

Legal Memorandum

No. 58
October 1, 2010



Published by The Heritage Foundation

The Arizona Immigration Law: Racial Discrimination Prohibited

Hans A. von Spakovsky

Abstract: *Why has the Obama Administration, as part of its lawsuit against the Arizona statute that attempts to help enforce national immigration laws, not claimed that the state law requires or allows illegal racial profiling? The answer is surprisingly simple: Arizona state law actually contains more stringent restrictions against racial profiling than federal guidelines published by the U.S. Department of Justice (DOJ). Consequently, if the Obama Administration files suit alleging that the Arizona law is illegal because it uses racial profiling and is discriminatory, it will also have to file suit against all of the federal law enforcement agents who follow DOJ's Guidance on race profiling in law enforcement activities. Such a suit against Arizona is completely unwarranted and would constitute litigation based on political or other improper considerations, not the rule of law.*

The Obama Administration has attacked the new Arizona statute that attempts to help enforce national immigration laws on several grounds and in many forms, including in federal court. Yet the incendiary claim that the state law requires or allows illegal racial profiling, repeated by various Administration officials, was conspicuously *not* included in *U.S. v. Arizona*. The reason is quite simple: Arizona state law actually contains more stringent restrictions against racial profiling than federal guidelines published by the U.S. Department of Justice (DOJ).

Early claims by Administration officials about the Arizona law were most likely intended to increase

Talking Points

- The claim by critics of Arizona's new immigration law that it requires or allows racial profiling is false. The statute was carefully crafted to explicitly prohibit illegal racial profiling.
- Arizona's immigration law contains more stringent restrictions against racial profiling than federal guidelines published by the U.S. Department of Justice for federal law enforcement agencies.
- The state law is fully in line with case law regarding racial profiling that allows the questioning of the immigration status of individuals, especially those in Arizona who have been lawfully arrested, stopped, or detained for other reasons.
- Despite the initial heated rhetoric of President Barack Obama and Attorney General Eric Holder that racial profiling would result from the Arizona law, the Justice Department's lawsuit against the Arizona law omits any claim that the new law will lead to racial profiling.

This paper, in its entirety, can be found at:
<http://report.heritage.org/lm0058>

Produced by the Center for Legal & Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

racial profiling fears since the term “racial profiling” and some form of “discrimination” were used so often. For instance, President Barack Obama and Attorney General Eric Holder each expressed grave

Early claims by Administration officials about the Arizona law were most likely intended to increase racial profiling fears since the term “racial profiling” and some form of “discrimination” were used so often.

concerns about the potentially discriminatory aspects of the law without any evidence for such a claim.¹ It was later revealed that many Administration officials who made such claims had not read the short bill, including Attorney General Holder, who admitted in response to a question from Representative Ted Poe (R-TX) that he had “not read it.”² Nevertheless, in an interview with Bob Schieffer, the Attorney General threatened to “bring suit on that [racial profiling] basis” were the law to have a “racial profiling impact.”³

Yet the United States very tellingly did not include a racial or ethnic discrimination claim in its recently filed lawsuit against Arizona.⁴ Instead, the Obama Administration challenged the law on the ground that it somehow interfered with federal immigration priorities and thus was preempted by federal immigration law.⁵ This is a very weak claim.

In essence, the federal government is arguing that if Arizona helps to enforce the immigration laws, such assistance would interfere with the federal government’s plan *not* to enforce them. While logically true, that is a novel type of preemption claim under the Supremacy Clause since the Arizona law interferes only with the federal government’s enforcement *policies* (or non-enforcement policies, as the case may be) rather than with a federal law itself. Only the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land” under Article VI—not the policy preferences of the President.

The Attorney General stopped just short of admitting the weakness of the racial profiling argument by claiming that the lawsuit does not attack the Arizona law’s potential for discrimination because the Department of Justice “wanted to go out with what we thought was our strongest initial argument.”⁶ That is a laughable claim for a department with thousands of lawyers, weeks of study, and the habit of bringing every plausible claim and then some when it files suit.

