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Texas takes on the TSA: The Constitutional Fight over Airport Security

Abstract: Since 9/11, air transportation has been one of the most important and closely watched areas of homeland security under federal control. Despite this centralization of authority, some states have begun to question some of the policies enacted by the Transportation Security Administration (TSA). In 2011, Texas passed legislation that would have criminalized TSA officers for carrying out such policies, specifically enhanced pat downs of airport travelers. In light of threats from the Department of Justice, Texas ultimately backed down from the legislation, but the legal arguments made by participants on both sides remain relevant to future conflicts between state and federal authority on homeland security. The events in Texas are particularly interesting because they make public the tension between citizen preferences for security and civil liberties, highlighting the role of federalism in the homeland security domain. Using legal analysis, we find that federal power in the realm of aviation security given by the Constitution's Supremacy Clause is less clear-cut than generally argued. Therefore, Texas' attempt to assert its authority in this domain was not necessarily legally unsound.

Keywords: civil liberties; tenth amendment; transportation security administration; United States.

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Former Miss USA Susie Castillo was brought to tears as she recounted a TSA screening she endured at a Dallas airport checkpoint. A video recorded after the April 21st, 2011 incident shows her weeping as she describes the procedure.

“I’m sure this woman was just doing her job. But she ... I mean she actually ... felt ... touched my vagina. And so I think that’s why I’m crying; that’s what I’m so emotional, because I’m already so upset that they’re making me go making me do this. Making me choose to either get molested, because that’s what I feel like and, or, or, go through this machine that’s completely unhealthy and dangerous. I don’t want to go through it, and here I am crying” (Holt 2011).

1 Introduction

Since September 11, 2001, the safety of passenger air transportation in the United States has been one of the highest priorities for the homeland security community. The networked configuration of airports makes the system as vulnerable as its weakest link, so Congress took a number of steps to secure each passenger aircraft including hardening cockpit doors and deploying Federal Air Marshals on flights, then nationalized the system for securing access to airports by creating the Transportation Security Administration (TSA) (Frederickson and LaPorte 2002). The original purpose of the TSA was to ensure uniform standards for passenger screening at all US airports, so that no one airport would jeopardize the security of the whole system. Recently, however, new policies introduced by TSA have begun to conflict with local norms in some of the jurisdictions where they operate.

In May and June of 2011, Texas introduced two bills in the state legislature (HB 1937 and HB 1938) to curtail the ability of the TSA to search passengers before boarding an aircraft. Specifically, HB 1937 intended to make it a state crime if an agent, “without probable cause ... performs a search for the purpose of granting access to a publicly accessible building or form of transportation and intentionally, knowingly, or recklessly touches the anus, sexual organ, buttocks or breasts of the other person.” Its companion bill, HB 1938, outlawed the installation or operation of “Body imaging scanning equipment” in any Texas airport. These bills, along with a House Resolution (HCR 80) were introduced in response to the implementation of two major changes at the TSA in late 2010 which upset passengers and civil liberties advocates: The large-scale deployment of advanced passenger screening machines and the implementation of new, more invasive pat down procedures.

Despite claims made by the federal government in response to the bills, the legal basis of both sides’ claims is not decisive. The U.S. Department of Justice (Murphy 2011) argued that the Supremacy Clause of the Constitution made clear that air transport security was an exclusively federal domain, and that the states have no right to limit the powers of the federal government in this area. Texas, meanwhile, claimed that it had both police powers and a mandate to protect the health and safety of its citizens. Although Texas ultimately withdrew the bills, the continued deployment of advanced passenger screening machines and enhanced pat down procedures indicate that TSA feels confident in the mandate of its legal authority.¹

¹ Granted, it’s a blog, which sacrifices the depth of the discourse for a quick response, but the TSA’s response is not as nuanced as this issue deserves: “What’s our take on the Texas House of Representatives voting to ban the current TSA pat-down? Well, the Supremacy Clause of the U.S. Constitution (Article. VI. Clause 2) prevents states from regulating the federal government” (Transportation Security Administration 2011).

State legislators in nine states have either passed resolutions criticizing the new policy or introduced laws similar to Texas' to limit the ability of TSA to perform the pat downs. Alaska, Hawaii, Michigan, Montana, New Hampshire, New Jersey, Pennsylvania, Texas, and Washington are part of a "State Legislation Campaign" in response to "public outrage at the illegal and abusive TSA tactics" (Freedom To Travel USA 2011). Due to the ongoing debate over air transportation and civil liberties, it is important to understand the motivation and legal basis for Texas' challenge to federal authority.

