

ARIZONA SB 1070: WHAT EXACTLY DOES THE U.S. OBJECT TO?

Ever since federal District Court Judge Susan Bolton issued her 28 July 2010 Order granting, in part, the Obama Administration's Motion for Preliminary Injunction (*HSNW 29 July 2010*) enjoining enforcement of Arizona SB 1070 readers of the *HSNW* have asked two (2) questions; "Isn't the State of Arizona merely attempting to enforce existing federal immigration law?" and "What exactly does the Obama Administration object to?"

The answer to the first question is a resounding, "No." SB 1070 goes much further than existing federal immigration law in seeking to regulate the presence of foreign nationals – primarily Mexican nationals – on U.S. soil. The answer to the second question is much more complex.

First a word about procedure. On 23 April 2010, Arizona Governor Jan Brewer signed Senate Bill 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act." In an apparent attempt to render the Arizona law more constitutionally acceptable, seven days later, the Governor signed into law a set of amendments to Senate Bill 1070 under House Bill 2162. [Both Senate Bill 1070 and House Bill 2162 are collectively referred to as "SB 1070" and/or "the Arizona law"].

On July 6, 2010, the United States filed a Complaint in the United States District Court for the District of Arizona challenging the constitutionality of S.B. 1070. According to the Complaint, the primary objections to Arizona's law are that S.B. 1070 violates the "Supremacy Clause" of the United States Constitution (U.S. Const., art. VI, cl. 2) and that "the federal government has preeminent authority to regulate immigration matters." (Comp., p.1).

Concurrently with the Complaint, the United States filed a Motion requesting that the Court issue a preliminary injunction enjoining Arizona from enforcing S.B. 1070 until the Court could make a final determination as to its constitutionality.

In order for a Preliminary Injunction to issue a, "plaintiff must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." (*Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008)).

On 28 July, Judge Susan Bolton issued an Order granting preliminary injunctive relief with regard to only four (4) parts of the Arizona law and not the statute in its entirety. Procedurally, and importantly, Judge Bolton's Order ruled only on the Motion for Preliminary Injunction and not upon the overarching Complaint.

On 29 July, Arizona Governor Jan Brewer filed an Appeal of Judge Bolton's Order with the United States Court of Appeals for the Ninth Circuit in San Francisco. (*HSNW 30 July 2010*) The Appeal sought an expedited hearing on the case.

On 30 July, the Court of Appeals denied Arizona's Motion for Expedited Briefing and the matter was calendared for November 2010.

Arizona Bill 1070:

Arizona Senate Bill 1070 Section 2 has three (3) primary provisions: 1) prohibiting Arizona officials, agencies, and political subdivisions from limiting enforcement of federal immigration laws; 2) requiring that state officials work with federal officials with regard to unlawfully present aliens; and 3) allowing legal residents to sue any state official, agency, or political subdivision for adopting a policy of restricting enforcement of federal immigration laws to less than the full extent permitted by federal law. Section 4 amends the crime of human smuggling. Section 5 creates a new crime for stopping a motor vehicle to pick up day laborers and for day laborers to get in a motor vehicle if it impedes the normal movement of traffic. Sections 7 and 8 relate to the employment of unauthorized aliens. Section 9 amends the requirements for employers in verifying employment authorization and Section 11 creates a gang and immigration intelligence team.

U.S. Complaint:

Any effort to determine exactly what the Obama Administration finds objectionable in S.B. 1070 ought to begin with the Complaint. The Complaint seeks a declaratory judgment deeming large portions of S.B. 1070 unconstitutional and preliminary and permanent injunctions enjoining its enforcement.

Specifically, the U.S. complains that, "S.B. 1070 is preempted by federal law and therefore violates the Supremacy Clause of the United States Constitution." The Complaint continues that, "[T]he federal government has preeminent authority to regulate immigration matters." And that, "This authority derives from the United States Constitution and numerous acts of Congress." The Complaint states that, "the nation's immigration laws reflect a careful and considered balance of national law enforcement, foreign relations, and human interests."

Perhaps most importantly, the U.S. objects that, "S.B. 1070 pursues only one goal – 'attrition' – and ignores the many other objectives that Congress has established for the federal immigration system." The term "attrition through enforcement" was coined by Jessica M. Vaughan of the Center for Immigration Studies (www.cis.org) an "independent, non-partisan, non-profit, research organization" that, from its web site, seems to have distinctive anti-immigration sentiments. S.B. 1070 itself makes "attrition through enforcement the public policy of all state and local government agencies in Arizona."

However, the Complaint does not take issue with all of S.B. 1070. The Complaint only seeks to have S.B. 1070 Sections 1-6 declared unconstitutional. The U.S. did not, in its Complaint, object to Sections 7 and 8 of S.B. as they relate to the employment of unauthorized aliens; Section 9 as it amends the requirements for employers in verifying

employment authorization; and Section 11 creating a gang and immigration intelligence team.

In its “First Cause of Action”, the government claims, “[s]ections 1-6 of S.B. 1070, taken in whole and in part, represent an impermissible effort by Arizona to establish its own immigration policy and to directly regulate the immigration status of aliens. In its “Second Cause of Action”, the government states that S.B. 1070 is preempted by federal statute and by U.S. foreign policy. In its “Third Cause of Action”, the administration complains that S.B. 1070 restricts interstate travel and, therefore, violates the Commerce Clause of the Constitution of the United States.

