3-9-2018

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Feds v. California

09 Mar 2018

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On March 6, 2018, the Department of Justice filed a lawsuit against the State of California challenging three California laws, on the basis that they are preempted by federal immigration law.

Under U.S. law, the federal government has broad power to regulate immigration. Individual states like California cannot regulate immigration – that is, they cannot decide whom to admit or deport, and they have no power to remove someone from the state on the basis of immigration status. The admission and removal of immigrants are federal prerogatives.

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That said, states and localities can – and do – engage in all manner of legal regulations that affect the lives of immigrants. States regulate conditions of employment, determine the criteria for public support for higher education, provide health benefits to residents, control the state's substantive criminal law and enforce state law through their own enforcement bodies and courts. State laws and state enforcement practices therefore play a significant and direct role in shaping the lives of immigrants who reside in a state. The same is true of localities. Cities have their own police forces and their own enforcement priorities. They control local zoning, help set policies for local schools, and enact a host of local ordinances that affect the lives of their residents, including their immigrant residents.

For the most part, states and localities can enact laws and policies that impact their immigrant residents without running afoul of or creating conflict with federal law. So, for example, California has a law that allows certain students, including some who lack legal immigration status, to qualify for in-state tuition at state universities. This law does not conflict with federal immigration law. Indeed, the relevant federal statute appears to concede the power to decide this matter to the states. Similarly, some states and localities have laws or policies that prohibit police officers from making inquiries into immigration status during investigative stops. There is no federal law that requires such inquiries.

States and localities that decide that such laws enhance public safety therefore have the ability to enact such policies as part of their general police power.

When a state or local law conflicts with a federal law that expressly prohibits the state or local action in question, such a law does violate the Constitution. Sometimes, even if the law is not expressly forbidden, federal courts will nevertheless find that it is preempted because it conflicts with federal law or because it presents an obstacle to federal law.

These are the arguments at issue in the lawsuit filed by the Department of Justice (DOJ) against California on March 6, 2018. The Department is arguing that three of California's laws are preempted by federal immigration law. The first is Assembly Bill (AB) 450 – the Immigrant Worker Protection Act – which provides that an employer or its agents "shall not provide voluntary consent to an immigration enforcement agent to enter any nonpublic areas of a place of labor" unless the agent can produce a judicial warrant. There is a similar provision to prohibit voluntary access to employer records. AB 450 also requires employers to give employees 72 hours notice before allowing ICE inspection of documents through a "Notice of Inspection." And it prohibits employers for engaging in verification of immigration status over and above what is required by federal law.

The second challenged provision is AB 103, which provides for inspection of all facilities that house immigrant detainees and allows state officials to examine the "due process" provided to the immigrant detainees and to assess "the circumstances around their apprehension and transfer to the facility." The complaint alleges that state officials already have made inquiries for documentary evidence and have inspected facilities under this law.

The third challenged provision is Senate Bill 54 which prohibits state and local officials other than employees of the California Department of Corrections from "[p]roviding information regarding a person's release date or responding to requests for notification by providing release dates or other information;" "providing personal information"; and "transfer[ring] an individual to immigration authority." This law exempts a huge swath of the incarcerated population from these protections on the basis of their crime of conviction. And it always allows transfers where there is a judicial warrant. The law is only designed to protect against warrantless transfers upon administrative request and to protect the private information of all individuals in state custody from being shared absent a judicial order. In the complaint, DOJ asserts that California blocks the sharing of information about immigration status and "does not impose these restrictions on other forms of information sharing on other topics" – which is odd because the law is not limited by topic and is generally designed to protect personal information.

Will DOJ prevail? That is not clear. The doctrine of preemption is complicated and the existing case law is full of internal contradictions. In the end, the outcome of the case will more likely depend on the political views of the judges deciding the case than on abstract principles of preemption. The simple truth is that although the California laws certainly increases the transaction costs of federal enforcement of immigration law, it is not clear that they are preempted. Some recent history helps to illustrate the point.

This is not the first time that the federal government has sued a state over its immigration policy. Memorably, the Obama administration sued the state of Arizona over S.B. 1070 – a state law that (among other things) required state officials, where practicable, to inquire about immigration status when making routine stops. (SB1070 Section 2). Section 287 of the Immigration and Nationality Act (INA) directly governs how and when state police can participate in immigration enforcement efforts and the Arizona provision clearly fell outside of those guidelines, but all nine Justices still concluded that Section 2 of S.B. 1070 was not preempted. In other words, the Supreme Court has shown itself reluctant to strike down state laws on the basis of the broad language of the INA's enforcement provisions. If that trend were to hold, then the challenge to SB 54 would fail. Nothing that California is doing through SB 54 violates the specific language in the INA that the DOJ cites in its complaint.

One could argue that Congress intends for immigration law to be enforced, and that Arizona's S.B. 1070 provision was therefore in harmony with federal objectives whereas the California law is not. But Congress has expressed various concerns in the enactment of immigration laws, including antidiscrimination concerns. California's laws could be seen as prioritizing certain Congressional values, just as the Arizona law clearly prioritized others. The fact that the administration shares different priorities and does not like the laws does not mean that they are preempted; the *Arizona* litigation illustrates the point.

Of course, given the shifting politics, there is no guarantee that the outcome in the Arizona case will dictate the result of the DOJ's challenge to California. For some justices, it may be fine to interfere with federal law through overzealous enforcement but not to interfere through the elevation of its residents' privacy and liberty interests over federal immigration enforcement objectives. Politics and power, not preemption, will be the true core of the decision in this case.

The legal landscape on the other challenges looks similar. Unlike the employment provisions at issue in Arizona's SB 1070, the California law is not a regulation of the employment of immigrants – something the court found to be preempted by the Immigration Reform and Control Act of 1986 (IRCA). In 2011, in a case called Chamber of Commerce v. Whiting, the court very narrowly interpreted IRCA's preemption provisions. It does not seem that this narrow preemption provision would cover AB 450. AB 450 is a rule on when employers can voluntarily expose all of their employees to enforcement efforts, not a rule on the hiring of unauthorized workers. The DOJ complaint argues that AB 450 is preempted by the INA's requirements that states not prohibit communications about immigration status, but that is not at all clear from the language of the statute.

Finally, the law that applies to detention facilities may be preempted because it deals with immigration enforcement facilities. But this is not the first time states have played a role in inspecting federal detention facilities for compliance with state law. For example, when children were being detained in immigration detention facilities in Texas and those facilities were not licensed under state law to care for minors, a Texas state court judge got involved. It seems unlikely that generally applicable state regulations of facilities would be preempted by immigration law. It may be a harder question as to whether California's law,

which is specifically aimed at immigration detention centers, is preempted. But the DOJ complaint certainly doesn't do a great job of pointing to the statutory language that would result in such preemption.

Ultimately, there is no slam dunk argument for preemption. But if I were a betting woman, I might still place my money on DOJ. Trump's administration has worked quickly and effectively to reshape the federal judiciary from the Supreme Court down. In cases like this, that fact could make all the difference.

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How to cite this blog post (Harvard style)

Chacón, J. (2018) Feds v. California. Available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/03/feds-v-california (Accessed [date]).

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