Our analysis draws first from the literature on federalism to frame the debate. Texas' dispute with TSA is similar in spirit to other state challenges to federal authority in health insurance, immigration, and same-sex marriage (Krane 2007). The dispute between Texas and the TSA uniquely illustrates the current tensions of federalism in the particularly salient issue domain of security. Federalism is a useful starting point because, as Donald Kettl (2003: p. 263) points out, "Homeland security is also, by its nature, one woven deeply into the fabric of US federalism, where it is impossible for any player to define objectives and measures authoritatively for the other players." Federalism scholars looking at homeland security issues have tended to focus on specific events, such as Hurricane Katrina (Derthick 2007) or the Deepwater Horizon disaster (Birkland and DeYoung 2011) as illustrative case studies. Our research adds to this literature by including an additional case of state/federal dissonance, but provides a legal analysis which illustrates the standing of both parties. As Kettl (2003: p. 271) observes about homeland security, "Perhaps no other issue in US history has so sharply raised a question about the role and structure of federalism."

This study also contributes to the understanding of citizen preferences for domestic counterterrorism policies. A number of empirical studies (Huddy et al. 2005; Hetherington and Suhay 2011) utilizing survey and experimental data have looked at the political implications of homeland security and domestic counterterrorism practices. This research forms the basis of our understanding for how Americans will react to measures, such as pat downs at the airport, which are intended to counter terrorist threats. These studies fail, however (with the notable exception of Best et al. 2012), to examine these questions from a cost-benefit perspective, ignoring how much citizens are willing to give up for the safety provided by these policies. The implicit assumption is that Americans want an unlimited safeguards from terrorist events, and expect the state and federal government to do anything to protect them.

The case of Texas illustrates how this may not necessarily be true. If there is indeed a line that balances protection from terrorist attacks and protection of civil liberties, this controversy has come closest to actually exposing where it is. Unlike hypothetical scenarios in surveys, the actual public statements in this

case represent the most complete picture of where citizen preferences conflict with federal homeland security motivations. Given the activity of other states, these anxieties may be generalizable, making this analysis more salient than most single location case studies.

We find that, despite backing down in the face of a federal threat, Texas' Tenth Amendment arguments were not unreasonable, given their Constitutionally mandated police powers to protect citizens within their state. Furthermore, the arguments provide a useful illustration of how the Supremacy Clause is not a blank check for the federal government to override state preferences, even in federal policy domains. By presenting this conflict as a legal analysis, we hope to illustrate the underlying mechanisms which may be expected to reappear in future state/federal conflicts over homeland security issues.

2 Federalist Expressions of Citizen Preferences

Our analysis links two distinct social science literatures – the generally legalistic and theoretical study of federalism with empirical studies of citizen preferences for domestic counterterrorism policies in the post-9/11 era. The overlap between these two subfields lies where the public perception of federalist encroachment turns into action, as in this case. Ripberger (2011: p. 88) illustrates this intersection, noting that, “Whereas research at the policy level tends towards policy analysis, research on the policy process focuses on the way in which the institutions of government translate problems into broader policy action, and research on the public looks at the way in which individual perceptions and beliefs shape mass preferences.” In connecting these literatures, we are building on work such as Schneider (2008), which links public perception of disaster response to observed bureaucratic processes. The benefit here of a legal case study analysis is that it highlights the underlying process behind an observed legal outcome. Furthermore, most of the participants in the Texas case used legal reasoning to make their arguments for and against the proposed legislation.

3 Federalism

Comparatively little research exists that examines the federalism implications of homeland security. Studies in this area have tended to center on what Scavo et al. (2007) call “focusing” events like Hurricane Katrina (Derthick 2007) or the Deepwater Horizon disaster (Birkland and DeYoung 2011). These cases fit more

easily into established paradigms of federalism research, and illustrate familiar concepts such as centralization and advocacy coalitions (Regan and Deering 2009). May et al. (2011) argue that homeland security is weak as a policy concept, and suffers from a lack of stakeholders and strong interests among and between levels of government. Eisinger (2006: p. 542) articulates the challenge of coming to terms with homeland security as an issue domain, noting that, “Homeland security poses an unusual problem in American federalism. Security is a high-stakes issue on which there has been an immediate confluence of interests among all three levels of government.” This is in stark contrast to more developed policy domains with federalism implications, such as the environment and health care.

