

Legal Considerations for Federal Funding Challenges

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Agenda



1. Introduction
2. Overview of Funding Issues and Legal Implications
3. Review of U.S. Supreme Court Decisions Impacting Funding
4. Current Funding Litigation
5. Conclusion and Questions/Answers

Tenth Amendment Considerations

- **Tenth Amendment:** “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.”
- *Printz v. United States*, 521 U.S. 898 (1997): “...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....**such commands are fundamentally incompatible with our constitutional system of dual sovereignty.**”

Spending Clause Overview

- Congress has the “power of the purse,” not the Executive Branch.
- Even Congress’ power to put conditions on state/local funding is not unlimited:
 - Cannot be unduly coercive (such that it turns to compulsion);
 - Must be germane; and
 - Conditions cannot be illegal / unconstitutional.

Presidential Impoundment

- **Impoundment Control Act**, Limited Presidential impoundments into two categories: (1) deferrals – for temporary delays in spending and (2) rescissions – for permanent cancellation of spending. The Act provides the President a process to submit impoundments to Congress.
- *E.g., Commonwealth of Pennsylvania v. Lynn*, 362 F. Supp. 1363, 1369 (D.D.C. 1973); *Pealo v. Farmers Home Administration*, 361 F. Supp. 1320, 1323 (D.D.C. 1973); *State Highway Commission of Missouri v. Volpe*, 347 F. Supp. 950, 952 (W.D. Mo. 1972): President Nixon's impoundments of funds under various laws violated those laws.
- *Train v. City of New York*, 420 U.S. 35 (1975) (9-0): President Nixon's impoundment of funds under the Clean Water Act violated that law.
- *City of New Haven v. U.S.*, 809 F.2d 900 (D.C. Cir. 1987): Absent the ICA, the President lacks authority to defer spending for policy reasons.
- *Clinton v. New York*, 524 U.S. 417 (1998) (6-3): Even under a procedure created by statute, President may not withhold appropriated funds.

Case Law on Conditions on Grants from First Trump Administration

- Generally supports local autonomy and arguments that these actions violate the separation of powers, Spending Clause, and Tenth Amendment. But the decisions were not uniform.
- *See City of Philadelphia v. Attorney General*, 916 F.3d 276 (3d Cir. 2019); *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020); *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020); *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); But see *City of New York v. U.S. Dep't of Justice*, 951 F.3d 84 (2d Cir. 2020).

Executive Orders / Actions Impacting Funding

Unleashing
American
Energy

Regulatory
Freeze Pending
Review

Protecting
American
People Against
Invasion

Ending Illegal
Discrimination
and Restoring
Merit-Based
Opportunity

Ending Radical
and Wasteful
Government
DEI Programs
and Preferencing

Protecting
American
Communities
from Criminal
Aliens

Ending
Taxpayer
Subsidization of
Open Borders

Ending Crime
and Disorder
on American
Streets

Improving
Oversight of
Federal
Grantmaking

Executive Order No. 14173: “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”

- Directs each federal agency to include “in every contract or grant award” a term that the contractor or grant recipient “certify that it does not operate any programs promoting DEI” that would violate federal antidiscrimination laws.
- Contractor / grantee must agree that its compliance “in all respects” with all applicable federal nondiscrimination laws is “material to the government’s payment decisions” for purposes of the False Claims Act (FCA)

Executive Order 14151: “Ending Radical and Wasteful Government DEI Programs and Preferencing”

- Directs that OMB “shall coordinate the termination of all discriminatory programs, including illegal DEI and ‘diversity, equity, inclusion, and accessibility’ (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear.”
- Directs OMB and each agency to terminate all “equity-related” grants or contracts.

