Why Preemption Args Wouldn't Stall Trump Hush-Money Case

By **Ethan Greenberg** (March 12, 2024)

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On Feb. 15, acting New York County Supreme Court Justice Juan M. Merchan denied former President Donald Trump's motion to dismiss the indictment in the state's case against Trump.

That indictment charges Trump with falsifying business records that relate to hush-money payments made to adult film actress Stormy Daniels. Justice Merchan also set the case down for trial on March 25.

Justice Merchan's decision and the impending trial date may set the stage for a new Trump-centered legal skirmish, one that will turn the public's attention to an arcane but important issue in white collar criminal practice, namely: When can a state court criminal case be stayed, and ultimately dismissed, on the grounds that it is preempted by federal law?

The issue arises in the following context. Trump stands charged with 34 counts of falsifying records in the first degree in violation of NY Penal Law Section 175.10. That charge, in relevant part, requires that the defendant falsify business records with the intent to conceal the commission of another crime.

The Manhattan indictment alleges that Trump falsified the business records of the Trump Organization by creating various documents and document entries that falsely characterized the hush-money payments as "legal expenses."

Manhattan District Attorney Alvin Bragg's theory of the case is that four different crimes were committed when those payments were made at the close of the 2016 presidential campaign, and that Trump subsequently attempted to conceal those four crimes by falsifying company records.

More specifically, the district attorney alleges that the payments constituted criminal violations of: (1) New York's Tax Law; (2) New York's Election Law; (3) New York's Penal Law; and, most important for present purposes, (4) the Federal Election Campaign Act.[1]

As to FECA, the prosecution contends that Trump's falsification of records was intended in part to conceal the FECA crimes that were committed in 2016 by Trump's former personal attorney, Michael Cohen. In 2018, Cohen pled guilty to those crimes in federal court in connection with the hush-money payments he made on Trump's behalf to Daniels.

The Manhattan prosecution's partial reliance on Cohen's federal election law crime raises the possibility that Trump may now go to federal court and make a motion to stay and ultimately dismiss the Manhattan case on the ground that it is preempted by the federal FECA statute.

Some pundits and scholars — including, most prominently, professor Jed Handelsman Shugerman of Boston University School of Law — have long speculated, and continue to predict, that Trump will make such a motion.[2]

Now that Trump's Manhattan trial is just weeks away, the time for Trump to move for such a stay has arrived.

But so far, Trump's lawyers have not moved for a stay. The reason why is unclear. It may be that Trump's lawyers have decided not to make such a motion at all, bucking the common wisdom. Or it may be that — consistent with a general defense strategy of delay — Trump's lawyers are waiting until the last possible moment to make a motion for a stay in order to maximize the delay and disruption it might bring about. Or it may simply be that Trump's attorneys are still busy polishing their motion papers before submitting them.

In any event, for the reasons explained below, it seems doubtful that a motion to stay the Manhattan case based on federal preemption would succeed.

To begin with, it does not appear that New York's law against falsifying business records — a state criminal statute of general applicability that is not specifically directed at regulating elections — is preempted by FECA.

Still, the idea that the Manhattan prosecution as currently structured may be preempted, at least in part, by FECA is not completely frivolous, because the Manhattan charges do refer to Cohen's FECA conviction.

Nevertheless, pursuant to the federal Anti-Injunction Act[3] and well-settled case law, it appears that any motion for a stay based on preemption should and will be quickly denied. That is so because the appropriate time for Trump to raise the preemption issue in federal court would first come only after there is a trial and conviction, if any, before Justice Merchan in New York state court, and after all Trump's New York state appeals are exhausted.

Preemption Generally

The doctrine of preemption is founded primarily upon the U.S. Constitution's supremacy clause, which provides that "the Laws 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."

The doctrine provides, in essence, that because federal law supersedes conflicting state laws, in certain circumstances a state court case that is based on a state law that conflicts with a federal statute can be dismissed on the ground that the case is preempted by federal law.

Disputes over preemption are quite common in civil litigation,[4] and they typically arise in the context of state efforts to regulate industries that are already subject to extensive federal regulation — such as banking, food and drugs, and transportation.

Thus, for example, a typical dispute over federal preemption can be found in Morales v. Trans World Airlines Inc.[5] There, the U.S. Supreme Court looked at the federal Airline Deregulation Act. That statute contains an express preemption clause that prohibits states from enacting laws "related to a price, route, or service of an air carrier."[6]

In its 1992 decision in Morales, the court held that the Airline Deregulation Act preempted a state's efforts to regulate the content and format of airline advertising, because the state's guidelines referred to airfares and were likely to affect the price of airline tickets.

