

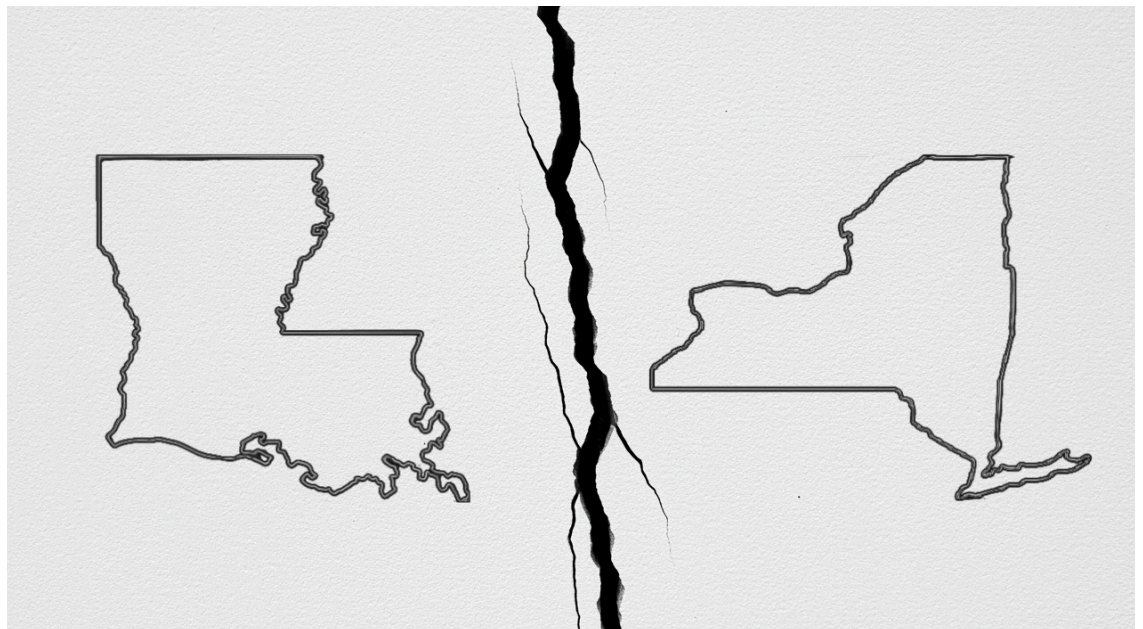
Post-Dobbs litigation to test federal Extradition Act enforcement powers

As the interstate abortion legal battle intensifies, a legal expert examines potential scenarios Louisiana might pursue after New York's refusal to extradite a doctor - raising questions about federal power, state sovereignty, and the constitutional limits of enforcing abortion laws across state lines.

By Caleb Mason

“Leave it up to the states the *Dobbs* decision, it's clear now, since Louisiana just indicted a doctor in New York for providing a pregnancy termination prescription to a Louisiana resident. Louisiana has formally requested that New York arrest and extradite the doctor, and New York has refused. This is a real constitutional crisis.

We can't pretend that there's some easy compromise position that would thread the legal needle, or that the only issue is shipping mifepristone by mail. Even if a woman got a plane ticket from Louisiana to New York for an in-person appointment, and took the mifepristone in New York (as opposed to receiving it in Louisiana by mail), Louisiana could still argue that the doctor's conduct affected Louisiana sufficiently for jurisdiction on various grounds—e.g., prior communications like scheduling emails; the time it takes for the medicine to take full effect (up to three days); or simply the patient's status as a Louisiana resident. Louisiana wouldn't have to be too particular about those arguments, because under the authorities governing interstate extradition (discussed in yesterday's article), all the arguments about the propriety of the charges would have to take place *in Louisiana*



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courts. A New York court would never get to evaluate the merits of the Louisiana charge.

So now that Gov. Hochul and the New York state legislature have said: “Not now, not ever,” what will Louisiana do? Here are the most likely options:

1. Louisiana could hire private bounty hunters to seize Dr. Carpenter in New York and bring her to Louisiana.

2. Louisiana could send its state police to New York to seize Dr. Carpenter and bring her to Louisiana.

3. Louisiana could contact a local New York law enforcement official

and request that that official arrest and extradite Dr. Carpenter in defiance of the New York state statute.

4. Louisiana could ask federal officials to have federal law enforcement agents seize Dr. Carpenter in New York and bring her to Louisiana.

5. Louisiana could sue Gov. Hochul and demand that she arrest and hand over Dr. Carpenter. The suit would most likely be filed in federal District Court in New York (following *Puerto Rico v. Branstad*, in which Puerto Rico sued the Governor of Iowa, in federal court in Iowa, to enforce an extradition request).