Shortly after 9/11, Donald F. Kettl (2003) recognized that homeland security is basically a problem of coordination. The need for consistency across many jurisdictions presented an enormous challenge for a system that was intended to operate with zero error tolerance. Observing the system a few years later, he noted that, “Most of DHS’s [Department of Homeland Security] efforts have been focused in corralling its vast federal empire. Coordination with state and local governments has largely been an afterthought” (Kettl 2006: p. 283). Despite the importance of coordination, DHS took a hierarchical approach to their state and local partners which alienated them. Eisinger (2006: p. 541) remarks that, “...the local government ‘bill of particular irritants’ regarding the nature of the homeland security partnership with the federal government is a long one. Although the post 9/11 situation clearly called for a coherent security strategy articulated by strong central leadership, with local government playing a crucial and willing supporting role, local officials believed that they were left too much to their own devices and made to bear a disproportionate fiscal burden.”

In the time leading up to the standoff between Texas and the TSA, states were tiring of the top-down approach to homeland security, even in domains, such as air security, in which all parties agreed on the importance of federal control. Arguably the first organized opposition from states to centralized homeland security mandates was in response to the REAL ID Act. Regan and Deering (2009: p. 498) provide the first empirical analysis of this case from a federalism perspective. They weigh competing explanations of unfunded mandates, state sovereignty, privacy, advocacy coalitions, and state leadership, and find the most support for state norms as an explanation for opposition to the REAL ID Act, noting that, “... states with stronger privacy orientations also were more likely to pass bills or resolutions in opposition.” This indicates that citizen preferences, as expressed through local norms, play a role in federalist challenges to centralized homeland security mandates.

4 Citizen Preferences for Safety and Civil Liberties

Much of the study of citizen preferences for domestic counterterrorism policies is based on survey research of Americans shortly after 9/11. Davis and Silver (2004: p. 41), for example, in a survey taken between November 14, 2001 and January 15, 2002 found a positive correlation between personal fear of terrorism and support for homeland security measures. Similarly, Huddy et al. (2005), in a survey taken between October 2001 and early March 2002 found a positive correlation between perceived threat and more support for a variety of government actions including curtailing civil liberties. Using more recent data, Bali (2009) and Schildkraut (2009) find some public support for domestic counterterrorism measures, such as REAL ID and ethnic profiling. Hetherington and Suhay (2011), using large-scale survey data, find that a subset of the population is inclined to support homeland security policies that infringe on civil liberties regardless of perceived threat.

Citizens are not simply driven by fear, however, when considering homeland security policies. Sanquist et al. (2008), indicate that people approach security measures, including airport screening, from a rational cost-benefit perspective, preferring measures that are effective and not overly intrusive.

Public support for both the AIT scanners and enhanced pat down procedures is mixed. Prior to the implementation of the new procedures, a Congressional Research Service Report (CRS) to Congress stated that, “Polling data indicate that about 75–80% of Americans support the use of AIT at airport checkpoints” (Elias 2011). TSA itself cited five separate polls indicating similar levels of public support for use of the AIT scanners (Transportation Security Administration). Only one of the polls was taken after deployment of the new pat down procedures, within <2 weeks of implementation.

After the new pat down procedures were put in place nationwide, different polls showed different results. Nate Silver of the New York Times wrote, “the new survey implies that public opinion on the machines may be shifting quite rapidly ... about 17% of Americans have gone from supporting the machines to opposing them in the span of a single week.” Silver also analyzed polls which specifically addressed the enhanced pat down procedures: “Moreover, the ABC News poll finds that 50% of Americans think the TSAs ‘enhanced’ pat-downs go too far – and 37% of Americans feel strongly so – versus 48% who say they are justified” (Silver 2010).

In contrast to earlier studies, Best et al. (2012: p. 608) is the first empirical research to account for citizens’ worries about homeland security measures. They find that individuals who are concerned about government surveillance of ordinary Americans are less likely to support such measures, concluding that, “the balance of anxiety about both terrorism and domestic government monitoring

should powerfully dictate individuals' support for domestic counterterrorism policies." By looking at where citizens look for the balance between security and liberty, this study introduces an additional dimension to the understanding of Americans' support for domestic security policies after 9/11.²

5 National Deployment of Body Scanners and Enhanced Pat Down Procedures

In order to understand the source of Texas' concern, we begin by reviewing TSA's nationwide deployment of full-body scanners and enhanced pat downs which occurred in late 2010.