FECA's Preemption Provision

The Supreme Court has identified two general types of preemption: express or explicit, and implied.[7] Express preemption occurs where a federal statute contains a provision, like the Airline Deregulation Act's preemption clause, that expressly preempts certain kinds of state laws related to the subject covered by the federal statute.

FECA contains such an express preemption clause. It provides that the provisions of the statute, and of rules prescribed under it, "supersede and preempt any provisions of State law with respect to election to Federal office."[8]

Thus, as a logical matter, if Trump moves for a stay of the Manhattan prosecution based on the doctrine of preemption, he must argue in substance that New York's Falsifying Business Records statute as applied to him is a provision of state law with respect to election to federal office that is preempted by FECA.

Manhattan Case May Be Partially Preempted

There is a nonfrivolous argument to be made that Trump's Manhattan case is, in part, preempted by federal law.

The district attorney's theory of the case is that one of the crimes that Trump intended to conceal by falsifying records was the FECA crime committed by Cohen, for which Cohen was convicted in federal court. Thus, preemption might arguably be appropriate because, at least in a strictly literal sense, the Manhattan case asks a state court jury to find, among many other things, that Cohen committed a federal FECA crime.

But that argument is a very weak one for at least four related reasons.

First, this is not a case where the Manhattan jury must decide for itself whether Cohen committed a federal FECA crime. Here, Cohen has already been prosecuted in federal court, and the fact that Cohen is guilty of a federal FECA crime is already established by virtue of his federal conviction.

Thus, the Manhattan's jury's job will not be to determine whether Cohen committed a FECA crime, but only to determine whether Trump intended to conceal Cohen's already proven FECA crime.

Notably, under New York law — like the law of many other states — there are a number of situations where a New York state criminal prosecution can rely in part upon a prior federal conviction without running afoul of the preemption doctrine.

For example, a prior federal criminal conviction frequently serves as the basis for a New York state prosecution for criminal possession of a weapon in the third degree in violation of Penal Law Section 265.02(i), which makes it a felony to illegally possess a gun when the defendant has a prior criminal conviction.

Thus, it seems very doubtful that the mere fact that the Manhattan prosecution relies in part upon a prior federal conviction means that the Manhattan case is necessarily preempted by federal law.

Second, it is important to note that Cohen's FECA conviction is only a small and nonessential part of the Manhattan case. The Manhattan prosecution alleges that Trump falsified records in order to conceal four different crimes, only one of which was Cohen's FECA crime.

Depending on how Justice Merchan structures his jury instructions and the verdict sheet in the Manhattan case, the jury's verdict may well make it clear that the jury has found that Trump intended to conceal one or more state law crimes. And, if that is the case, then the possible FECA conviction and Trump's potential preemption defense would become essentially irrelevant.

Third, the FECA charge and Trump's preemption defense both relate to the charge of falsifying business records in the first degree because, as noted, that charge requires proof that defendant falsified records intending to conceal some other crime.

However, the lesser included offense of falsifying business records in the second degree does not require an intent to conceal another crime. Thus, whether or not Cohen committed a FECA crime would be irrelevant to a second degree falsification charge.

Accordingly, even if Trump were to prevail on a preemption defense, the result should not be an outright dismissal of the Manhattan case; rather, the result should and likely would be merely that the top charge in his case would be reduced from first to second degree falsification of business records.

First degree falsification of records is a Class E felony with a maximum potential sentence of four years in prison. By way of contrast, second degree falsification is a Class A misdemeanor with a maximum potential sentence of one year in jail.

There is a tendency in the media to downplay the significance of a "mere" misdemeanor conviction. But a misdemeanor conviction is still a criminal conviction, and one year in jail is a substantial penalty.

If the charges against Trump were reduced to misdemeanor level because of the preemption issue, he could still be convicted of 34 Class A misdemeanors. He could then theoretically be sentenced to 34 consecutive one-year jail sentences; by operation of law, however, those 34 sentences would merge, so that in fact Trump would face a maximum of two years in jail.

Two years in jail is, in itself, plainly nothing to sneeze at, especially for a man of Trump's advanced age.

