

State and Local Enforcement of Federal Immigration Law - The Arizona Experience



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A Shell of Its Former Self

What remains of SB 1070 after the
U.S. District Court Injunction

Timing is Everything

SB 1070 as amended was set to take effect at midnight on July 29, 2010.

On July 28th, U.S. District Court Judge Susan Bolton issued an Order enjoining, in part, enforcement of certain provisions of the law.

Judge Bolton's ruling was specific to the lawsuit filed by the United States Attorney General, and did not halt certain other provisions from going into effect that were potentially problematic for law enforcement.

The next hearing is scheduled for November 1, 2010.

The Government's Case

The heart of the U.S. Government's suit is the principle of supremacy and preemption in the field of immigration enforcement.

The U.S. argues that the power to regulate immigration is vested exclusively in the federal government, and thus, SB 1070 is preempted.

The Court considered each statute separately and enjoined those for which the U.S. would likely succeed on the merits in establishing preemption, also noting likely irreparable harm without an injunction.

Injunction in a Nutshell

- **Portions of 11-1051(B)** which require officers to:
 - Make a reasonable attempt to determine immigration status when there is reasonable suspicion to suspect unlawful presence.
 - Determine an arrestee's immigration status prior to release from custody.
- **13-1509** in its entirety.
- **13-2928(C)** creating a class one misdemeanor to solicit or perform work in Arizona without authorization.
- **13-3883** authorizing officers to make warrantless arrests upon probable cause for any “public offense that makes the person removable from the United States.”

Preemption 101

- Preemption can be either express or implied.
- There are two types of implied preemption:
 - Field preemption (“The depth and breadth of a congressional scheme occupies the legislative field”)
 - Conflict preemption (Compliance with both schemes is impossible, or the state law frustrates the purpose of the federal law.)
- “The Supreme Court has consistently held that the federal government has broad and exclusive authority to regulate immigration, supported by both enumerated and implied constitutional powers.” —**So... does SB 1070 seek to “regulate immigration?”**

Preemption Findings

- Congress enacted the Immigration and Nationality Act, providing a comprehensive and complex statutory scheme for regulating immigration.
- Various federal agencies, including the Dept. of Justice, Dept. of Homeland Security and the Dept. of State are empowered to administer and enforce the INA.
- Congress also enacted the Immigration Reform and Control Act to sanction employers who knowingly employ unauthorized aliens. This provides NO SANCTION for the worker.

Enjoining Specific Provisions

- The Federal Government's lawsuit sought to enjoin enforcement of "SB 1070" in its entirety, but the court noted that it is not a freestanding statute, but rather an amalgam of new statutes and amendments to existing law.
- Noting the severability clause in section 12(A) of SB 1070, the court was "obligated to consider S.B. 1070 on a section by section and provision by provision basis."

A.R.S. §11-1051(B)

- The Court breaks this into two categories:
**Mandatory Immigration Status
Determination Upon Arrest and Immigration
Status Determination During Lawful Stops,
Detentions, or Arrests.**
- The Court also addresses the issue of
“presumptive identification” contained in 11-
1051(B).

A.R.S. §11-1051(B)—Arizona's Argument

- A person arrested shall have immigration status determined before the person is released.
- Arizona contends this should be applied only to arrests where there is reasonable suspicion that the person is an unlawfully present alien.
- The Court notes that this sentence does not contain this modifier, and interprets it as it was originally written prior to the modification by HB 2162.
- Arizona acknowledged that this sentence “might well have been more artfully worded.”

A.R.S. §11-1051(B)—U.S. Argument

- The U.S. government's position is that requiring mandatory determination of immigration status for all arrestees "conflicts with federal law because it necessarily imposes substantial burdens on lawful immigrants in a way that frustrates the concern of Congress for nationally-uniform rules governing the treatment of aliens throughout the country—rules designed to ensure '*our traditional policy of not treating aliens as a thing apart.*'" (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

A.R.S. §11-1051(B)—U.S. Argument

- The U.S. also argues that “the influx of requests for immigration status determinations directed to the federal government or federally-qualified officials would ‘impermissibly shift the allocation of federal resources away from federal priorities.’”
- DHS is required by 8 U.S.C. §1373(c) to “respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status...for any purpose authorized by law, by providing the requested verification status or information.” DHS has done this with the LESC.