6. Louisiana could contact the

FBI and as many other states as it wants, and have Dr. Carpenter's name added to the NCIC or other nationwide databases of active wants and warrants.

Let's take these one at a time.

I assume the Louisiana authorities would balk at Option 1, the private bounty hunter option. And I assume that the Louisiana state police would balk at Option 2, because they would be committing kidnapping as a matter of New York state law, and the Louisiana indictment would not be a defense in a New York state court. (Good for the goose, good for the gander).

Option 3 would rely on the “constitutional sheriff” notion, which asserts that a sheriff is bound by the Constitution alone and should not be constrained by other state government actors if in the sheriff’s view those actors are contravening the Constitution. The argument would be that a “no extradition on out-of-state abortion-related charges” violates the Constitution’s Extradition Clause, and so a county sheriff would be within his rights, upon request, to use his own guys, his own guns, and his own vans to arrest a doctor and deliver her to the demanding state. It’s highly unlikely for New York, I think, but conceivable when we expand our analysis to other parts of the country.

I think Option 6 (getting her name into wants-and-warrants databases) has almost certainly already been done, but I doubt Louisiana is going to stop there. That leaves (4) and (5) as the most likely.

Let’s start with Option 4. Do federal agents have the legal authority to make an arrest in New York based on a Louisiana state arrest warrant for a violation of Louisiana state law?

This is not as easy to answer as you’d hope. Let’s start with the existing statutory authority of federal law enforcement agents. Such officials, e.g., FBI agents or Deputy U.S. Marshals, have the statutory power to make arrests for violations of federal law (whether pursuant to a warrant or probable cause). *See, e.g.*, 28 U.S.C. sec. 566(c), (d). And there’s ample authority upholding the power of federal agents to make arrests for state-law crimes when operating as part of a joint state-federal task force, with the participation and cooperation of state authorities.

But neither of those apply in the case of Dr. Carpenter. She’s not charged with any violation of federal law, and we know there will *not* be any state cooperation or participation in her arrest, because New York has just passed a law prohibiting its law enforcement officials from cooperating or participating in this extradition request. The arrest of Dr. Carpenter on the Louisiana arrest warrant will never be lawful under New York state law.

I have drawn a blank in trying to find a case addressing the authority of federal agents to make an ar-

rest in one state *without* the participation or cooperation of that state’s government, on the *sole* basis of a state-law arrest warrant issued by *another* state. There’s an obvious reason there aren’t such cases out there: ever since the Civil War, we have not faced the scenario in which some states take the moral stance of explicitly refusing to recognize extradition requests from other states.

As far as I am aware, the only other context, besides joint federal-state operations, in which a federal agent may make a purely state-law arrest is when the federal agent personally witnesses the state-law crime, and the state-law crime poses an immediate danger. The U.S. Marshals Service, as an example, has a policy directive addressing state-law arrests. It reads: “If a Deputy U.S. Marshal, who is in possession of their badge, credentials, and authorized weapon, witnesses a violation of state law which could result in death or physical injury to a person, the Deputy is authorized and has the discretion to take reasonable action as a law enforcement officer to prevent the crime or apprehend the violator.” (USMS Policy Directive No. 8.9.) It continues: “This applies only to situations where there is an immediate need to arrest the person to prevent his/her escape, to prevent additional violations from occurring, or to prevent physical injury or death.” *Id.*

Such policies provide, in a nutshell, that a federal agent is not *required* to walk past an in-progress assault without intervening. But could such a policy support a Deputy U.S. Marshal arresting Dr. Carpenter in Manhattan? No. The indictment has already been filed and the extradition request already served, the alleged crime has long since been completed. So there’s no way the federal agent could “witness” it. It would be far too much of a stretch, in my opinion, to claim that existing legal authorities empower federal agents to arrest Dr. Carpenter in New York on the Louisiana warrant.

But could Congress authorize such arrests by statute? (Or, more tendentiously, could the executive branch do so by executive order, Attorney General Opinion, Office of Legal Counsel memo, or the like?)

Suppose Congress created an “Extradition Act Enforcement Agency,” specifically authorized to arrest people who have been indicted on state charges, and are located in states in which the state government declines the charging state’s extradition request? The constitutionality of such an agency could, if challenged, be defended on the grounds that the agents would be enforcing federal law (namely, the 1793 Extradition Act). Would you accept that argument if you were a court? Is that enough of a “necessary and proper,” or “affecting interstate commerce” hook?