However, Trump is an elderly man, with no criminal record, who is charged with nonviolent crimes. So in the real world, he is not likely to be sentenced to anything like two years in jail — whether he is convicted of first degree falsification, or is instead convicted of second degree falsification.

In other words, even if Trump were to prevail on a preemption defense, so that the top charge he faces is reduced from first to second degree falsification of records, the practical impact — as opposed to the political impact — on Trump would be next to negligible.

Fourth, and most important, Trump's preemption defense has already been considered and rejected in federal court, albeit in a slightly different procedural context.

Last spring, Trump briefly had his Manhattan case removed to federal court pursuant to Title 28 of the U.S. Code, Section 1442(a). That statute, in substance, permits an officer of the U.S. to remove a state court case to federal court if: (1) the case is based on actions taken by the officer "under color of his office," and (2) the officer has a defense based on federal law.

The Manhattan district attorney then moved to remand Trump's case back to state court.

After extensive briefing and an evidentiary hearing, on July 19, 2023, U.S. District Judge Alvin Hellerstein granted the district attorney's motion and remanded Trump's case back to state court.[9]

Trump argued to Judge Hellerstein that removal was proper because Trump had a valid federal defense to the Manhattan charges — the defense of preemption. Accordingly, Judge Hellerstein's July 19 decision closely analyzed the merits of Trump's preemption defense.

The bar that Trump faced was a low one. Under the removal statute, Trump did not need to prove that he would prevail upon his preemption defense. Rather, all Trump had to do to defeat the motion for remand was to demonstrate that he had raised a colorable federal defense.[10]

Yet Judge Hellerstein found that Trump failed to satisfy even that minimal burden, holding that Trump had "no colorable basis to support a federal preemption defense."[11]

Judge Hellerstein's opinion drew an important distinction between two different kinds of state laws. On the one hand, state laws that are specifically directed at regulating campaign conduct of the kind that is governed by FECA are preempted. On the other hand, state laws of general applicability that merely happen to be invoked in a given election-related case are not preempted.

So, for example, in Teper v. Miller,[12] the U.S. Court of Appeals for the Eleventh Circuit found in 1996 that FECA did preempt a state statute that forbid state legislators, including those running for federal office, to accept campaign contributions while the legislature was in session.

The Teper court found that the state statute was preempted by FECA because the statute was specifically directed at activity that is regulated by FECA — namely, campaign fundraising.

By way of contrast, in WinRed Inc. v. Ellison,[13] a political action committee argued that FECA preempted a state consumer protection law. It was alleged that the consumer law had been violated by the committee's use in solicitations for contributions of fine print and prechecked boxes, which steered unwitting donors into unintentionally agreeing to make recurring contributions.

The U.S. Court of Appeals for the Eighth Circuit found in 2023 that FECA did not preempt the state's consumer protection law because the consumer law was a law of general applicability, and was not specifically directed at regulating election-related activity.

Judge Hellerstein reasoned that New York state's law against falsifying business records, like the consumer protection law in WinRed, is a law of general applicability, and is not specifically directed at election activities.

Moreover, said Judge Hellerstein, the prosecution's theory in Trump's hush-money case does not limit or interfere with federal regulation of elections. Accordingly, Judge Hellerstein held that FECA preemption did not apply.

For all four of these reasons — and especially in light of Judge Hellerstein's well-reasoned opinion rejecting Trump's preemption defense — should Trump file a motion for a stay based on federal preemption, it would seem to be destined for failure.

Moreover, even if Trump did possess a truly strong substantive argument for preemption, it still does not appear that a motion made by Trump to stay the Manhattan trial on the ground of preemption would succeed, or that such a stay motion would even detain the federal court for very long. That is so because of the procedural strictures of the Anti-Injunction Act.

The Anti-Injunction Act

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[14]

The Anti-Injunction Act has been part of federal law in some form since 1793, and it is considered to be an essential component of the American system of dual federal and state courts.

In substance, the Anti-Injunction Act prohibits a federal court from staying a state court proceeding, except in the three rare situations expressly enumerated in the statute. The statute embodies the principle, articulated by the U.S. Supreme Court in its 1970 decision in Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, that state court cases "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the U.S. Supreme] Court."[15]

The general rule is therefore clear: A party who claims that federal law preempts a state court case must in the first instance make its preemption argument to the state court itself; if the state court rejects the party's preemption argument, then the party should take the preemption issue to federal court only after the state court appellate process has been exhausted.

