

The United States v. Arizona The Power Struggle Over Setting Immigration Enforcement Priorities

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On April 23, 2010, Arizona Governor Brewer signed into law state senate bill 1070 (SB 1070). In signing the bill, the governor declared that Arizona could no longer stand idly by while the federal government failed to protect Arizona from the criminal acts caused by undocumented migrants in the state.¹

In the weeks leading up to the bill's passage, scores of protestors had been urging the legislature not to enact the statute. The protestors feared that the law would result in a cascade of anti-Latino fervor in the state. When signed, the federal government expressed mild concern about the statute's ramifications and did not immediately act, to the dismay of civil rights activists. However, a few weeks before the bill was to go into effect, the federal government filed a lawsuit challenging the law's constitutionality, but not raising concerns over racial profiling. In response to criticisms about the federal government's failure to raise objections to the statute based on civil rights, Attorney General Holder indicated that if the statute does go into effect, the federal government will monitor closely and file suit if any civil rights violations occur.

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Anti-immigrant groups saw Arizona's actions as a model and began courting politicians across the country to encourage them to pass copycat legislation. On the other side, Latino leaders began encouraging a boycott of Arizona. Both sides can claim some victories. Politicians in over 15 states have indicated interest in enacting SB 1070 copycat statutes,

and at least four states have already proposed legislation to do so.² In contrast, a number of cities have terminated their business dealings with Arizona, and the state's conference industry is facing a 50-75 percent drop in new bookings.³

High emotions have given way to a multiplicity of lawsuits, seven at last count, filed to prevent the statute from going into effect and to declare it unconstitutional. The fate of the lawsuits is pending as I write this; however, at the core of the grievance are fears that the law is difficult to enforce without prejudicing Arizona's Latino residents, and concerns that the state is engaging in regulating a field reserved for federal action.

Stepping back from the spectacle that surrounds SB 1070, it is not difficult to see that Arizona is trying to straddle between state and federal fields of regulatory power and between state and federal priorities, while also attempting to redefine both relationships. The state attempts to accomplish this first by claiming that what it is doing fits squarely within its state rights, and second by arguing that its statute helps the federal government achieve what should be a common goal: the removal of undocumented migrants.⁴ But before shedding light on constitutional tensions created by the statute, we must strip away the rhetoric and look at SB 1070's actual statutory language.

THE NUTS AND BOLTS OF SB 1070

We must understand that SB 1070 is not one law, but rather a series of laws joined together by the common goal of creating a hostile environment for undocumented migrants in the state of Arizona. Each of the different provisions must withstand constitutional scrutiny independently, and it is possible that some parts of SB 1070 will survive and others fail as the lawsuits wind their way through the U.S. legal process.

The bill creates several new state crimes designed to punish individuals without immigration status by making it:

- Illegal for a non-citizen not authorized to work under federal law to seek or be employed in the state. Arizona Revised Statutes ("A.R.S.") § 13-2928(C).
- Illegal to hire or be hired at a public place, if in the process of the transaction traffic is blocked or impeded. A.R.S. § 13-2928 (A) and (B).
- Unlawful for a person who is in violation of a criminal offense to transport, move, conceal, harbor, or shield an undocumented non-citizen in order to further the

illegal presence of the non-citizen; or to encourage a non-citizen to come to Arizona knowing that it will be in violation of law. A.R.S. § 13-2929(A)

- Illegal for any non-citizen in the United States to fail to register or carry a federal immigration document that has been issued to the person under 1304(e) or 1306(a) [The Alien Registration Act of 1940]. A.R.S. § 13-1509(A) (F). But note that, "This section does not apply to a person who maintains authorization from the federal government to remain in the United States."

In addition to creating new criminal statutes targeting undocumented persons present in Arizona, SB 1070 specified a number of activities that law enforcement must undertake to identify, arrest, and remove undocumented migrants found in the state of Arizona. Namely,

- When lawfully stopping, detaining, or arresting a person that the police have reasonable suspicion is undocumented, the police must, when practicable, make reasonable efforts to determine the person's immigration status, except when it would interfere with an investigation. When a person is stopped or detained, presentation of an Arizona driver's license or another specified form of identification may be sufficient to show legal status or citizenship. A.R.S. § 11-1051(B).
- When a person is arrested, their immigration status must be determined before they are released by checking with the federal government. A.R.S. § 11-1051(B).
- When a non-citizen who is unlawfully present is discharged after conviction of an offense, federal authorities must be notified. A.R.S. § 11-1051(C).
- Police may make a warrantless arrest for any offense that makes the arrestee removable from the United States. A.R.S. § 13-3883(A)(5).
- Law enforcement agencies must not establish "sanctuary cities." A.R.S. § 11-1051(A).

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Arizona claims that what it is doing fits squarely within its state rights, and argues that SB 1070 helps the federal government achieve what should be a common goal: the removal of undocumented migrants.