As Arizona Governor Jan Brewer observed, “Why would they have to hesitate, after all the comments they made, and all the outrage that they made against the bill in regards to racial profiling, that it didn’t show up?”⁷ Any lawsuit filed by the

-
1. Press Release, The White House, Remarks by President Obama and President Calderon of Mexico at Joint Press Availability (May 19, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-obama-and-president-calderon-mexico-joint-press-availability>.
 2. *Hearing on the United States Department of Justice Before the H. Comm. on the Judiciary*, 111th Cong. (May 13, 2010) (statement of Eric Holder, Attorney General); Stephen Dinan, *Holder Hasn’t Read Arizona Law He Criticized*, THE WASHINGTON TIMES, May 13, 2010, available at <http://www.washingtontimes.com/news/2010/may/13/holder-hasnt-read-ariz-law-he-criticized>.
 3. *Face the Nation* (CBS television broadcast July 11, 2010), transcript available at http://www.cbsnews.com/htdocs/pdf/FTN_071110.pdf?tag=contentMain;contentBody.
 4. *United States v. Arizona*, No. 10-1413 (D. AZ filed July 6, 2010).
 5. The complaint also asserted that Section 5 of the law, which prohibits the transportation of illegal aliens, violated the Commerce Clause, a claim the district court rejected. *Id.* at 27–30; See also Hans von Spakovsky and Jack Park, *On Arizona and Immigration: Judge Ignores Rule of Law*, THE FOUNDRY (July 28, 2010 at 5:12pm), <http://blog.heritage.org/2010/07/28/on-arizona-and-immigration-judge-ignores-rule-of-law/>.
 6. *Face the Nation*, *supra* note 3.
 7. Stephan Dinan, *Arizona Warned of 2nd Lawsuit*, THE WASHINGTON TIMES, July, 12, 2010, at A10, available at <http://www.washingtontimes.com/news/2010/jul/11/arizona-warned-of-2nd-lawsuit/?page=1>.

Justice Department in the future on the grounds that the statute is discriminatory on its face or necessarily leads to racial profiling would be groundless. Such claims are unsustainable based on the plain text of the Arizona statute and its adherence to federal regulations and case law regarding racial profiling.

Distinguishing “Facial” from “As-Applied” Challenges

Before turning to the text of the Arizona law, it is important to distinguish between claims that a law is invalid “on its face” and those that assert it could be invalid “as applied” under certain circumstances. Almost any law can be applied in a discriminatory way, and if it is, state officials should be stopped (by a civil rights lawsuit if necessary) from enforcing it that way. But in that situation, the law itself is not the problem, and it is not struck down.

Any lawsuit filed by the Justice Department in the future on the grounds that the statute is discriminatory on its face or necessarily leads to racial profiling would be groundless. Such claims are unsustainable based on the plain text of the Arizona statute and its adherence to federal regulations and case law regarding racial profiling.

Imagine an interstate highway speed limit law, which once was more tightly controlled by federal statute but is still subject to federal guidelines.⁸ If state troopers enforce it only against blacks, or twice as often against black drivers they see speeding than against other drivers, the troopers need to be enjoined. But no one would argue that we cannot or should not have speed limits because racial profiling by state troopers is possible.

This example would result in a challenge to the statute “as applied” by the state troopers to a particular group of individuals. By contrast, a facial challenge contends that the law or practice is invalid “on its face” regardless of the circumstances sur-

In fact, Arizona did take steps to amend the law immediately after passage to minimize the possibility of discriminatory application.

rounding its possible enforcement. To prevail in this type of legal claim, the challenger generally has to prove that the law is not valid under any reasonable set of facts.⁹

Regarding the Arizona law, the claim that some officials might enforce it in a discriminatory manner is not a fundamental challenge to the law itself. Nevertheless, the state should be sensitive to that possibility and guard against it. In fact, Arizona did take steps to amend the law immediately after passage to minimize the possibility of discriminatory application. Even so, if many state officials are not careful to follow the prohibitions on illegal racial profiling, respect for the law will diminish to the point that enforcement will be difficult and hugely unpopular, at best.

Obama Administration officials’ criticisms were vague, and perhaps intentionally misleading, regarding whether they believe the law is discriminatory on its face or might be enforced in a discriminatory manner. Yet there is no reason to threaten suit against a future, possible discriminatory application—at least until there was some evidence that this actually occurred, and even then, the charge should not be about the law but about the officials implementing it. Thus, the criticisms of the law made while it was being debated, soon after enactment, and before it went into effect must necessarily be interpreted as attacking the law “on its face.” It is this claim that is addressed below.

