

The True Powers of the TSA

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The Texas House of Representatives unanimously passed a resolution (HB 1937), which, if it became law, would have requires the Transportation Safety Administration to establish probable cause before performing groping searches on travelers passing through airport security. HB 1937 would have made it a felony in the state of Texas "for security personnel to touch a person's private areas without probable cause as a condition of travel or as a condition of entry into a public place."

U. S. Attorney John E. Murphy responded with a letter to state officials, which read in part (he incorrectly referred to the bill as HB 137 instead of HB 1937):

"HB 137 would conflict directly with federal law. The practical import of the bill is that it would threaten criminal prosecution of Transportation Security Administration personnel who carry out the security procedures required under federal statutes and TSA regulations passed to implement those statutes. Those officials cannot be put to the choice of risking criminal prosecution or carrying out their federal duties. 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.

"If HR 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."

When presented in the Texas Senate, the Senate promptly responded to the federal threat to shut down air travel out of Texas by pulling the bill. The federal government won that battle without a fight. The important thing for us however, is not how this episode played out, but what powers U. S. Attorney Murphy is claiming in his letter.

First, he is saying that any law passed by Congress automatically supersedes any state law. The Supremacy Clause (U. S. Constitution, Article VI) states:

"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; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

It is surprising indeed that a U. S. Attorney regards the fondling of airline passengers a legitimate power given to the federal government.

Secondly, he is implicitly claiming that every federal official can commit any violation of any state law so long as he does so in the course of his official duties, and as long as such actions are permitted under a federal law. (Groping is already illegal in Texas.) One wonders when that arbitrary power will be extended to all federal employees, whether on duty or not.

Here is a test for the lawmakers in Texas and every other state. There is no requirement in the federal or any state constitution that requires states to permit federal officials to enter a state-owned building. It would be a useful experiment for Texas to pass a law requiring all federal officials, and anyone representing a federal agency, to pass through an airport-type metal detector/secondary screening process before being granted entry into any state facility, "in order to ensure the safety of the citizens of Texas."