# RECENT INDICTMENT

TENTH AMENDMENT — ANTICOMMANDEERING — DEPARTMENT OF JUSTICE BRINGS OBSTRUCTION OF JUSTICE CHARGES AGAINST MASSACHUSETTS STATE COURT JUDGE. — Indictment, *United States v. Joseph*, No. 19-cr-10141 (D. Mass. Apr. 25, 2019).

As established by the Supreme Court, Congress lacks the constitutional authority to "commandee[r]" state governments by requiring them to "enact and enforce . . . federal regulatory program[s]."[1] This means that "even where Congress . . . [can] pass laws requiring or prohibiting certain acts," it cannot "compel the States to require or prohibit those acts."[2] States often cite this doctrine when resisting the notion that they must help enforce federal immigration policies.[3] On April 25, 2019, the United States Department of Justice (DOJ) issued a stark rebuke to such claims when it charged Judge Shelley Joseph, a Massachusetts state court judge, with obstruction-of-justice-related offenses.[4] The DOJ alleged that Judge Joseph had conspired to release an undocumented immigrant from her courthouse after learning that Immigration and Customs Enforcement (ICE) was there to arrest him.[5] Although not a typical case, Judge Joseph's prosecution undermines each of the normative goals of the anticommandeering doctrine, triggering significant Tenth Amendment concerns. Given the constitutional issues at stake, a court should be reticent to read the federal obstruction of justice statutes to authorize such a prosecution without a clear indication that Congress intended to alter the balance between state and federal power.

On March 30, 2018, the Newton Police Department arrested "A.S."[6] on narcotics and fugitive-from-justice related charges.[7] After A.S.'s fingerprint records revealed that he had previously been deported from the United States and was prohibited from entering the country until 2027,[8]

---

[1] New York v. United States, 505 U.S. 144, 161 (1992) (first alteration in original) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

[2] *Id.* at 166.

[3] *See, e.g.*, New York v. DOJ, 343 F. Supp. 3d 213, 233 (S.D.N.Y. 2018).

[4] *See* Indictment at 15–17, United States v. Joseph, No. 19-cr-10141 (D. Mass. Apr. 25, 2019) [hereinafter Indictment].

[5] *Id.* at 11–12.

[6] DOJ referred to the arrested man as "A.S." for "alien subject" in order to retain his anonymity. *Id.* at 3.

[7] *Id.* The charges were filed under Massachusetts state law. *Id.* The information throughout the next three paragraphs is based only on the Indictment's allegations and has not been confirmed by any judicial factfinder.

[8] *Id.*

ICE issued both a federal immigration detainer[9] and a warrant of removal to the Newton Police.[10]

Three days later, A.S. appeared on his state criminal charges in front of Judge Joseph in Newton District Court.[11] On the morning of the proceeding, ICE dispatched a plainclothes officer to the courthouse to arrest A.S.[12] 8 U.S.C. § 1357 gives ICE the authority to arrest noncitizens for civil immigration infractions.[13] Internal ICE policy, in turn, permits federal immigration officers to conduct such arrests in state courthouses, at least in part because of reduced "safety risks to . . . ICE officers."[14] Although the officer seeking to arrest A.S. remained in the public audience area of Judge Joseph's courtroom throughout the morning, the court clerk later instructed him to leave the courtroom; the clerk noted that if A.S. were released, it would be into the courthouse lobby.[15]

That afternoon, Judge Joseph discussed ICE's presence with the Assistant District Attorney and A.S.'s defense counsel at sidebar.[16] During the conversation, Judge Joseph requested to go off the record, prompting the court clerk to turn off the courtroom recorder for fifty-two seconds.[17] Once back on the record, the Commonwealth dismissed the fugitive-from-justice charge, given the dearth of evidence tying A.S. to the crime.[18] Because the state did not seek to detain A.S. on the narcotics charge,[19] Judge Joseph then announced A.S.'s release[20] and

---

[9] Such detainers are not mandatory but are rather "requests" to local law enforcement agencies to hold an individual beyond when she would have otherwise been released. *See* Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014).

[10] Indictment, *supra* note 4, at 3. The warrant directed federal immigration officers to take custody of A.S. for removal. *Id.* at 3–4. It was not directed at any state officials.

[11] *Id.* at 5–6.

[12] *Id.* at 6.

[13] 8 U.S.C. § 1357(a) (2012) (stating that a federal immigration officer has the power, *without a judicial warrant*, to "arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of [any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens] and is likely to escape before a warrant can be obtained for his arrest").