Deeper examination of the Complaint, however, leads to much more revealing objections to S.B. 1070. The Administration’s first objection to S.B. 1070 is that Arizona is attempting to manifest “a scheme of state immigration” that creates state crimes relating to presence, employment and transportation that are not federal crimes. The argument is that Congress has elected not to criminalize these acts and, therefore, the State of Arizona cannot do so.

The second objection is that the Arizona law seeks to enforce “low-level” immigration violations and, thereby, interfere with the federal government’s prioritization of the removal of dangerous foreign nationals. The federal government puts the highest priority upon detecting and removing terrorist (both actual and potential) and then those convicted of serious and often violent criminal offenses. Arizona, on the other hand, is seeking to remove those merely “unlawfully present” in the United States.

The third objection is that S.B. 1070 allows for “warrantless” arrests of those any law enforcement officer feels is “removable.” The U.S. objects S.B. 1070 Section 6 both on the grounds that it violates the Fourth Amendment’s protection against unreasonable search and seizure and that it allows untrained officers to make unilateral and unfettered determinations as to who is removable from the United States.

Motion for Preliminary Injunction:

As mentioned above, the Administration’s Motion for Preliminary Injunction only contests Sections 2 through 6 of S.B. 1070 and not the statute in its entirety. The Administration sought only to enjoin enforcement of Section 2’s mandatory inspections scheme; Section 3’s “alien registration crime”; Section 4’s “alien smuggling crime”; Section 5’s “alien transporting and harboring crime’s”; and, Sections 6’s “warrantless arrest of ‘removable’ aliens.”

In order to prevail on the Motion for Preliminary Injunction the U.S. had to satisfy Judge Bolton that the U.S.; (1) is likely to succeed on the merits; (2) is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) a preliminary injunction is in the public interest.

Judge Bolton's Order:

On 28 July, Judge Susan Bolton issued her decision in *United States of America v. State of Arizona and Janice K. Brewer, Governor of the State of Arizona*.

Firstly, it is important to note that Judge Bolton did not rule upon the legitimacy or constitutionality of Arizona's S.B. 1070 as it stands. Neither did Judge Bolton grant the Administration's Motion for Preliminary Injunction in its entirety.

Finding that the United States had failed to argue to the contrary, Judge Bolton allowed into effect:

Portions of Section 2 of S.B. 1070; prohibiting Arizona officials, agencies, and political subdivisions from limiting enforcement of federal immigration laws; requiring that state officials work with federal officials with regard to unlawfully present aliens; and allowing legal residents to sue any state official, agency, or political subdivision for adopting a policy of restricting enforcement of federal immigration laws to less than the full extent permitted by federal law;

Section 4 of S.B. 1070 amending the crime of human smuggling;

The portion of Section 5 of S.B. 1070 creating a crime for stopping a motor vehicle to pick up day laborers and for day laborers to get in a motor vehicle if it impedes the normal movement of traffic;

Section 7 of S.B. 1070 amending the crime of knowing employment of unauthorized aliens;

Section 8 of S.B. 1070 amending the crime of intentional employment of unauthorized aliens;

Section 9 of S.B. 1070 amending the requirements for checking employment eligibility; and,

Section 11 of S.B. 1070 creating the gang and immigration intelligence team enforcement mission fund.

Moreover, Judge Bolton found that the United States was not likely to succeed on the merits of its claim and did not enjoin enforcement of:

The portion of Section 5 of S.B. 1070 creating a separate crime for a person in violation of a criminal offense to transport or harbor an unlawfully present alien or encourage or induce an unlawfully present alien to come to or live in Arizona; and,

Section 10 of S.B. 1070 amending the provisions for the removal or impoundment

of a vehicle to permit impoundment of vehicles used in the transporting or harboring of unlawfully present aliens.

The only parts of Arizona's S.B. 1070 in which Judge Bolton did find that the United States was likely to succeed on the merits and, therefore, enjoined from enforcement were:

The portion of Section 2 of S.B. 1070 requiring that an officer make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States, and requiring verification of the immigration status of any person arrested prior to releasing that person;

Section 3 of S.B. 1070 creating a crime for the failure to apply for or carry alien registration papers;

The portion of Section 5 of S.B. 1070 creating a crime for an unauthorized alien to solicit, apply for, or perform work; and,

Section 6 of S.B. 1070 authorizing the warrantless arrest of a person where there is probable cause to believe the person has committed a public offense that makes the person removable from the United States.

Arizona's Appeal to the Court of Appeals for the Ninth Circuit:

The day after Judge Bolton issued her Order enjoining enforcement of only four (4) provisions of S.B. 1070, the State of Arizona appealed to the United States Court of Appeals for the Ninth Circuit sitting in San Francisco. Arizona's Appeal in the form of a Motion sought only to expedite briefing and oral argument on Judge Bolton's decision.

The Motion stated that:

This appeal involves an issue of significant importance—the State of Arizona's right to implement a law its Legislature enacted to address the irreparable harm Arizona is suffering as a result of unchecked unlawful immigration;

and that, therefore, the Appeal should be heard on an expedited basis.

Order of the United States Court of Appeals for the Ninth Circuit:

The very next day, 30 July 2010, the Court of Appeals denied Arizona's Motion, set a Briefing Schedule in compliance with local rules, and instructed the Clerk of the Court to calendar the case for Oral Arguments in November.

Conclusion:

This is an ongoing and very complicated matter. Both sides of the immigration debate claimed victory in Judge Bolton's decision. The short answer to the question, "What exactly does the United States object to in Arizona's S.B. 1070?" is that the Administration feels that Arizona is attempting to encroach upon its unfettered right to regulate immigration.