Executive Order 14159: “Protecting the American People Against Invasion”

- **Section 17: “Sanctuary Jurisdictions.** The Attorney General and the Secretary of Homeland Security shall, to the maximum extent possible under law, evaluate and undertake any lawful actions to ensure that so-called “sanctuary” jurisdictions, which seek to interfere with the lawful exercise of Federal law enforcement operations, do not receive access to Federal funds. Further, the Attorney General and the Secretary of Homeland Security shall evaluate and undertake any other lawful actions, criminal or civil, that they deem warranted based on any such jurisdiction’s practices that interfere with the enforcement of Federal law. 90 Fed. Reg. at 8446.”

Executive Order 14287: “Protecting American Communities from Criminal Aliens”

- Directs AG and Secretary of DHS to identify “sanctuary jurisdictions,” take steps to withhold federal funding from such places, and develop “mechanisms to ensure appropriate eligibility verification is conducted for individuals receiving Federal public benefits.”

Executive Order 14218: “Ending Taxpayer Subsidization of Open Borders”

- Directs all agencies to ensure “that Federal payments to States and localities do not, by design or effect, facilitate the subsidization or promotion of illegal immigration, or abet so-called ‘sanctuary’ policies that seek to shield illegal aliens from deportation.”
- Directs all agencies to “identify all federally funded programs administered by the agency that currently permit illegal aliens to obtain any cash or non-cash public benefit” and “take all appropriate actions to align such programs with the purposes of this order and the requirements of applicable Federal law, including . . . [Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)].”

Executive Order 14332: “Improving Oversight of Federal Grantmaking”

- Directs all agencies to appoint a senior political appointee to review all discretionary (competitive) grant opportunities to ensure they align with Administration priorities.
- Ensure grants advance the President’s policies.
- Grants shall not be used to fund, promote, encourage, subsidize, or facilitate: racial preferences or other forms of racial discrimination; “denial by the grant recipient of the sex binary in humans or the notion that sex is a chosen or mutable characteristic;” illegal immigration; or other initiatives that compromise public safety or promote anti-American values.
- Directs the White House Office of Management and Budget to revise the Uniform Guidance to streamline application requirements and require all discretionary grants to permit termination for convenience, including when the award no longer advances agency priorities or the national interest

Agency Level Action: Pauses, Terminations, Conditions, & Guidance

- **Grant terminations / pauses** (IRA and IIJA funds impacted; DOJ canceled hundreds of grants; FEMA SSP grant)
- **Program cancelations:** FEMA – Ending BRIC program/ denial of disaster requests
- **New Conditions:** Agency Standard Terms & Conditions updated adding new conditions for grants; DOT Memo (4/24) threatens to withhold transportation funding from jurisdictions with “illegal DEI” programs and immigration policies contrary to EOs
- **Agency Guidance / Other Action:** DOJ publishes sanctuary jurisdiction characteristics and list of sanctuary jurisdictions / AG DEI Memorandum

Example from DHS Standard Terms and Conditions

- Must comply with 8 USC 1373 & 1644
- Must comply with 8 USC 1324
- Must agree they will honor requests for cooperation “such as participation in joint operations, sharing of information, or requests for short term detention of an alien pursuant to a valid detainer. A jurisdiction does not fail to comply with this requirement merely because it lacks the necessary resources to assist in a particular instance”
- Agree to provide access to detainees.
- Agree they will not leak or publicize immigration operations.
- Recipient must agree that compliance with this term is material to the government’s decision to make the grant.

DOT Letter from Secretary Duffy (4/24)

- Announced policy that all DOT funding is contingent on recipients complying with new immigration and DEI conditions.
- “In addition, your legal obligations require cooperation generally with Federal authorities in the enforcement of Federal law, including **cooperating with and not impeding** U.S. Immigration and Customs Enforcement (ICE) ... in the enforcement of Federal immigration law. DOT has noted reported instances where some recipients of Federal financial assistance **have declined to cooperate with ICE investigations**, have issued driver's licenses to individuals present in the United States in violation of Federal immigration law, **or have otherwise acted in a manner that impedes Federal law enforcement.**”

DOJ / DHS Publish (New) List of Sanctuary Jurisdictions on 8/5/25

- Includes 12 States plus the District of Columbia
- 4 Counties
- 18 Cities
- Notes that the initial list will be reviewed regularly to include additional jurisdictions and to remove jurisdictions that have changed their policies / practices.

