The Volokh Conspiracy

Does the Supremacy Clause mean that the federal government always wins?

David Kopel • October 2, 2012 6:05 pm

Last week, I filed an amicus brief on behalf of petitions for certiorari in *Chafee v. United States* and *Pleau v. United States*. These related cases could be among the most important federalism cases before the Court this term. The amici are the Cato Institute and the Independence Institute.

The State of Rhode Island and the federal government are fighting for custody of Jason Pleau, who is accused of perpetrating a murder during the course of a bank robbery. Rhode Island got him first, by revoking his parole for previous crimes. Pleau has offered to plead guilty in Rhode Island state court, and receive a sentence of life without parole for the murder/robbery. Although Pleau's robbery of the bank's night depository involves no particularly strong federal interest (such as the murder of a federal officer), the U.S. Attorney for Rhode Island wants to prosecute Pleau in federal court, and has stated that capital punishment may be sought.

Over four decades ago, the States entered into an interstate compact, the Interstate Agreement on Detainers Act (IADA). The Act provides the procedures for the temporary transfer of a prisoner from one state to another state, for criminal prosecution in the second state. Congress liked IADA so much that it not only gave permission for the compact, it also enacted IADA as a federal statute, and made the U.S. a party to the compact. So under IADA, the U.S. functions just like any other "sending" or "receiving" state.

The U.S. Attorney filed a detainer under IADA, to obtain temporary custody of Pleau. IADA explicitly provides that the Governor of the sending state has an unlimited right to refuse to transfer a prisoner. Rhode Island Governor Lincoln Chafee exercised this right. Because Rhode Island does not have the death penalty, Chafee believes that it would be contrary to Rhode Island public policy for Pleau to be subject to capital punishment for a crime perpetrated in Rhode Island, by a Rhode Island citizen, against another Rhode Island citizen.

Having been rejected under IADA, the U.S. Attorney then sought to obtain Pleau by asking a federal district court to issue a writ of *habeas corpus ad prosequendum.* This common law writ is used by a court to obtain a prisoner for prosecution, and it is implicitly recognized in the 1948 federal habeas corpus statute.

Lower courts split on whether the *ad prosequendum* writ could be used to evade IADA. Rhode Island lost in federal district court, won 2-1 before a First Circuit panel, and then lost 3-2 before the First Circuit en banc. What made the case of particular interest to Cato and the Independence Institute was the en banc majority's casual use of the Supremacy Clause as a trump card automatically resulting in a win for the federal government.

The National Governors Association filed an amicus brief on behalf of Governor Chafee before the en banc panel; the NGA argued vigorously against the U.S. Attorney's theory that the Supremacy Clause can override a valid compact between the States and the federal government. The NGA argued that this interpretation makes all federal/state compacts into worthless scraps of paper, as far as federal adherence to the compact is concerned.

Although the Solicitor General initially declined to respond to the cert. petitions by Chafee and Pleau, the Supreme Court has requested a response from the SG, which should be filed later this month.

The Cato Institute's write-up of the case is here. Scotusblog's collection of the various briefs is here, including the cert. petition amicus briefs of the National Governor's Association and the Rhode Island ACLU. (Note that this is for docket number 12-223, the Chafee case. The related case of Pleau is 12-230, which is linked from the Scotusblog page for Chafee.) Below is the summary of argument from my amicus brief:

> The First Circuit's decision violates Supreme Court teachings about the relationship between habeas corpus writs and state sovereignty, as explicated by Chief Justice Marshall in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), and by Chief Justice Taft in *Ponzi v. Fessenden*, 258 U.S. 254 (1922). More fundamentally, the First Circuit misuses the Supremacy Clause to make it an absolute trump card to defeat any state claim. This is not, and never has been, the meaning of the Supremacy Clause.
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> The decision below mangles the Supreme Court's major case about the Interstate Agreement on Detainers Act, *United States v. Mauro*, 436 U.S. 340 (1977). Westlaw characterizes the First Circuit's decision as the "most negative" of the more than 600 lower court cases applying *Mauro*. The decision below does not merely misread *Mauro*, but instead chops quotes and inverts language so as to turn *Mauro* into the opposite of what Mauro actually said.
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> There is no evidence, let alone an "unmistakably clear statement," that any act of Congress, including the 1789 and 1948 habeas corpus statutes, was intended to abrogate state sovereignty,

including the sovereign right of Governors to refuse a writ of *habeas corpus ad prosequendum*.

The First Circuit grants unauthorized additional power (indeed, statutorily forbidden power) to the federal government, which makes it imperative that this Court grant certiorari to protect our constitutional system of dual sovereignty.

Thanks to my fine summer interns, Christopher Ferraro and Rachel Maxam, of Denver University Sturm College of Law, for their work on this brief.