[14] ICE, DIRECTIVE NO. 11072.1, CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES 1 (2018). Some courts have limited ICE's ability to make such civil arrests in state courthouses. Although a preliminary injunction preventing ICE from "civilly arresting parties . . . attending Massachusetts courthouses on official business" has since been issued by the U.S. District Court for the District of Massachusetts, *see* Ryan v. ICE, 382 F. Supp. 3d 142, 161 (D. Mass. 2019), there was no such limit at the time of A.S.'s hearing.

[15] Indictment, *supra* note 4, at 6. The indictment alleges that the "normal custom and practice" in this courthouse was to release defendants into the courtroom, the exit of which led into the lobby. *Id.* at 4.

[16] *Id.* at 7.

[17] *Id.* at 8.

[18] *Id.* at 9.

[19] *Id.*

[20] *Id.* at 10.

granted the defense attorney's request to speak with his client downstairs.[21] Trial court officer Wesley MacGregor subsequently released A.S. out the back door of the courthouse using his security access card.[22]

The DOJ charged both Judge Joseph and MacGregor with conspiring to obstruct an official proceeding.[23] The indictment alleges that Judge Joseph and A.S.'s defense attorney "create[d] a pretext" to bring A.S. downstairs and that Judge Joseph acted "to achieve the object [of the conspiracy]" by ordering the court recorder to be turned off and granting the defense attorney's request to bring A.S. downstairs.[24] On April 25, 2019, Judge Joseph and MacGregor were indicted by a federal grand jury for conspiracy to obstruct justice,[25] aiding and abetting obstruction of justice,[26] and aiding and abetting obstruction of a federal proceeding.[27]

The Supreme Court has instructed lower courts to require an "unmistakably clear" statement from Congress before applying statutes in a manner that disrupts the "usual constitutional balance" between the state and federal governments.[28] This doctrine ensures that if Congress "wishes to enter constitutionally disfavored terrain," it does so "explicitly."[29] In prosecuting Judge Joseph, the government enters exactly such disfavored terrain: federal commandeering of state governments. As the Supreme Court has articulated the anticommandeering doctrine, Congress lacks the power to require that states "enforce a federal regulatory program."[30] The anticommandeering doctrine's normative goals are undermined by Judge Joseph's prosecution. These concerns persist despite this being a somewhat atypical case of commandeering: the federal policy at issue was implemented via prosecution, originated in the executive branch, and was imposed on a state judge. Given the constitutional principles at stake, courts should require a clear statement from Congress that it intended to upset the traditional federal-state balance before upholding such a prosecution.

The obstruction of justice statutes under which the DOJ is prosecuting Judge Joseph are broad in their language, making no mention of

---

[21] *Id.* at 9.

[22] *Id.* at 1, 10.

[23] *Id.* at 11–12.

[24] *Id.* at 11; *see also id.* at 11–12.

[25] *See* 18 U.S.C. § 1512(k) (2012).

[26] *See id.* §§ 2, 1512(c)(2).

[27] *See id.* §§ 2, 1505; Indictment, *supra* note 4, at 15–17.

[28] Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989)).

[29] John F. Manning, Essay, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 420 (2010) (citing Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331–32 (2000)).

[30] New York v. United States, 505 U.S. 144, 161 (1992) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

whether they apply to state officials.[31] Courts often refuse to apply such broad statutes in a way that might undermine the constitutional balance between the state and federal governments without an "unmistakably clear" statement that Congress intended to alter this balance.[32] Such "clear statement" rules impose a "clarity tax on Congress"[33] by requiring that it "speak with unusual clarity when it wishes to effect a result"[34] within a "constitutionally disfavored terrain."[35]

By prosecuting Judge Joseph, the DOJ enters the "constitutionally disfavored terrain" of federal commandeering. The Supreme Court first articulated the modern anticommandeering doctrine in *New York v. United States*,[36] declaring that Congress cannot "require the States to govern according to Congress' instructions."[37] Because "the power to issue direct orders to the . . . States" is "conspicuously absent" from Congress's constitutionally enumerated powers, the federal government is limited from doing so by the Tenth Amendment and the Constitution's structure.[38] The Court expanded this principle in *Printz v. United States*,[39] holding that Congress could not "circumvent [the] prohibition [on commandeering legislatures] by conscripting the States' officers directly."[40] Most recently, in *Murphy v. NCAA*,[41] the Court succinctly articulated the normative values animating the doctrine. First, it serves as a "structural protection[] of liberty,"[42] protecting individuals by

---

[31] *See* 18 U.S.C. §§ 1505, 1512(c)(2), (k).

