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Defending Municipalities in Section 1983 Actions



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DEFENDING MUNICIPALITIES

Covering The Bases: Litigating Qualified Immunity On Summary Judgment

By: Timothy T. Coates, Managing Partner, Greines, Martin, Stein & Richland LLP, Los Angeles, California

Qualified immunity is indispensable when defending municipal actors against Section 1983 claims. Knowing how, when and where to assert the defense is critical.

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Navigating Discovery In Section 1983 Police Misconduct Cases: Setting The Stage For Success At Trial

By: Nicole M. O'Connor, Senior Assistant Corporation Counsel, City of Boston Law Department and Erika P. Reis, Senior Assistant Corporation Counsel, City of Boston Law Department

A thorough, well-developed evidentiary record, particularly in police misconduct cases where timelines and factual descriptions can become hazy, is essential when defending law enforcement.

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BY: GENE TANAKA
*Partner, Best Best & Krieger, LLP,
 Walnut Creek, California*

The New Federalism: Blue States v. United States

THE LEGAL BACKDROP

For years, red states pushed back on the United States arguing that the federal government’s statutes and regulations interfered with states’ rights under federalism. But now, that narrative is reversed.

In the topsy-turvy world of politics today, blue states — not red states — are asserting federalism to support their initiatives on sanctuary cities, car emissions and legalized marijuana, to name a few. As you may (or may not) recall from your law school classes, federalism in the United States recognizes that the national government and state governments share powers. Specifically, the Constitution 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.”¹

While the authority of the United States to legislate in the areas of immigration, environment and controlled substances is not seriously under challenge, whether federal laws and regulations overturn state statutes in these areas is much more complicated. Each dispute calls into question different areas of law. For sanctuary cities, the separation of powers and Congress’ power of the purse is being litigated. With respect to car emissions, the courts are considering whether actions of the U.S. Environmental Protection Agency followed principles of administrative law. And for legalized marijuana, Congress’ yearly budget authorization, a fraught process, will be determinative.

We cannot presume to answer who should prevail in these fights, but we can analyze the background of the federal-state disputes on sanctuary cities, car emissions and legalized marijuana and frame the issues to help us understand

as we watch these battles play out in court and — in the court of public opinion.

Sanctuary Cities – a Hot Button Issue
 Immigration is top-of-mind and very contentious these days. One issue is the decisions by states and municipalities to consider themselves sanctuary cities. There is no formal definition, but a sanctuary city (or county or state) is a locality that has decided to limit its cooperation with federal authorities enforcing immigration laws. This includes a wide range of actions, such as denying requests to detain individuals requested by U.S. Immigration and Customs Enforcement, prohibiting local police from stopping people solely to establish their immigration status, providing legal assistance to the immigrant community, or allowing undocumented immigrants to obtain driver’s licenses.² In May 2018, the Federation for American Immigration Reform estimated that 564

U.S. cities, counties and states have adopted some type of sanctuary policy.³

In response, President Trump signed an Executive Order to defund jurisdictions that refuse to comply with federal immigration law.⁴ California then sued the United States and, on Nov. 20, 2017, U.S. District Court Judge William Orrick, sitting in the Northern District of California, issued a nationwide permanent injunction stopping that Executive Order. Following an appeal, the U.S. Ninth Circuit Court of Appeals affirmed Orrick’s injunction on behalf of the City and County of San Francisco and the County of Santa Clara because the Executive Order violates the Separation of Powers and, more specifically, the Appropriations Clause, which grants the power of the purse to Congress, not the President.⁵ As the Ninth Circuit noted, the Executive Branch “may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals.”⁶ However, the appeals court vacated the nation-wide injunction, and returned it to the district court for further findings to justify a nationwide injunction,⁷ where it is still pending.

Also in response, Attorney General Jeff Sessions and the U.S. Department of Justice (collectively, DOJ) required state and local jurisdictions that adopted sanctuary city statutes and ordinances to provide ICE access to their correctional facilities, give ICE notice of the release dates of detainees, and certify compliance with a statute that requires information sharing with the U.S. Department of Homeland Security in order to receive grants that support local law enforcement.⁸ The reaction was swift. At least six lawsuits were filed around the country.⁹ In each of the six cases, the DOJ lost, based in part on the same ground that tripped up President Trump’s Executive Order: violation of the Separation of Powers and the Appropriations Clause. Also, courts in those cases found the DOJ action was arbitrary and capricious in violation of the Administrative Procedures Act. Some of the district courts issued nation-wide injunctions, but all of them were stayed to resolve procedural issues or appeals.

It is likely that the U.S. Supreme Court will have to be the final word on these issues.

Car Emissions – Local Efforts to Address Climate Change

With federal inaction on climate change, some states stepped up their efforts to address the problem at the local level. Reacting to the Trump administration's roll-back of emissions standards, California and 12 other states moved forward with stricter vehicle emissions standards. The Clean Air Act allows a waiver of federal preemption for states that adopt emissions standards that are at least as protective of the public health and welfare as applicable federal standards.¹⁰ In January 2013, the EPA granted California a waiver for its Advanced Clean Cars Program, which included Low-Emissions Vehicle (LEV III) regulations.¹¹ The LEV III regulations set more rigorous standards to reduce greenhouse gas emissions than the federal standards. Twelve other states followed suit and adopted California's LEV III regulations.

