delegate legislative authority to executive agencies based on "[a] practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to

delegate power under broad general directives.” *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The Supreme Court formulated the “intelligible principle” standard for evaluating nondelegation cases. The “intelligible principle” standard that so long as Congress sets forth “an intelligible principle to which the person or body authorized . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power.” *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409-410 (1928).

Here, Congress did not expressly delegate the power to the Department of Justice to impose additional conditions on grant recipients beyond the statute. Congress authorized the DOJ to “*make grants* to States and units of local government . . . to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice, including for any one or more of [certain enumerated] programs.” 34 U.S. § 10152(a)(1) (emphasis added). Congress’s use of the language “making grants” is a clear authorization to the DOJ to disburse grant funds according to the terms already set forth by Congress. Nowhere in the statute did Congress delegate a separate discretionary power to the DOJ to impose additional conditions on grant recipients.

However, even if we were to recognize that Congress delegated this discretionary power to DOJ to impose additional conditions, which we do not, we are not convinced that the challenged conditions would be a permissible exercise of spending power. The legitimacy of Congress's exercise of the spending power — or the delegation of spending power to federal agencies — rests on “whether the State voluntarily and knowingly accepts the terms of the ‘contract.’” *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 2602 (2012).

This limitation is "critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Sebelius*, 567 U.S. at 2602.

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court struck down the Medicaid expansion requirement of the Affordable Care and Patient Protection Act. The Court recognized that "[t]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement,' it was 'a gun to the head.'" *Sebelius*, 567 U.S. at 2602. The DOJ's conditions requiring state and local law enforcement to act as federal immigration agents and enforce federal immigration law — or forfeit critical federal funding for law enforcement and jeopardize the public safety of its residents — would present an ultimatum even more coercive than Medicaid expansion. It would hold law enforcement hostage to federal immigration policy.

#### ***IV. PRESENTMENT CLAUSE***

The third argument presented by the City of Philadelphia is that the Executive Branch may not decline to disburse funds designated for a particular program without violating the Presentment Clause of the Constitution. The Presentment Clause provides that "every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." U.S. Const. art. I, § 7, cl. 2-3.

In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Supreme Court struck down the Line Item Veto Act of 1996, which granted the President the power to unilaterally amend or repeal parts of statutes that had been passed by Congress, as unconstitutional under the Presentment Clause. There the Court held that "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. City of New York*,

524 U.S. 417, 438 (1998). The Framers understood the text of the Presentment Clause as requiring that “[the President] either ‘approve all the parts of a Bill, or reject it in toto.’” *Clinton*, 524 U.S. at 440.

The Department of Justice’s imposition of additional conditions and refusal to disburse grant funds appropriated by Congress unless it complies with the conditions amounts to an unconstitutional line-item veto in violation of the Presentment Clause. Imposing new conditions on grant recipients and refusing to disburse funds unless they comply with the conditions is the equivalent of amending the statute to add new provisions. This is an essential legislative function reserved to Congress and not within the power of the executive branch.

#### *V. CONCLUSION*

For the foregoing reasons, we **AFFIRM** the decision by the U.S. District Court for the Eastern District of Pennsylvania and enjoin the Attorney General from enforcing the challenged conditions.