[32] *Gregory*, 501 U.S. at 460 (quoting *Will*, 491 U.S. at 65); *see also* McDonnell v. United States, 136 S. Ct. 2355, 2373 (2016) (refusing to construe a federal criminal statute in a manner that curtailed the "prerogative to regulate the permissible scope of interactions between state officials and their constituents"). For critiques of this "clear statement" principle, see Manning, *supra* note 29, at 404; and Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1228–29 (2013).

[33] Manning, *supra* note 29, at 403.

[34] *Id.* at 407.

[35] *Id.* at 420; *see also* Bond v. United States, 134 S. Ct. 2077, 2088 (2014) ("Part of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991))).

[36] 505 U.S. 144 (1992).

[37] *Id.* at 162. The Court's reasoning was grounded in an originalist understanding of the Framers' intention for Congress to "regulate individuals, not States." *Id.* at 166.

[38] Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018) (discussing the doctrine laid out in *New York*). Justice O'Connor made clear that the doctrine implicates both Article I and the Tenth Amendment, since whatever powers are not delegated to Congress in Article I are reserved to the states under the Tenth Amendment. *See New York*, 505 U.S. at 159.

[39] 521 U.S. 898 (1997). Both *Printz* and *New York* have been the subject of substantial criticism by legal scholars. *See, e.g.*, Evan H. Caminker, Printz*, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 209, 234–43 (critiquing *Printz*'s methodological underpinnings and its consequences for future federal legislation); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2195–205 (1998) (describing numerous scholarly critiques of the anticommandeering doctrine).

[40] *Printz*, 521 U.S. at 935.

[41] 138 S. Ct. 1461.

[42] *Id.* at 1477 (quoting *Printz*, 521 U.S. at 921).

dividing power between state and federal governments.[43] Second, the doctrine advances political accountability by ensuring that "[v]oters who like or dislike the effects of the regulation know who to credit or blame."[44] Lastly, it prevents Congress from enacting a law and then "shifting the costs of regulation to the States."[45]

All of these substantive goals are undermined by Judge Joseph's prosecution. On the first point of *Murphy*, requiring state judges to assist in federal immigration enforcement erodes the "structural protections of liberty" that a division between state and federal power provides to individual immigrants.[46] The federal policy at issue here "augment[s]" the law enforcement "power of the Federal Government"[47] in the state courthouse, an area where regulation is traditionally left to state courts themselves.[48] Second — and perhaps most salient here — is the accountability rationale: much as the anticommandeering doctrine anticipates, requiring state judges to release individuals to ICE allows the federal government to implement controversial immigration policy while escaping public scrutiny over its enforcement.[49] This concern is heightened where the federal government implements its policy through

---

[43] *Id.* (quoting *New York*, 505 U.S. at 181).

[44] *Id.*

[45] *Id.* It is worth noting that the anticommandeering doctrine has undergone various shifts in "political valence" throughout its history. Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1175 (2013). Some scholars have suggested that anticommandeering principles, though not present at the Founding, emerged during the late eighteenth century "mostly due to Federalist opposition to state enforcement of federal law." *Id.* at 1174. Its early doctrinal roots lie in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), in which the Court established that, although the Fugitive Slave Act was constitutional, states could not be "compelled to enforce" it. Josh Blackman, *Improper Commandeering*, 21 U. PA. J. CONST. L. 959, 968 (2019) (quoting *Prigg*, 41 U.S. (16 Pet.) at 615). After a dormant period, the doctrine was revived during "the Rehnquist Court's federalism revolution," *see* Campbell, *supra*, at 1108, to thwart federally imposed background check requirements for firearm purchasers, *see Printz*, 521 U.S. at 902, 935. More recently, the doctrine has emerged with newfound relevance in arguments against federal immigration enforcement. *See, e.g.*, City of Chicago v. Sessions, 321 F. Supp. 3d 855, 869 (N.D. Ill. 2018); Blackman, *supra*, at 982 (invoking anticommandeering principles to argue that local governments do not have to provide information to ICE); Jessica Bulman-Pozen, Essay, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029, 2046–47 (2018) (same).

[46] *See* Blackman, *supra* note 45, at 983 (comparing sanctuary city laws with "the personal liberal laws [that] were enacted . . . to protect runaway slaves from the Fugitive Slave Act"); *see also* Nancy Gertner & P. Sabin Willett, Commentary, *We've Seen Federal Aggression with "Illegals" Before — During Slavery*, WBUR (May 24, 2019), https://www.wbur.org/cognoscenti/2019/05/24/judge-shelly-joseph-immigration-enforcement-nancy-gernter-sabin-willett [https://perma.cc/QMK7-WL8Y].