6 National Deployment of AIT Scanners

Full body scanners, otherwise known as Advanced Imaging Technology (AIT) scanners were deployed at American airports beginning in 2006 (Johnson 2006). Two different types of scanners were in use in 2011, both of which scanned the entire person and effectively showed an image of a nude body to an operator in a separate area, who analyzed the images for the presence of prohibited items. One scanner, a so-called "backscatter" machine, utilizes low-level radiation to produce the images for analysis, while another utilizes millimeter-wave frequencies. According to the CRS, by January 2011, "486 AIT units had been deployed to 78 airports. The President's budget request for FY2011 sought funding for 503 additional units, to bring the nationwide total to roughly 1000" (Elias 2011: p. 3).

Some members of the traveling public have expressed privacy and health concerns about these scanners. The Electronic Privacy Information Center (EPIC) filed suit in July 2010 to prevent the deployment of AIT scanners at US airports, calling them "unlawful, invasive, and ineffective." Their lawsuit claims that the scanners violate "the Administrative Procedures Act, the Privacy Act, the Religious Freedom Restoration Act, and the Fourth Amendment" (Electronic Privacy Information Center 2010).

TSA responded that AIT scanners pose no threat to privacy. In testimony to the House Committee on Homeland Security, Subcommittee on Transportation

² Of course, the presence of multiple airport security laws tailored to the preferences of each state undermines the unifying purpose for which the TSA was created. The presence of a weak link could be exploited by terrorists, thus changing the public's perception of the costs and benefits of intrusive airline security procedures.

Security on February 10, 2011, TSA Administrator John S. Pistole stated that, “TSA also applies facial blurs to both the millimeter wave and backscatter technologies,” and “As with current AIT software, ATR-enabled [Automated target recognition] units deployed at airports are not capable of storing or printing the generic image” (Pistole 2011: p. 4). According to the CRS, “X-ray backscatter systems currently deployed use computer algorithms to render a ‘chalk outline’ sketch of the individual and discernible concealed items” (Peterman et al. 2011: p. 4).

The safety of the machines, particularly the radiation-emitting backscatter machine, has also been called into question. Scientists from University of California, San Francisco, and Arizona State University have written multiple letters to Dr. John Holdren, the President’s advisor for science and technology policy voicing concern about its widespread use on the traveling public without normal scientific vetting for safety (Sedat et al. 2010). TSA has responded that both types of AIT scanners are safe for use on the public (Pistole 2011).

Under current policy, use of the scanners by passengers is optional, and passengers may choose to opt out and receive a manual pat down instead, in a private room and with a witness of their choosing. Passengers who opt out of both the AIT scanner and pat down are not permitted to enter the secure area of the airport terminal.

7 National Deployment of Enhanced Patdown Procedures

In October 2010, TSA implemented a new enhanced procedure for pat downs which some perceived as substantially more invasive (Transportation Security Administration 2010). These changes were in response to the attempt by Umar Farouk Abdulmutallab to detonate explosives placed in his underwear on a flight from Amsterdam to Detroit. According to Administrator Pistole in his February 2011 testimony to Congress, “Terrorists look for gaps or exceptions to exploit. They are studying our security measures and will exploit our social norms to their advantage. The device used in the December 25, 2009, bombing attempt illustrates this fact; it was cleverly constructed and intentionally hidden on a very sensitive part of the individual’s body to avert detection by officials in Amsterdam” (Pistole 2011).

The exact procedures for the pat down are not published due to security concerns, but a CRS report, relying on a Washington Post news article, stated that

“The new procedures involve using the front of the hand to search for concealed items and more detailed tactile inspection of areas higher on the thigh and in the groin area. The procedures routinely involve touching of buttocks and genitals” (Elias 2011: p. 5). As in the case of Susie Castillo, a growing number of individuals have expressed outrage that pat downs are overly intrusive or aggressive, and have reported their stories to the media:

1. Amy Alkon, author of the nationally syndicated advice column *Advice Goddess*, stated that during her pat down the TSA screener touched her, “In my vagina. Between my labia. I was shocked – utterly unprepared for how she got the side of her hand up there” (Alkon 2011).
2. Alaska State Representative Sharon Cissna, a breast cancer survivor with a mastectomy, was prohibited from flying by TSA after an AIT scanner showed an anomaly around her mastectomy area and she refused to submit to a pat down, which she called an “intensive physical search” (Bohrer 2011).
3. A video of a six-year-old child receiving an “intense pat-down” (Condon 2011) brought criticism from some members of Congress and resulted in modified procedures for children under twelve years old.