DOJ Sanctuary Jurisdiction List & Characteristics

- **Public Declarations:** Cities, states, or counties that publicly declare themselves a sanctuary jurisdiction or equivalent, with the intent to undermine federal immigration enforcement.
- **Laws, Ordinances, Executive Directives:** Cities, states, or counties that have laws, ordinances, regulations, resolutions, policies, or other formalized practices that obstruct or limit local law enforcement cooperation with U.S. Immigration and Customs Enforcement (ICE).
- **Restrictions on Information Sharing:** Cities, states, or counties that limit whether and how local agencies share information about immigration status of detainees with federal authorities.
- **Funding Restrictions:** Cities, states, or counties that prohibit local funds or resources from being used to support federal immigration enforcement efforts.

DOJ Sanctuary Jurisdiction List & Characteristics

- *Non-cooperation with Federal Immigration Enforcement:* Cities, states, or counties that provide training to city employees and police on enforcing sanctuary policies and declining to respond to ICE requests for information.
- *Limits on ICE Detainers:* Cities, states, or counties that refuse to honor ICE detainer requests unless there is a warrant signed by a judge.
- *Jail Access Restrictions:* Cities, states, or counties that restrict ICE agents' ability to interview detainees absent detainee consent.

DOJ Sanctuary Jurisdiction List & Characteristics

- *Immigrant Community Affairs Offices:* Cities, states, or counties that create dedicated offices to engage and advise illegal alien communities on evading federal law enforcement officers.
- *Federal Benefit Programs:* Cities, states, or counties that circumvent federal laws prohibiting the provision of federal benefits to illegal aliens and provide them with access to benefits, including health care assistance, legal aid, food and housing assistance, and other subsidies. This includes cities, states, or counties that establish stand-alone benefit programs or equivalents.

Sanctuary Policy Considerations

- 8 USC § 1373 – “... local government entity or official **may not prohibit, or** in any way **restrict**, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information **regarding the citizenship or immigration status**, lawful or unlawful, of any individual.”
- **Ice Detainers** – administrative warrants (not judicial).
 - Probable cause?
 - Liability?

Example of DEI Certification from FTA's Master Agreement

- Pursuant to “Executive Order 14173, Ending Illegal Discrimination And Restoring Merit-Based Opportunity, by entering into this Agreement, the Recipient certifies that it does not operate any programs promoting diversity, equity, and inclusion (DEI) initiatives that violate any applicable Federal anti-discrimination laws.”
- “Pursuant to Executive Order 14173, Ending Illegal Discrimination And Restoring Merit-Based Opportunity, the Recipient agrees that its compliance in all respects with all applicable Federal anti-discrimination laws is **material** to the government’s payment decisions for purposes of [the False Claims Act].”

DOJ “Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination” (Published 7/29/25)

- Provides “non-binding” best practices to help avoid legal risk. Key points:
- Underscores the prohibition on using protected characteristics for employment, program participation, contracts, resource allocation, or other similar activities, opportunities, or benefits, except in rare cases where such discrimination satisfies the relevant level of judicial scrutiny. (Includes “diverse slate” requirements).
 - Also applies to requirements that contracting entities utilize specific number of working hours from individuals in a protected class.
- States the importance of sex-separated intimate spaces.
- Indicates cannot use facially neutral criteria as a proxy for protected characteristics such as “cultural competence,” “lived experience”, and geographic targeting.