[47] *Printz*, 521 U.S. at 922.

[48] *See* Memorandum of Amicus Curiae the Ad Hoc Committee for Judicial Independence at 5, United States v. Joseph, No. 19-cr-10141 (D. Mass. Sept. 17, 2019) ("It is well established that 'the courtroom and courthouse premises are subject to the control of the court.'" (quoting Sheppard v. Maxwell, 384 U.S. 333, 358 (1966))); *see also* Note, *States' Commandeered Convictions: Why States Should Get a Veto over Crime-Based Deportations*, 132 HARV. L. REV. 2322, 2338 (2019) (describing how federal immigration enforcement allows federal regulation "in areas core to state police powers").

[49] *Cf. Printz*, 521 U.S. at 930.

individual prosecutions, leaving no written law to which state officials can point in justifying their compliance with a disputed federal law. Finally, such a policy shifts the cost of enforcing federal immigration law to the state. By relying on state courthouse security personnel to reduce resistance to ICE arrests, the federal government can enforce an intrusive immigration policy without allocating sufficient resources to do so independently.[50]

Admittedly, this prosecution is not the typical anticommandeering case: the policy at issue was implemented via prosecution, brought by the federal executive branch, and imposed on a state judge. These differences, however, do not diminish the Tenth Amendment concerns raised by such a prosecution. It is true that a prosecution is not a "direct order[] to the government[] of [a] State[],"[51] but a rather roundabout way of enforcing an unwritten federal policy.[52] Nonetheless, prosecution is a particularly coercive form of federal intervention, providing state officers functionally no choice but to enforce the regulatory program at issue.[53] Therefore, bringing criminal charges against an individual state officer for failing to enforce a federal regulatory program may constitute improper commandeering.

The anticommandeering concerns also persist even though this policy was imposed by the executive branch, without explicit authorization from Congress. There has been little academic or judicial discussion of the extent to which singular federal executive action is subject to the constitutional limits of the anticommandeering doctrine.[54] However, it seems intuitively clear that Congress should not be able to avoid implicating the anticommandeering doctrine by writing general statutes that give the executive branch free rein to commandeer the states in their implementation.

---

[50] *Cf. id.* ICE policy explicitly states that courthouse arrests can "reduce safety risks to . . . ICE officers and agents" because "[i]ndividuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband." ICE, *supra* note 14, at 1.

[51] Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018).

[52] *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 108 (1861) ("It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be . . . punished for his refusal."), *overruled in its interpretation of the Extradition Clause by* Puerto Rico v. Branstad, 483 U.S. 219 (1987). In this case, the unwritten federal policy would be that state judges must release individuals to ICE when requested to do so.

[53] *See* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York*,* Printz*, and* Yeskey, 1998 SUP. CT. REV. 71, 108 ("Given the large personal stakes for the official [where jail time is at stake], it is unlikely that she will choose between the options in a manner that advances intrinsic political values . . . ."); *see also* New York v. United States, 505 U.S. 144, 176 (1992) (emphasizing that states must have a meaningful choice as to whether to implement the federal policy).

[54] Previous instances of executive commandeering have been explicitly authorized by Congress. In *Printz*, for example, law enforcement officers violating the Gun Control Act could be fined or imprisoned. 521 U.S. at 904. Although this criminal penalty suggested that the enforcement of the statute would ultimately come from the DOJ, the congressional statute explicitly authorized such a prosecution and thus could be challenged directly. *Id.*

The largest hurdle to overcome in applying the anticommandeering doctrine to Judge Joseph's prosecution is the fact that state judges, unlike other state officials, are subject to the Supremacy Clause.[55] The Supremacy Clause requires state judges both to apply federal law in their proceedings and to hear federal causes of action in their courts.[56] But this does not entirely preclude the relevance of the anticommandeering doctrine here: some scholars have suggested post-*Printz* that even where state courts are required to hear federal causes of action, Congress may lack the authority to regulate state courtroom procedure.[57] To the extent that such a distinction exists between "substance" and "procedure,"[58] controlling the courthouse exit through which to release a criminal defendant likely falls on its "procedural" side.