In these cases, TSA management responded to the media with statements that proper procedures were followed.

8 Texas’ Response to AIT Scanners and Enhanced Pat Down Procedures

After implementation of this policy, the Texas House of Representatives unanimously passed a bill in 2011 to limit the invasiveness of the TSA pat downs. The key text of HB 1937 would amend the section of the Texas Penal Code related to sexual assaults to make the following a “a state jail felony:”

1. A person who is a public servant ...commits an offense if the person: ...
2. while acting under color of the person’s office or employment without probable cause to believe the other person committed an offense;
3. performs a search for the purpose of granting access to a publicly accessible building or form of transportation; and
4. intentionally, knowingly, or recklessly:
5. touches the anus, sexual organ, buttocks, or breast of the other person, including touching through clothing; or
6. touches the other person in a manner that would be offensive to a reasonable person.

In response, United States Attorney John E. Murphy issued a letter to Texas Speaker Joe Straus, Lieutenant Governor David Dewhurst, the House Clerk and the Senate Secretary, indicating that passage of the bill would “criminalize searches that are required under federal regulations in order to ensure the safety of the American public.” Murphy also wrote that, “Under the Supremacy Clause of the United States Constitution, Texas has no authority to regulate federal agents and employees in the performance of their federal duties or to pass a statute that conflicts with federal law.” Finally, he issued a direct threat to Texas lawmakers, stating that, “If HR [sic] 1937 were enacted, the federal government would likely seek an emergency stay of the statute. Unless or until such a stay were granted, TSA would likely be required to cancel any flight or series of flights for which it could not ensure the safety of passengers and crew” (Murphy 2011).

Despite passing the Texas House of Representatives, the sponsor of the bill in the Texas Senate withdrew his support on May 25, 2011 after it became apparent the bill would not have enough votes to pass (Hogue 2011b). Legislators urged the Texas Governor to reintroduce the bill in a special session of the Texas legislature under a new bill number, HB 41. On June 16, 2011, this bill was “passed unanimously out of the House Committee on Criminal Jurisprudence. There are at least 111 supporters in the House” (Hogue 2011a). With the input of law enforcement, the bill was amended to allow for searches based on “reasonable suspicion” (Hogue 2011c) and to limit the penalties to federal agents only (Hogue 2011d). This bill, too, failed to pass before the special session closed.

9 Tenth Amendment Arguments

Although a number of participants in the Texas case referred to the Fourth Amendment’s “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ... ,” we focus instead on the Tenth Amendment, which reaffirms the lines of authority between state and federal governments. While the Fourth Amendment arguments certainly have merit, the focus of its analysis is between the individual and the federal government. In this case, the dynamic under examination occurs between the state and federal governments, making the Tenth Amendment a more illustrative legal framework.

From the beginnings of the Republic, the federal and state governments have reigned side by side, but not with an even nor clear delineation of power between them. The Constitution’s Tenth Amendment, adopted in 1791 as part of the Bill of Rights and created, in part, to reassert states’ rights, provides that “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.” The division between state and federal powers delineated by the Constitution is not merely “formalistic.” Rather, the Tenth Amendment “leaves to the several States a residuary and inviolable sovereignty” (Madison 1961). This but emphasizes the founding principle of governance in the United States, that “[s]tates are not mere political subdivision of the United States,” (*New York vs. US et al.*) but are rather sovereigns unto themselves.

The exercise of dominion over their respective areas of responsibility resulted in tension between the governments almost from the outset (*McCulloch v. Maryland*). This tension, the Framers believed, was a valued and necessary attribute of the federalist system they constructed:

“Power being almost always the rival of power, the general government will at times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.... If their rights are invaded by either, they can make use of the other as the instrument of redress... It may safely be received as an axiom in our political system, that the state governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority” (Hamilton 1961).