Or would you be sympathetic to the arrestee’s argument, namely: the Extradition Act imposes an obligation on *governors*, not on me. I didn’t violate the Extradition Act, and *I’m* the one you arrested. You’re not “enforcing” federal law at all, by arresting *me*—you’re “enforcing” *state* law from the state that charged me, and *that* is outside your constitutional powers.

That’s not a frivolous argument, by any means. In fact, I think it’s a pretty good one. Federal power is limited by the Constitution. The Extradition Act is a federal law, and its constitutionality is unlikely to be questioned (given the Extradition Clause of the Constitution). But the arrestee in our hypo, or Dr. Carpenter in real life, *did not violate* the Extradition Act. The *only* person who can violate the Extradition Act is “the executive officer” of a state or territory. Neither the Act nor the Constitution—the argument would go—give the federal government the authority to arrest Dr. Carpenter and hand her over to Louisiana authorities to be tried on a Louisiana state indictment. At most, the Act and the Constitution give the federal courts the power to issue an order to Gov. Hochul. But enforcement of that order would be by contempt proceedings directed against Gov. Hochul. If the constitutional bases of Congress’s power are the Extradition Clause and the Necessary and Proper Clause, then I think direct federal arrest of Dr. Carpenter would be *ultra vires* and void.

To be sure, arguments seeking to enforce the constitutional limits of federal power usually lose. I think many judges would shrug, cite *Wickard v. Filburn* and *Gonzales v.*

Raich, and say that direct federal arrests can be broadly construed as “enforcement” of the Extradition Act, and thus it’s within Congress’s power to authorize them (or potentially within the executive branch’s power to carry out absent Congressional action). *Gonzales v. Raich*, 545 U.S. 1 (2005); *Wickard v. Filburn*, 317 U.S. 111 (1942).

Some judges would surely say that. But not *all*, I think. After all, it wasn’t that long ago that the Supreme Court struck down a law under the Necessary and Proper Clause on the grounds that Congress’s goal of creating national uniformity on an important social issue went too far in imposing a burden on *individuals*. That was, of course, Chief Justice Roberts’ opinion in the Affordable Care Act case *NFIB v. Sebelius*, 567 U.S. 519 (2012). The Court struck down the individual mandate component of the ACA as exceeding Congress’s power under the Necessary and Proper Clause. If Congress were to try to graft an analogous “individual liability” onto the Extradition Act—which by its terms applies only to the executive authority of a state—that might strike some judges as a bit too much like the *ultra vires* individual mandate in *NFIB*. Just as Congress cannot compel an individual to buy health insurance (such a decision might read), it cannot compel an individual to comply with the Extradition Act. Federal power in the area of interstate extradition may only be directed at governors—not at individuals.

So we’re left with the question: Suppose Gov. Landry of Louisiana writes to Attorney General Bondi, and requests that the federal Justice Department arrest Dr. Carpenter? Gov. Landry will argue that Louisiana issued an arrest warrant pursuant to an indictment; the 1793 Extradition Act requires that each state comply with another state’s extradition requests; the Supreme Court has repeatedly upheld that mandatory federal-law obligation; and New York is explicitly refusing to comply with Louisiana’s extradition request.

What will the Attorney General do? If she directs her agents (most likely from the Marshals Service or the FBI) to arrest Dr. Carpenter in New York and transport her to

Louisiana to be handed over to Louisiana state authorities, and Dr. Carpenter or Gov. Hochul seek a restraining order in federal District Court, what will a federal judge do? Would a court uphold the lawfulness of the federal action? Or would a court issue an injunction forbidding it?

I think Gov. Hochul has standing to file suit to enjoin any seizure, because the service of the extradition request and her refusal of it has created a live case or controversy. I think Dr. Carpenter also has standing to file suit right for the same relief, because there's a

real risk of irreparable harm, and no adequate remedy other than an injunction. And I think that Louisiana has standing to file suit against Gov. Hochul to enforce its extradition request.

I predict that when this issue is litigated, we'll see the argument that the federal government lacks the power under the Necessary and Proper Clause to enforce the Extradition Act against anyone besides state governors. And we'll see the argument that things have changed since *Branstad* in 1987, so that courts should re-evaluate Gov. Dennison's argument from 1861, that

a state does not have an "obligation to surrender its citizens or residents to any other State, on the charge that they have committed an offense not known to the laws of the former, nor affecting the public safety, nor regarded as malum in se by the general judgment and conscience of civilized nations." *Dennison*, 65 U.S. 66, 69.

This article is the second part of yesterday's article titled "The case of Dr. Maggie Carpenter: The Dobbs extradition crisis is here."

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