THE STATE'S ATTEMPT TO EXPLOIT A GREY AREA IN CONSTITUTIONAL LAW

State Rights

Arizona's best argument in defense of SB 1070 is that the state is engaging in legislative actions reserved to the states through the Tenth Amendment, which reads, "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."⁵

The U.S. Supreme Court has held that states may enact statutes that have an incidental effect on federal regulation of immigration if the statute is focused directly upon and tailored to combat a local problem⁶ or if the subject matter of the law in question is an area traditionally occupied by states and Congress has not clearly manifested its intention to preempt the regulation in question.⁷

Arizona's statute was drafted by Kris W. Kobach who has authored a series of articles promoting the theory that states can operate within the confines of the Tenth Amendment by simply criminalizing particular conduct by undocumented migrants in a way that mirrors federal law, thereby acting under the state's undisputed right to address crime and avoiding federal preemption.⁸

SB 1070 attempts to bring Kobach's vision to fruition by creating state criminal statutes that punish undocumented aliens who seek employment and/or who fail to register under federal law.

For the argument to prevail, however, Arizona will need to convince the courts that SB 1070 is addressing public safety and employment, two traditional state areas of regulation. The governor and legislature laid the foundation for the public safety argument by linking the need for SB 1070 with the need to address the allegedly high incidence of crimes by undocumented migrants in the state and the downward pressure on wages created by the availability of undocumented

workers.⁹ However, SB 1070 does not address a problem unique to Arizona nor does it do so in an insular fashion.

Arizona may be a border state and it may be disproportionately affected by illegal crossings into the U.S.; however, illegal immigration is a national concern, not a localized problem unique to Arizona. There are over 12 million individuals without immigration status living in the United States, roughly five percent of them in Arizona. Arizona's crime statistics and unemployment are actually lower than the national average. Although localized violence in Mexico near the border has increased, the state does not face similar violence.¹⁰ Moreover, Arizona may be resolving its own purported illegal immigration problem by forcing it onto other states. News reports indicate that undocumented individuals are not returning to their country of nationality, but rather moving to other states with already higher percentages of undocumented migrants, like New Mexico, Nevada, and California.

Also, SB 1070 requires Arizona's police officers to detain and transfer undocumented migrants to federal authorities. In order for SB 1070's law enforcement mandate to work, the federal government would need to be a willing participant in determining the immigration status of those arrested, and in detaining undocumented individuals caught by Arizona law enforcement officers. Although the federal government has not refused outright to participate in the enforcement of SB 1070, it has raised concerns about its ability to effectively meet its enforcement obligations to other states while submitting to the multiplicity of requests it anticipates receiving from Arizona law enforcement agencies attempting to transfer undocumented aliens from state to federal custody.

The effects of SB 1070 on other states and the federal government are too numerous for Arizona to be able to argue that the law is narrow and only regulating local activity. While Arizona may believe that SB 1070 presents the best solution to address illegal immigration, the policy decision to enact laws with such sweeping national effects cannot come from unilateral state action.

CONCURRENT POWER

Arizona's legislators and the governor have also purported that SB 1070 mimics federal immigration statutes and therefore both can coexist without causing externalities.¹¹ However, the actual language of SB 1070 belies this attempt at several points. Some of the new crimes carry different penalties (smuggling) or *means rea* (registration). Some do not have a federal counterpart. The worst offender is the law criminalizing the act of non-citizens not authorized to work under federal law to seek or be employed in the state.¹²

Arizona Revised Statutes § 13-2928(c) has no parallel in the Immigration and Nationality Act (INA). In 1986, Congress enacted the Immigration Reform and Control Act (IRCA), implementing a complex and extensive national system for employers to verify the ability of an employee to work legally in the United States. Congress consciously chose to punish the employer for hiring an undocumented migrant, not the employee.¹³ The federal law subjects undocumented workers to removal if arrested by ICE, and to prosecution, but only if the individual used fake ID or documents belonging to someone else in the attempt to obtain employment.

This mistake may prove critical to Arizona. The Supreme Court has ruled that states cannot enact laws that “stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.”¹⁴ In its lawsuit, the federal government complains that Arizona's emphasis on prosecuting employees restructures the government's immigration enforcement method adversely to Congress's carefully deliberated design. If the court agrees that the two laws diverge in intent, the Arizona provision will be struck down.

However, the possibility that the crime of “seeking employment when not federally authorized to do so” may prove unconstitutional does not terminate the possibility that other sections touching on employment of undocumented migrants will survive. To illustrate, another of SB 1070's provisions makes it a crime to block traffic in order to hire a worker. Past fed-

eral cases have held that controlling the movement of vehicles and traffic solely within state lines is a traditional state action and therefore constitutional.¹⁵

CHALLENGING TRADITIONAL STATE AND FEDERAL ROLES

Arizona's Governor Brewer often defends SB 1070 by claiming that Arizona is only doing what the federal government has failed or refused to do.¹⁶ The phrase is politically advantageous. It allows Republicans to present the federal government, currently controlled by the Democrats, as ineffective and lacking common sense for failing to embrace Arizona's offer to assist in controlling illegal immigration. The message is working in Arizona. The governor, who is running for reelection, is using SB 1070 to propel her campaign. Republican candidates in other states have taken notice and have used promises of enacting SB 1070 copycat legislation to enhance their own reelection hopes.