“If the [state] grant be opposed to, or inconsistent with, any constitutional power which Congress has exercised, then, so far as the incompatibility exists, the grant is nugatory and void, necessarily, and by reason of the supremacy of the law of Congress. But if the grant be not inconsistent with any exercise of the powers of Congress, then, certainly, Congress has no authority to revoke or annul it. Such an act of Congress, therefore, would be either unconstitutional or supererogatory” (*Gibbons v. Ogden*).

There are at least two strong constitutional reasons why TSA’s public statement, noted earlier, that, “the Supremacy Clause of the US Constitution (Article. VI. Clause 2) prevents states from regulating the federal government” (Transportation Security Administration 2011) cannot pass unchallenged. Both reasons go to the heart of this article’s focus on the Tenth Amendment. First, the role of the States under the Tenth Amendment must still be recognized by the federal executive and legislative branches and, second, the Supremacy Clause is not the federal leviathan that the TSA blog and many commentators suggest.

The Tenth Amendment has been battered by the courts and commentators, notably in the *Garcia v. San Antonio Metropolitan Transit Authority* decision.³ In

³ As the dissent notes, however, the commentators have suggested as early as 1954 that nationally elected officials can act as guarantors of constitutional federalism, but the dissent further suggests that then extant reasons for “national action” are no longer valid. On prominent commentator referred to the decision as the “second death of federalism” (Van Alstyne 1985).

Garcia, the Court refused to assert the Tenth Amendment on behalf of the states as a defense against congressional action under the Commerce Clause. Instead, the Court opined that the states were protected by their participation in the “national political process,” rather hazily defined as a focus on “the role of the States in the federal system” as providing them with indirect influence over the President and the House of Representatives and the then more direct influence over the Senate through selection of Senators by the respective state legislatures. That participation would, the Court presumed, protect the states from undue congressional interference. The majority noted the ability of states to obtain federal grant funds and to exempt themselves from certain federal laws as evidence that the national political process was effective in states’ protections. The dissent proclaimed that the majority’s decision, “reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.”

In fact, however, Congress has been responsive to the states. For example, Rep. John Mica, Republican from Florida’s Seventh District and one of the authors of the original TSA bill, wrote to the airport directors of more than 150 airports nationwide in 2010 and noted that the Act creating the TSA provided that airports could opt to employ a qualified private screening company after a two-year implementation period (Nixon 2012). When TSA balked at accepting new airports as applicants for private contractors to perform the screening function, in 2012, Rep. Mica wrote legislation compelling TSA to do so. The extent to which this results from the national political process outlined in *Garcia* is at best speculative.

10 The Role of the Supremacy Clause

The Supremacy Clause to the Constitution provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land.” In his letter to the Texas legislative Leaders, US Attorney Murphy strongly implies that airline security is a function for the federal government alone. The Congress has evidenced its intent to occupy the field of airline safety by its constant regulation thereof. This concept of preemption is based on the Supremacy Clause of the Constitution and has been too broadly interpreted to mean that any federal law – even a regulation of a federal agency – trumps any conflicting state law.

The Supremacy Clause, however, does not grant power to Congress to override the state legislatures. Instead it provides the means of conflict resolution between the federal and state governments once federal power has been validly

exercised. The phrase “made pursuant thereof,” means that only if federal power has been properly exercised, can it then be said to be supreme over the several states. As noted in *Marbury v. Madison*, “It is ... not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, which shall have rank.”

The Supreme Court continues to recognize this balance, stating, “under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause” (*Tafflin v. Levitt*). As Clark (2003: p. 3) observes, “the Supremacy Clause designates as ‘the supreme Law of the Land’ *only* those ‘Laws of the United States ... made in Pursuance of the Constitution [emphasis added].” If a federal statute satisfies this condition, courts must apply the statute notwithstanding contrary state law. If the federal statute fails this condition, however, it does not qualify as “the supreme Law of the Land” and courts remain free to apply state law.” The application of Supremacy Clause scrutiny to federal statutes, thereby determining that their creation was pursuant to the Constitution, reassures the states “that courts (both federal and state) would keep the federal government within the bounds of its assigned powers. Thus, in effect, the Clause reserves all remaining powers to the states, or to the people” (Clark 2003: p. 3). The judiciary is the obvious forum for resolution. But, the state legislature has had an historical role as well. While the Supreme Court has noted that it serves as a political check on the Congress (*Garcia v. San Antonio Metropolitan Transit Authority*), that power should extend to promulgation of proscriptive state legislation.