Given the concern that requiring state judges to help enforce federal immigration policy may constitute unconstitutional commandeering, the federal obstruction of justice statutes should not be read to cover Judge Joseph's conduct without a clearer statement from Congress. Applying a clear statement rule[59] here would require Congress to speak explicitly if it wanted to upend the constitutional balance between the federal executive and state judges,[60] rather than permit legislators to write broad laws that the executive may apply in a constitutionally suspect way. Such a requirement would also facilitate legal challenges to overreaching executive action. Where the only colorable commandeering arises via prosecution, it is more difficult to challenge the policy directly via the articulated anticommandeering doctrine. Currently, states have to wait for broad executive action — such as Judge Joseph's prosecution — before bringing a more tenuous "as applied" challenge. If Congress were

---

[55] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[56] *See* Testa v. Katt, 330 U.S. 386, 393 (1947) (holding "that a state court cannot 'refuse to enforce a right arising from the law of the United States'" (quoting Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 222 (1916))); *see also* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1029 (1995) (stating that the Supremacy Clause "requires state courts to engage in affirmative action through entertaining federal causes of action").

[57] *See, e.g.*, Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 972 (2001).

[58] *Id.* at 979. The Court engaged with this distinction to some extent in both *Artis v. District of Columbia*, 138 S. Ct. 594, 607 (2018), and *Jinks v. Richland County*, 538 U.S. 456, 464–65 (2003), though it ultimately declined to decide whether the distinction was merited. *See Artis*, 138 S. Ct. at 607 (quoting *Jinks*, 538 U.S. at 464–65).

[59] *See* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

[60] *Cf.* David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 627–28 (2013) (proposing an "anticommandeering clear statement rule," *id.* at 627, as a way to avoid the pitfalls of the traditional anticommandeering doctrine in the marijuana legalization context).

instead required to legislate directly about state judges' responsibility to assist ICE's courthouse arrests, that statute might be more easily challenged on its face.

Applying such a clear statement rule here would not interfere with all federal prosecutions of state officials. The Supreme Court has upheld various prosecutions of state judges under federal civil rights laws,[61] even in relation to procedural courtroom acts like jury selection.[62] But, unlike the obstruction of justice statutes, federal civil rights statutes are explicitly written to apply to state officers.[63] Where Congress has been less than clear about requiring state officers to help enforce federal regulatory programs,[64] courts should be more reticent to read the statutes to upend the traditional federal-state balance.

If the federal government wants to test the boundaries of the anti-commandeering doctrine — as it does in prosecuting Judge Joseph — courts should require that Congress explicitly state its intentions to do so. This is particularly important in the immigration context, where the executive branch often acts unilaterally.[65] Without such an intervention, states may find it difficult to effectively challenge the Executive's persistent attempts to coerce state officers into helping enforce its controversial immigration policies.[66]

---

[61] *See, e.g.*, Dennis v. Sparks, 449 U.S. 24, 28 n.5 (1980) (holding that a state judge may be criminally liable under 18 U.S.C. § 242 (2012) even if he is immune from civil damages under 18 U.S.C. § 1983 for his conduct).

[62] *See, e.g.*, *Ex parte* Virginia, 100 U.S. 339, 340, 349 (1880) (upholding the prosecution of a state court judge for excluding black jurors from jury duty).

[63] See, for example, 18 U.S.C. § 242, at issue in *Dennis*, which specifically criminalizes depriving persons of their constitutional and legal protections "under color of law," and Act of March 1, 1875, ch. 114, § 4, 18 Stat. 336, 336 (repealed 1948), at issue in *Ex Parte Virginia*, which prohibits "any officer or other person charged with any duty in the selection or summoning of jurors" from disqualifying jurors based on race. The Court has also "long held that legislation adopted pursuant to the Reconstruction Amendments stands on a uniquely strong ground vis-à-vis the claims of federalism." Adler & Kreimer, *supra* note 53, at 120.

[64] Unlike the civil rights statutes, no intention to tip the traditional federal-state balance strongly in the federal government's direction can be inferred from the language of the obstruction of justice statutes. *See* 18 U.S.C. §§ 1505, 1512 (making no mention of application to state officers).

[65] *See* Bulman-Pozen, *supra* note 45, at 2038. Professor Jessica Bulman-Pozen suggests that in the context of federal immigration enforcement, "[w]hen states are shaping national policy together with the federal executive branch, there is particular hazard to undermining their ability to function as discrete political communities." *Id.* at 2047.

[66] *See, e.g.*, Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800–01 (Jan. 30, 2017) (expanding the enforcement priorities of ICE and disqualifying "sanctuary jurisdictions," *id.* at 8801, from federal grants).