Although it may be a popular battle cry in a state that sees the Beltway as disconnected and aloof to the needs of Arizona, it does not hold up under constitutional scrutiny. The U.S. Constitution states,

This Constitution, and the Laws of the United States 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.¹⁷

States enjoy concurrent sovereignty with the federal government, subject to the Supremacy clause.¹⁸ The Supreme Court has held that “for local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nationals, we are but one people, one nation, one power.”¹⁹

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Arizona may be a border state and it may be disproportionately affected by illegal crossings into the U.S., but illegal immigration is a national concern, not a problem unique to Arizona.

The Department of Homeland Security and the Department of Justice argue that Arizona's claim that the federal government is not doing its job rests on a faulty assumption as to what constitutes the federal government's immigration enforcement job. They argue that Arizona fails to recognize the complex nature of immigration enforcement and the need for the federal government to control and balance a number of variables in deciding how to use enforcement resources to address illegal immigration. If Arizona is permitted to dictate how and when immigration enforcement is warranted by unilaterally declaring it a priority for local law enforcement to arrest individuals who are unlawfully in the United States and forcing federal authorities to receive the individual for removal processing, then the balance of power between the states and the federal government is turned on its head. This is constitutionally impermissible because, as the courts have repeatedly held in other cases, "whatever power a state may have is subordinate to the supreme national law."²⁰

CONCLUSION

SB 1070 faces an uphill battle, exemplified by the District Court's order enjoining major portions of the bill from going into effect. The phrases thrown around to defend it may play well in the media, but they do not play well in constitutional construction. Arizona's local problem with illegal immigration is no different from the problem in the nation as a whole. Arizona's immigration statutes are not just like federal immigration statutes. And Arizona's offer to do the federal government's job changes the job description.

Yet, even if Arizona is precluded from using the means it has chosen to address undocumented immigration, the ends envisioned may come to pass through other avenues. Many predict that Republicans will regain control of at least the House of Representatives. If the idea of SB 1070 proves to be popular with voters, a Republican-controlled Congress

could amend federal laws regulating collaboration between state and federal enforcement entities to accommodate the kind of involvement envisioned in SB 1070. Popular or not, constitutional or not, SB 1070's approach for handling illegal immigration is front and center in the immigration reform dispute. ■■■

NOTES

¹ Statement by Governor Jan Brewer on Signing Senate Bill 1070 issued April 23, 2010, available at azgovernor.gov/dms/.../PR_042310_StatementByGovernorOnSB1070.pdf.

² For example, North Carolina (SJ 1349), Pennsylvania (HB 2479), Rhode Island (HB 8142), and South Carolina (SB 4919).

³ Statement by Debbie Johnson, president and CEO of the Arizona Hotel and Lodging Association, "Horizon" show aired July 7, 2010, <http://www.azpbs.org/horizon/detail.php?id=1399#BusinessLeadersRespondtoSB1070>.

⁴ *United States v. Arizona* CV-1013-PHX-SRB (AZ Dist. Ct 2010).

⁵ U.S. Constitution, Art. X.

⁶ *DeCanas v. Bica* 424 U.S. 351 (1976).

⁷ *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218 (1947).

⁸ Kris W. Kobach, "Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration," *Georgetown Immigration Law Journal* vol. 22 (2008).

⁹ Craig Harris, Alia Beard Rau, and Glen Creno, "Arizona Governor Signs Immigration Law; Foes Promise Fight!" *The Arizona Republic*, April 24, 2010.

¹⁰ Dennis Wagner, "Violence Is Not Up on Arizona Border despite Mexican Drug War. Mexico Crime Flares, But Here Only Flickers," *The Arizona Republic*, May 2, 2010.

¹¹ Statement by Governor Jan Brewer on Signing Senate Bill 1070, April 23, 2010, available at azgovernor.gov/dms/.../PR_042310_StatementByGovernorOnSB1070.pdf.

¹² Arizona Revised Statutes (A.R.S.) § 13-2928(c).

¹³ H.R. Rep. No. 99-682(I) at 46.

¹⁴ *Hines v. Davidowitz* 312 U.S. 52, 6 (1941).

¹⁵ *ACORN v. City of Phoenix* 798 F.2d 1260 (9th Cir. 1986). See also *Comité de Jornaleros v. Redondo Beach* 2010 U.S. App. Lexis 11733 No. 06-55750 (9th Cir. June 9, 2010).

¹⁶ Craig Harris, Alia Beard Rau, and Glen Creno, *op. cit.*

¹⁷ U.S. Constitution Article VI, Clause 2.

¹⁸ *Tafflin v. Levitt* 493 U.S. 455 (1990).

¹⁹ *Chae Chan Ping v. U.S.* 130 U.S. 581 606 (1889).

²⁰ *Hines v. Davidowitz* 312 U.S. 52, 68 (1941).