DOJ DEI Guidance: Examples of Unlawful Policies and Practices

- **Unlawful preferential treatment** including race-based scholarships or programs (including mentorships, leadership initiatives), preferential hiring / promotion practices, access to facilities based on race (other protected characteristics).
- **Prohibited Proxies for Protected Characteristics.**
- **Unlawful Segregation.** E.g., allowing participants of a training to segregate into groups based on race.
- **MWBE programs.** Includes programs that use sex or race as tie-breakers or policies favoring “minority or women owned businesses” without satisfying strict scrutiny.
- **DEI Programs that create Hostile Work Environments.**

SCOTUS
Cases
Relevant
to Federal
Grants

Trump v. Casa –
Universal Injunctions

California v. Department
of Education – Tucker
Act / jurisdictional issues

Trump v. Casa

- On 6-27-25 the Supreme Court held that universal injunctions exceed the authority of federal courts in *Trump v. Casa*.
- Federal courts can only provide complete relief to the parties before them. (Left open the possibility a nationwide injunction could be necessary for States to obtain complete relief in this case).
- Noted that class actions are still available to litigants.

California v. Department of Education

- This case involves two competitive-grant programs that Congress created in response to a shortage of qualified teachers.
- On February 5, 2025, the Acting Secretary of Education issued an internal directive calling for the termination of any grants that fund practices “in the form of [diversity, equity, and inclusion (‘DEI’)].”
- On 4/4, the Supreme Court, on its emergency order docket, stayed the district court's TRO based on its finding that the district court likely lacked jurisdiction under the Tucker Act.

National Institute of Health v. American Public Health Association – Supreme Court

- 5 Justices voted to grant the federal government's application for a stay of the district court's order declaring the grant terminations were unlawful under the APA.
- The majority of the Justices concluded the case was controlled by the Court's prior decision in *Department of Ed. v. California*, which held that the APA's limited waiver of sovereign immunity does not extend to breach of contract claims and that these claims for grant terminations must therefore be brought in the Court of Federal Claims under the Tucker Act.
- Challenge to the guidance (which indicated NIH would no longer fund research projects connected to "gender identity," DEI, or COVID), the court said that challenge could remain in district court.

What Do These Cases Mean?

- *Trump v. Casa* – localities can only get relief if 1) they sue; 2) their State sues and seeks relief on behalf of its political subdivisions; 3) possibility of class actions.
- *California & NIH*– Provides the federal government with a powerful argument that many of the grant termination cases belong in the Court of Federal Claims rather than in federal district court. (This would mean it takes longer to get relief & no injunctions available). Before NIH, lower courts were mixed on the applicability of *California* as precedent for a variety of reasons. But it will be a tougher road for grant cancellations to be brought in district court now.

Current Litigation

- *San Francisco v. Trump* (sanctuary jurisdiction EO)
- *King County v. Turner* (conditions on DOT, HUD, DHS grants)
- *Illinois v. FEMA* (immigration conditions on FEMA grants)
- *State of California v. DOT* (immigration conditions on DOT grants)
- *State of Washington v. FEMA* (ending of BRIC program)
- *Appalachian Voices v. United States Environmental Protection Agency* (class action)

San Francisco v. Trump

- Coalition of localities sued to enjoin the enforcement of the Protecting Americans from Invasion Executive Order as well as the DOJ Memorandum dated 2/5/25 which both threatened to terminate federal funding from "sanctuary jurisdictions."
- The localities argue the EO and DOJ Memo violate the Tenth Amendment, Separation of Powers, Spending Clause, and Due Process Clause.
- PI was entered on 4/25 preventing the federal government from withholding funds based on the EO or Bondi Directives (only as to the plaintiffs).
- Second PI entered on 8/22. Court clarified that injunction applied to immigration conditions in DHS Standard Terms and Conditions and immigration conditions in DOT memo and HUD grants as well including CoC and CDBG.

King County v. Turner

- Lawsuit related to immigration /DEI conditions originally as to HUD's Continuum of Care grants and DOT grants. Concerns \$4 billion in funding
- Amended complaints added new grants and new plaintiffs (grants under other DOT subagencies, all HUD grants, and HHS grants)
- Argues violations of separation of powers, Tenth Amendment, Spending Clause, and APA.
- Court rejected the Tucker Act / jurisdictional arguments.
- PI entered on 6/3 only as to individual cities/counties that sued.
- The court granted the plaintiffs' third motion for a preliminary injunction on 8/12/25 extending the PI to 30 new plaintiffs added to the lawsuit as well as new HUD grants and HHS grants.