So, for example, in Chick Kam Choo v. Exxon Corp., the Supreme Court held in 1988 that the U.S. District Court for the District for the Southern District of Texas had erred when it issued an injunction staying a Texas state court wrongful death case on the ground that the state court case was preempted by federal maritime law.[16]

The Supreme Court explained that even if the defendant were correct that the state court case was preempted by federal law, under the Anti-Injunction Act, the only proper place for defendant to litigate the preemption issue was in Texas state court, holding that the defendants "must present their pre-emption argument to the Texas state courts, which are presumed competent to resolve federal issues."[17]

The lesson for the Trump case is thus plain enough: If Trump wishes to litigate the preemption issue, then pursuant to the Anti-Injunction Act, he must first do so before Justice Merchan, and next, if necessary, before the appellate courts of New York state. He cannot properly go directly to federal court now.

Exceptions to Anti-Injunction Act Appear Inapplicable

The Anti-Injunction Act does set forth three exceptions to the general rule that a federal court may not stay state court proceedings. A stay can be granted: (1) "as expressly authorized by an Act of Congress," (2) "where necessary in aid of [the federal court's] jurisdiction," or (3) where necessary to "protect or effectuate [the federal court's] judgments."[18]

But none of these statutory exceptions would appear to have any application to Trump's hush-money case. To begin with, there is no act of Congress that expressly, or even by implication, authorizes a stay in Trump's situation.[19]

Second, there is no pending federal case related to Trump's hush-money case. Thus, it cannot be contended that a stay is necessary in order to protect the federal court's jurisdiction in a related case.[20]

Finally, no prior related federal case has resulted in a judgment that could even arguably be affected by the hush-money case. Accordingly, it cannot be contended that a stay is necessary in order to protect some prior federal judgment.[21]

In short, it is very difficult to see how a motion for a stay filed by Trump would not clearly be barred by the Anti-Injunction Act.

General Standards for Injunctive Relief Also Militate Against Stay

The Anti-Injunction Act, if applicable, would completely bar Trump's motion for a stay based on preemption, should he file one.

Moreover, even if the court found that Trump's case somehow fell within a recognized exception to the Anti-Injunction Act, Trump would still have to satisfy the traditional criteria applied by courts to any application for injunctive relief.

They are: (1) a strong likelihood of success on the merits; (2) the lack of an adequate remedy at law; and (3) a likelihood of substantial and immediate irreparable injury to the moving party if an injunction is not granted.[22]

Trump would be hard-pressed to satisfy any of these criteria.

To begin with, it is obvious that Trump does have an adequate remedy at law in the state courts. If Trump is serious about a preemption defense, he should make a motion to dismiss the indictment on the basis of preemption before Justice Merchan.

If Justice Merchan rejects Trump's preemption defense, and if Trump is convicted, then Trump can argue the preemption issue again on his state court appeal from his conviction. Thus, it is obvious that Trump does have an adequate remedy under state law.

Trump will also be hard-pressed to show danger of irreparable injury. Again, even if he is correct on the preemption issue, as a logical matter all that Trump will have proven is that he should be charged with second degree falsification of business records, rather than first degree.

Yet being overcharged by a single degree is hardly irreparable injury. To the contrary, that is the sort of injury that can readily be repaired by a state appellate court simply by reducing the degree of Trump's conviction, if any.

As to the likelihood of success on the merits, Trump will have a great deal of difficulty establishing that he is likely to prevail on the merits of his preemption defense. That is so because Judge Hellerstein's decision in the removal proceeding has already fairly emphatically rejected that defense — albeit in a slightly different procedural context.[23]

As noted, Judge Hellerstein not only disagreed with Trump's preemption defense; he expressly found that the defense was not even colorable. That finding will make it very difficult for Trump to argue now on a motion for a stay that he is somehow likely to succeed on the merits of his preemption defense.

Thus, it seems fairly clear that Trump's chances of obtaining a stay based on a preemption defense are quite poor. The most likely result of a motion for such a stay is a quick, short and harsh federal court decision denying a stay based on the Anti-Injunction Act and on Judge Hellerstein's prior decision.

Admittedly, as a general matter, Trump's legal team has not been shy about recycling legal arguments that have already been rejected by the courts, especially when doing so may buy him an additional period of delay.

Nevertheless, even Trump's attorneys may be reluctant to put forward his preemption defense again as part of a motion to stay, because Judge Hellerstein has already so firmly rejected it.