In April and August 2018, the Trump administration's EPA announced that it was withdrawing current federal emissions standards since they may be too stringent, and proposed withdrawing the 2013 preemption waiver for California's Advanced Clean Cars Program.¹² On May 1, 2018, California and 17 other states filed suit directly in the U.S. Court of Appeals for the D.C. Circuit to overturn the EPA order withdrawing the current federal emissions standards.¹³ The states assert that the withdrawal of the current standards is arbitrary and capricious, lacks factual support, and lacks a reasoned explanation for the change of course in violation of the Clean Air Act, the Administrative Procedures Act and EPA's regulations.¹⁴ The matter is awaiting briefing and a hearing.

Legalized Marijuana - the Other Green Wave

It seems like every election, more states legalize marijuana. At last count, 33 states and the District of Columbia allow the medical use of cannabis. Ten states and the District of Columbia allow the recreational use of marijuana.¹⁵ But federal law makes the use and possession of cannabis illegal under the Controlled Substances Act of 1970.¹⁶ Under the Supremacy Clause of the U.S. Constitution: "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. . . ."¹⁷ Therefore, if Congress has legislated in the area, state law is preempted when they conflict. So how do the states continue to apply their marijuana laws in the face of federal law making cannabis illegal?

The answer lies in the budget process. In 2014 and 2015, Congress approved a budget amendment that prohibited the U.S. Justice Department from using funds to prevent states from implementing medical cannabis laws. This is known as the Rohrabacher-Farr, or CJS, amendment.¹⁸ The courts have interpreted this budget appropriation or its successor to prohibit the United States from prosecuting cannabis users and providers.¹⁹ While these cases only apply in their jurisdictions, the United States has not chosen to challenge other states.

Each year thereafter, Congress approved a similar budget amendment. Which takes us to today. The recently signed 2019 budget renews the CJS amendment yet again until September 30, 2019.²⁰

Conclusion – More of the Same

These conflicts reflect the deep divisions and closely balanced forces at play within our country at large. While a more unified Congress could resolve many of these disagreements, it too reflects the national divide between red and blue. This has left the courts to fill the gap. But, as this discussion illustrates, they are ill-suited to deal with nation-wide policy issues. Until we can narrow the differences and/or one side gains a lasting advantage, we will continue to see these challenges unfold.

Notes

1. U.S. Const. amend. X.
2. Tal Kopan, *What are Sanctuary Cities, and Can They be Defunded?*, CNN, Mar. 26, 2018.
3. *Sanctuary Jurisdictions Nearly Double Since President Trump Promised to Enforce Our Immigration Laws*, FAIR, May 2018, at 1.
4. 82 Fed. Reg. 8799 (Exec. Order 13768, Jan. 25, 2017).

5. *City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1231 (2018).
6. *Id.* at 1235.
7. *Id.* at 1245.
8. 8 U.S.C. § 1373; *City and County of San Francisco v. Sessions*, 349 F.Supp.3d 924, 933-934 (N.D. Cal. 2018).
9. *City of Philadelphia v. Sessions*, E.D. Pa., No. 17-cv-03894; *City of Chicago v. Sessions*, N.D. Ill., No. 17-cv-05720; *United States v. California*, E.D. Cal., No. 18-cv-490-JAM; *City of Los Angeles v. Sessions*, C.D. Cal., No. 17-cv-07215-R; *City and County of San Francisco v. Sessions*, N.D. Cal., Nos. 17-cv-04701-WHO, 17-cv-04642-WHO.
10. 42 U.S.C. § 7543(b).
11. 13 Cal. Code Regs. tit. 13, §§ 1961 – 1961.2, 3.
12. 83 Fed. Reg. 16,077-01 (Apr. 13, 2018); 83 Fed. Reg. 42,986-01 (Aug. 24, 2018).
13. *California v. U.S. Environmental Protection Agency*, D.C. Cir., No. 18-1114 (and consol. Nos. 18-1118, 18-1139).
14. *Id.* at State Petitioners' Non-Binding Statement of Issues, filed June 4, 2018, ECF No. 18-1114.
15. Jeremy Berke & Skye Gould, *This Map Shows Every U.S. State Where Pot is Legal*, BUSINESS INSIDER, Jan. 4, 2019.
16. 21 U.S.C. §§ 811, 812(c).
17. U.S. Const. art. 6, cl. 2.
18. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-215, § 538, 2130, 2217 (2014).
19. *United States of America v. Marin Alliance for Medical Marijuana*, 139 F. Supp. 3d 1039, 1047-48 (N.D. Cal. 2015); *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016).
20. Consolidated Appropriations Act, 2019, H.R. 648, § 537 (2019). **ML**



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