The Court 's Breakdown

- All arrestees must have their citizenship determined prior to release. “Arrest” means what it says and applies to all.
- State and local officers must obtain this information from the federal government.
- The federal government is required by statute to provide the information.
- This scheme impermissibly reallocates federal resources, and unnecessarily burdens lawfully present persons.
- U.S. likely to prevail on preemption claim.

A.R.S. §11-1051(B)—Determination During Stops, Detentions and Arrests

- The U.S. postulates mostly the same arguments, and prevails accordingly, but also adds a slightly different argument about the complexity of determining lawful status.
- There are numerous categories of lawfully present aliens “who will not have readily available documentation to demonstrate that fact,” such as foreign visitors from Visa Waiver program countries, asylum seekers, those with temporary protected status, U and T visa applicants, etc.
- U.S. born citizens also are not easily confirmable in a federal database.

A.R.S. §11-1051(B)—Presumptive ID

- The Court also concludes that the list of forms of identification that could provide a presumption that a person is not an unlawfully present alien applies only to the reasonable suspicion situation.
- The determination upon arrest provision is clear, and a “presumption” against unlawful presence would not dispose of the requirement that immigration status be checked.

Willful Failure to Complete or Carry Documents

- A.R.S. 13-1509 makes it a state crime to violate federal registration laws and provides for state prosecutions and penalties for violations of the federal registration law.
- The U.S. argues that this interferes with comprehensive federal alien registration law, seeks to criminalize unlawful presence, and will result in harassment of aliens.
- Arizona argues that this does not conflict with existing federal law nor does it intrude into an occupied field.

Willful Failure to Complete or Carry Documents

- The Court finds that the current federal alien registration requirements “create an integrated and comprehensive system of registration, in keeping with previous case law.
- The Court states that 13-1509, in attempting to supplement or compliment the federal scheme, instead alters the penalties established by Congress.
- 13-1509 “stands as an obstacle to the uniform, federal registration scheme and is therefore an impermissible attempt by Arizona to regulate alien registration.”

A.R.S. 13-2829(C)—Work by Unlawfully Present Persons

- The U.S. argues that state regulation of employment of aliens is preempted by the comprehensive regulatory scheme established by IRCA, and Congress deliberately chose not to criminally penalize aliens for working or attempting to work, but rather their employers.
- Arizona argues that the broad powers of states to regulate employment weighed heavily against a scheme where Congress had chosen not to act in a particular area.
- The Court finds that Congress' inaction with regard to employees and action against employers creates a comprehensive regulatory scheme, so Arizona is preempted.

Amendment to Arrest Powers

- A.R.S. 13-3883 already provides warrantless arrest power for felony, misdemeanor, petty offenses, and certain criminal misdemeanors associated with traffic accidents, so the actual effect was unclear.
- Problem with giving officers power to arrest for an offense that makes a person removable is in determining what that may be. Removal is a complex issue, exclusively within the authority of the federal government.
- What ultimately makes a person “removable” is a decision made by a court, and is not a decision that can be made by an officer. The risk of wrongful arrest is great.

The Remains of the Day

- The District Court injunction did not disturb the provision in 11-1051 creating a private right of action against a public official or entity for adopting a policy restricting enforcement of immigration law to the full extent permitted and the concomitant restriction on adoption of such a policy.
- Various new criminal violations aimed at day labor and human smuggling.

Looming Issues in Arizona

- Four police agencies in Arizona have received a request to produce documents under the Arizona Public Records Act from “Judicial Watch” on behalf of Sen. Russell Pearce, the main proponent of SB 1070.
- The request seeks any and all documentation related to policies and training on SB 1070, and is made to ensure compliance with the law.

Implications for the Rest of the Country

- Immediately, other states began considering adopting similar laws to address concerns about unlawfully present aliens.
- Possibility of a patchwork of laws across the country with no standardized means of handling foreign nationals suspected of unlawful presence.
- Interesting burden placed on the federal government to assist with differing laws.

Now Taking Bets

- Other lawsuits remain with varying bases for challenges to SB 1070.
- Ninth Circuit hearing?
- Off to Washington? A Supreme Court decision on this issue will impact everyone, by either precluding states from adopting individual approaches to immigration reform, or clearing the way for this to become the new way to deal with an issue not adequately addressed by the federal government.
- Will Congress act?