Illinois v. FEMA

- Challenges the immigration conditions being imposed in the DHS Standard Terms and Conditions on all FEMA funding.
- Defendants claim that the standard terms and conditions do not apply to all FEMA grants:
 - **Disaster :** • Public Assistance Programs • Disaster Case Management (DCM) • Hazard Mitigation Grant Program (HMGP) • Fire Management Assistance Grant (FMAG)
 - **Mitigation:** • National Earthquake Hazards Reduction Program – Individual State Earthquake Assistance (NEHRP-ISEA) • Flood Mitigation Assistance (FMA) • National Dam Safety Program (NDSP) • Community Assistance Program – State Support Services Element (CAP-SSSE) • National Urban Search & Rescue Response System (US&R) • Cooperating Technical Partners Program (CTP) Preparedness: • State and Local Cybersecurity Grant Program (SLCGP) • Nonprofit Security Grant Program (NSGP).

State of California v. DOT

- Challenges immigration conditions being imposed by the 4/24 Duffy Letter on all DOT Funding (\$100 billion)
- Argues the conditions are Ultra Vires / not authorized by Congress, they violate the Spending Clause, and violate the APA.
 - Federal funding is for programs to support the roads, highways, railways, airways, ferries, and bridges and immigration conditions do not have a nexus to transportation funding.
- PI entered on 6/19 as to States that sued **and their political subdivisions.**

Washington v. FEMA

- States sued FEMA for termination of the Building Resilient Infrastructure and Communities (BRIC) program.
- Congress has funded BRIC for pre-disaster mitigation purposes for decades.
- The complaint alleges that the BRIC termination violates the separation of powers and is “directly contrary to Congress’s statutory direction that Defendants must prioritize mitigation and are specifically barred from substantially reducing FEMA’s mitigation functions.”
- Defendants are arguing that they have not terminated BRIC / this was not a final agency action, so the lawsuit is not ripe.

Appalachian Voices v. United States Environmental Protection Agency

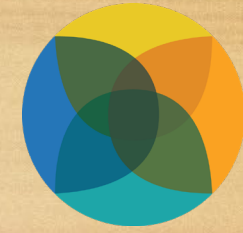
- Class action filed by nonprofits, Tribes, and local governments.
- Challenging the federal government's termination of the Environmental and Climate Justice Block Grant programs.
- The complaint argues that EPA terminated the grants en masse for policy reasons without reviewing individual grants or distinguishing among grant recipients or activities. They argue that the EPA's termination of these grants violates the separation of powers, the presentment clauses, and APA.
- The district court dismissed the complaint on 8/29 based on *NIH*.

Other Litigation to Watch

- *New York v. Department of Justice* (PRWORA)
- *New Jersey v. Department of Justice* (VOCA grant / immigration conditions)
- *New Jersey, et. al v. OMB* (2 C.F.R. § 200.340(a)(4))
- *Colorado v. U.S. Department of Health & Human Services* (termination of HHS grants)
- *Harris County v. Kennedy* (termination of public health funding)
- *Sustainability Institute v. Trump* (termination of IIJA and IRA funding)
- *Chicago v. United States Department of Homeland Security* (freezing funds under Security Cities Counterterrorism program)
- *Seattle v. Trump* (DEI conditions on grants)
- *National Association of Diversity Officers in Higher Education v. Trump* (DEI executive orders)

Key Takeaways

- There are dozens of lawsuits filed by state and local governments implicating grants.
 - Cases involving conditions on grants should have a strong argument to stay in district court and, so far, localities have been mostly successful in obtaining preliminary relief.
 - Cases involving grant terminations may need to be brought in Court of Federal Claims
- No more universal injunctions means localities with policies implicated by these conditions / agency actions must consider options, including whether to file or join a lawsuit or change policies.
- States can seek relief on behalf of their political subdivisions (though not all States are suing).



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Questions?

Thank you!