Certainly, the federal sphere of authority includes the authority to regulate air transportation. But US Attorney Murphy’s proposed interpretation of the Supremacy Clause is being extended at least two steps beyond that: first, to the concept of exclusive provision of security of all commercial airports and all flights; and second, that the federal sphere of regulatory authority includes the determination of conditions not just within the secure area of the airport, but at the boundary itself.

Air travel, and thus air security, has been a field occupied by the federal government. The *Airline Deregulation Act* unequivocally declared that no state may enact a law related to airline service. That Act, the US Court of Appeals ruled in 2008, prevented New York State from enacting an airline “Passenger Bill of Rights” (*Air Transport Association of America, Inc v. Cuomo*). The *Homeland Security Act of 2002* and the *Aviation and Transportation Security Act* were the primary pieces of post-9/11 federal legislation affecting the aviation industry. The latter, in particular, established a new Transportation Security Administration to oversee

security in all sectors of transportation, to avoid a patchwork quilt of security regulations with obvious seams that could be exploited by putative terrorists.

And yet, as the Supreme Courts two recent decisions (*Chamber of Commerce v. Whiting* and *Arizona v. United States*) on the enforcement of state and federal laws for employment of unauthorized aliens suggest, absent an express intention from Congress, state laws are not to be cavalierly preempted. Just as the Court took pains to uphold the ability of Arizona to regulate businesses and actions of state law enforcement which were consistent with the federal scheme, so the Courts could find that the Texas law was consistent with the Aviation and Transportation Security Act.

That boundary is not just the demarcation between those cleared to engage in commercial air travel, a determinative phase line, access to which is presumed to be negotiated between the individual traveler and the federal government. It is also the boundary between the states authority for protection of the individual travelers health, safety and welfare and the relinquishment of that authority to the TSA.

Here, there is no danger of multiple regulatory schemes. Air travel security may be a function recognized as wholly within the federal sphere. But air traveler safety requires the participation of the state as well. The TSA employs a “layered defense” to air travel security, professing twenty layers of security, with seven of those layers prior to checkpoint where the passenger interacts with the transportation security officer (TSO).

There is no actual or legally recognized exclusive federal control other than the secure area. State and local law enforcement are a necessary and welcome part of the security of airports and of passengers. The debate is the point at which the state must cede its police powers to the federal government’s Commerce Clause power.

The focus here, however, is not on the security of commercial air travel, but on the actions of the federal officers charged in assuring safe air travel. Since the Supremacy Clause expressly recognizes the primacy of federal laws, federal officials acting thereunder are entitled to immunity from state criminal charges when they are acting pursuant to federal laws. Where a federal officer has been charged with a state criminal act, a claim of “supremacy immunity” will prevail, if the federal officer was acting within the performance of his federal duties.

In the landmark case, *In re Neagle*, 135 US 1, 75, 1890, the Supreme Court based its ruling that a federal officer cannot be held on state criminal charges if the crime arose in the performance of his duties on the Supremacy Clause.

And in subsequent cases, such as *Clifton v. Cox* where a federal DEA agent exceeded his express authority in the execution of a search warrant by, *inter alia*, the shooting of the unarmed homeowner in the back, resulting in his state court

indictment for second degree murder and involuntary manslaughter, the Courts have continued to hold that if the federal officer was acting within the scope of his authority under federal law, he was entitled to federal “supremacy” immunity.

11 Analysis of Texas’ Proposed Legislation

The issue for Texas, then, is not whether the federal government wholly occupies the field of air safety. The issue is whether the states can enact legislation designed to protect the rights of its citizens by limiting the perceived excesses of law enforcement agents. Since they most assuredly can so act, then such limitation must apply to federal as well as state and local law enforcement agents acting within that state’s jurisdiction.

There can be no blanket immunity from state criminal laws for federal agents. There are obvious reasons why this should be so, that the average citizen intuitively understands, without lengthy debate on the tension between the Supremacy Clause and the Tenth Amendment. Federal agents, no less than the state’s own officers, must be competent to fulfill the duties of the office entrusted to them. That competency can extend, for example, to requiring certain conditions for employment: agents may be required to have a state-issued driver’s license to assure they have the minimal qualifications necessary to operate a federally-owned vehicle, or while operating that vehicle be required to follow the motor vehicle laws in that state’s jurisdiction. Similarly, persons in position of federal trust can be required to be free of criminal convictions, certainly including violations of state law.