Thus, if Trump's attorneys do buck the common wisdom and decide not to move for a stay, the likely chief reasons why would likely be: (1) a fear of making such a motion in the face of Judge Hellerstein's crystal-clear prior rejection of Trump's preemption defense, and (2) the additional procedural hurdles interposed by the Anti-Injunction Act.

Conclusion

There are only a few weeks left before Trump's Manhattan trial is scheduled to begin. There is a very real possibility that he will try to stall, and potentially kill, the Manhattan prosecution by making a motion in federal court to stay the Manhattan case on the ground that it is preempted by federal law.

But such a motion will likely be quickly, and properly, denied, and such a stay motion will therefore fail to defeat, or even significantly delay, the Manhattan prosecution.

Ethan Greenberg is a shareholder at Anderson Kill PC and co-chairs the firm's white collar defense practice group. He previously served as an Acting New York State Supreme Court Justice presiding over criminal cases, and as an assistant district attorney in the New York County District Attorney's Office.

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[1] 52 U.S.C. § 30101 et. seq.

[2] So, for example, in his April 5, 2023, New York Times opinion piece entitled "The Trump Indictment is a Legal Embarrassment," Professor Shugerman noted that Trump had previously made a motion for a federal court injunction against the Manhattan D.A. over a subpoena issue that took a year to resolve, and Professor Shugerman predicted that Trump's hush money case "is headed up the same road … Mr. Trump has a substantial chance of winning, given the clarity of the federal pre-emption language and confirmation of pre-emption in New York State law."

[3] 28 U.S.C. §2283.

[4] The preemption doctrine and the Anti-Injunction Act are usually invoked in civil litigation. But the same principles apply when a defendant seeks to stay or enjoin a state court criminal prosecution. See e.g., Bess v. Spitzer, 459 F. Supp. 2d 191, 207 (E.D.N.Y. 2006); Safe Haven Sober Houses LLC v. City of Boston, 517 F. Supp. 2d 557, 568 (D. Mass. 2007).

[5] Morales v. Trans World Airlines Inc., 504 U.S. 374 (1992).

[6] 49 U.S.C. §4171 (3)(b)(1).

[7] See generally Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

[8] 52 U.S.C. §30143(a).

[9] New York v. Trump, 23 Civ. 3773 (AKH), 2023 WL 4614689 (S.D.N.Y. July 19, 2023).

[10] Mesa v. California, 489 U.S. 121, 136 (1989).

[11] New York v. Trump, 2023 WL 4614689 at *12.

[12] Teper v. Miller, 82 F.3d 989 (11th Cir. 1996).

[13] WinRed Inc. v. Ellison, 59 F4th 934 (8th Cir. 2023).

[14] 28 U.S.C. §2283.

[15] Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Engineers, 398 U.S. 281, 287 (1970).

[16] Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988),

[17] Chick Kam Choo, 486 U.S. at 150.

[18] 28 U.S.C. §2283, supra.

[19] See Mitchum v. Foster, 407 U.S. 225, 237 (1972). Notably, pursuant to Mitchum, Trump might have a better chance to fall under the "Act of Congress" exception to the Anti-Junction Act and obtain a stay of the Manhattan case if Trump were to bring a new federal civil rights lawsuit under 42 U.S.C. §1983 against the Manhattan D.A. Such a lawsuit might, for example, assert that the D.A. is subjecting Trump to unconstitutional "selective prosecution" and thereby violating Trump's civil rights.

However, such a strategy will not help Trump win a stay based on preemption because here is no personal civil or constitutional right to preemption.

[20] See Atlantic Coastline, 398 U.S. at 295.

[21] See Key Co. LLC v. Equitable Prod. Co., 27 F.4th 252, 261 (4th Cir. 2022).

[22] See generally 9 West Fed. Procedure §47:133:

> Generally, a federal court must not except in exceptional and extremely limited circumstances, intervene by way of injunction in a pending state criminal prosecution. Specifically, not only must a case fall within one of the exceptions to the Anti-Injunction Act before an injunction may issue, but a defendant claiming entitlement to an injunction against criminal prosecution in state court must further show the likelihood of substantial and immediate irreparable injury as well as the lack of an adequate remedy at law to redress such injury.

[23] Notably, after much deliberation, last November Trump's attorneys successfully moved to dismiss with prejudice their appeal of Hellerstein's Decision – thus, at least seemingly conceding that the Decision was correct.