While there is a recognized principle of immunity for federal officers acting pursuant to federal laws, the concept of supremacy immunity, like the validity of federal laws, is dependent on their congruence with the Constitution itself. The Supremacy Clause does not say that all federal laws preempt state law. It provides that all the “Laws of the United States which shall be made in pursuance thereof [the Constitution]” shall be supreme over laws created in pursuance of other sources. Certainly, the Supremacy Clause creates a hierarchy of law. Certainly, it appears that any state law, even if clearly within a State’s power to enact, that interferes with federal law must yield thereto (*Gade v. National Solid Waste Management Association*).

Yet it is not enough to simply say that federal law “trumps” or “overrides” state law. What the Supremacy Clause provides is that federal law “made in Pursuance thereof,” meaning, made pursuant to the Constitutional restrictions on the federal government, is second in hierarchy to the Constitution. Federal

law may preempt state law only when it is itself constitutional. Therefore, the Supremacy Clause only grants supremacy to a particular federal law if the federal government is acting pursuant to its constitutionally authorized powers. Likewise then, a particular federal officer is only entitled to immunity if he is acting consistent with his or her constitutionally authorized power.

In *United States ex rel. Drury v. Lewis*, the court declined to reverse the decision by the District Court not to issue a writ of habeas:

“It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *In re Loney*, 134 U.S. 372, and *In re Neagle*, 135 U.S. 1, but the reasons for the interference of the Federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal. Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court.”

The most infamous case, *Idaho v. Horiuchi*,⁴ concerned criminal charges brought by the state against the FBI sniper in the Ruby Ridge shooting, acting pursuant to then-existing, albeit constitutionally-unsound, rules of engagement. The Ninth Circuit sitting *en banc*, reviewed at length the cases on Supremacy immunity. The Court observed,

“The Supremacy Clause is not absolute and so presupposes that federal agents can be prosecuted for violating state law...In keeping with the constitutional allocation of powers between the federal government and the states, federal agents enjoy immunity from state criminal prosecution. That immunity has limits. When an agent acts in an objectively unreasonable manner, those limits are exceeded, and a state may bring a criminal prosecution.”

A majority of Federal Circuit courts apply the two-prong test applied in *Horiuchi*: 1) If the federal officer is fulfilling his duty as authorized and 2) “did no more than what was necessary and proper for him to do,” then state criminal charges cannot be brought against him under Supremacy clause immunity. But if the federal officer exceeds that authorization by acting in a clearly unconstitutional manner, or if that authorization is itself unconstitutional, then he may answer to state criminal charges, but he will do so in federal court.

⁴ First decided in 215 F.3d 986 (9th Cir. 2000) was reversed, 253 F.3d 359 (9th Cir.) and the opinion vacated, 266 F.3d 979 (9th Cir. 2001).

The state legislatures were intended by the Framers as a check on Congress. They can enact legislation limiting the actions of state and federal law enforcement agents to assure compliance with constitutional standards. They may enforce those standards against federal law enforcement where the agents have acted in a clearly unconstitutional manner.

12 Conclusion

Since implementation of enhanced pat downs, TSA has not made public claims that they have intercepted a terrorist using these procedures. According to the Government Accountability Office (Lord 2010), there is also controversy over whether AIT scanners would have stopped the so-called “underwear bomber.” As Sullivan (2011) notes, the possibility of explosives being secreted in the body cavity was known to US intelligence at the time that the AIT scanners were implemented. Without seeing any direct benefit, yet experiencing invasive procedures when travelling and with the likelihood that those procedures will have to be again revised, it is possible that public support for the enhanced pat down procedures will continue to deteriorate. The debate that played out publicly in Texas may, therefore, be an early indication of future sources of state/federal tension in the homeland security policy domain.

The Supreme Court is, of course, the ultimate arbiter of any “constitutional fight” between federal and state laws. In cases such as these, which pit states’ rights against central government mandates, the Court is the final decision-maker. However, the ability of the state legislatures to fulfill their role as a check on the federal Congress has been seriously diminished by the doctrine of national sovereignty and the concomitant use of implied preemption of state laws to thwart local objections to broadly envisioned yet non-transparent federal policies. The eight states that have enacted legislation regulating aspects of immigration within their borders is an obvious example. The Texas bill, however, goes directly to the heart of the Tenth Amendment because of its focus directly upon the behavior believed by so much of the public to be contrary to their constitutional interests.

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