Arizona Law

The new Arizona law (S.B. 1070, as amended by H.B. 2162) expressly prohibits illegal racial profiling. Only after a law enforcement official conducts a lawful stop, detention, or arrest for “any other law or ordinance of a county, city or town or this state”

8. Although there was no federal law requiring a 55-mile-per-hour national speed limit, the receipt of federal highway funds was at one time conditional upon states implementing such a speed limit on their interstate highways.

9. United States v. Salerno, 481 U.S. 739 (1987); United States v. Stevens, ___ U.S. ___, 130 S.Ct. 1577 (2010).

may an officer question a person's immigration status. To the extent that race and ethnicity are irrelevant factors in the initial *lawful* stop, detention, or arrest (and this is almost universally true), that initial contact cannot take race or ethnicity into account at all. An officer may then question the person's immigration status only if he has a "reasonable suspicion" that the person who has been stopped, detained, or arrested is an alien and is unlawfully present in the United States.¹⁰

The Arizona law prohibits any consideration of race or national origin by local and state law enforcement officials that is not consistent with federal law.

The Arizona law also specifies that local police "may not consider race, color, or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution."¹¹ The immigration law also mandates that its provisions must be "implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."¹²

Thus, the Arizona law *prohibits* any consideration of race or national origin by local and state law enforcement officials that is not consistent with federal law. The police may not stop someone merely out of a suspicion that a person may be present in the country illegally. Additionally, law enforcement officials may not question a person's immigration status simply because that person is, or appears to

be, of a certain race or ethnicity. Claims by critics that the law allows people to be stopped based on racial profiling or requires such profiling at a later stage have no basis in the law itself—it requires a reasonable suspicion of another offense before immigration status can even be considered.

Judge Susan Bolton of the United States District Court for Arizona recently issued a preliminary injunction blocking the implementation of some provisions of the Arizona law as preempted by federal law. Despite the clear text of the law, Judge Bolton read it as mandating that police inquire about the immigration status of all those arrested.¹³ Judge Bolton misread the text, but even if her reading of the statute were correct, claims of racial profiling would still be unsustainable. If every person arrested had his or her immigration status checked with federal authorities, there is no discrimination because the law would then target people of every race and ethnicity. Accepting the text as written or adopting Judge Bolton's misreading of the statute both lead to the same conclusion: The Arizona law does not discriminate.

Federal Guidelines and Court Decisions

What is so odd about Attorney General Holder's claim of racial discrimination is that the language of the Arizona law is in full compliance with (and in fact stricter than) the Department of Justice's own guidance on racial profiling for federal law enforcement officers. Promulgated by DOJ's Civil Rights Division in 2003, the "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies" ("Guidance") outlines how race may and may not be used as part of federal law enforcement procedures.

10. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 23, 2010) (as modified by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 30, 2010)) ("S.B. 1070"); A.R.S. § 11-1051(B). This provision was temporarily enjoined by a federal court on July 28, 2010, based on a finding that the government is likely to succeed on the merits of showing that it is preempted by federal law. *United States v. Arizona*, slip. op. at 4. S.B. 1070 originally stated that law enforcement officials could not "solely" consider race, color, or national origin in implementing this law; however, this was amended by H.B. 2162 to implement a much broader prohibition on the consideration of race, color, or national origin.

11. S.B. 1070 § 2(b). The Arizona Constitution provides that "[n]o law shall be enacted" that grants privileges or immunities that "shall not equally belong to all citizens." Arizona Constitution, Art. II, Section 13. Section 13 is violated if "aliens and citizens similarly situated are not treated alike." *Ariz. State Liquor Bd. of Dep't of Liquor Licenses & Control v. Ali*, 550 P.2d 663 (Ariz. Ct. App. 1976).

12. S.B. 1070 § 2(k).

13. *United States v. Arizona*, slip op. at 14–15; see generally Hans von Spakovsky and Jack Park, *supra* note 5.

The Guidance defines racial profiling as “the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures...premiered on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.”¹⁴ The Guidance prohibits the use of race or ethnicity in “routine or spontaneous law enforcement decisions, such as ordinary traffic stops,” except in “a specific suspect description.” Federal officers are permitted to use race and ethnicity as a criterion “to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization.”¹⁵

In fact, the DOJ Guidance allows federal law enforcement officers engaged in border protection activities to consider race or ethnicity “to the extent permitted by the Constitution and the laws of the United States,” which almost exactly parallels the language in the Arizona law. The federal standards on racial profiling “do not affect current Federal policy with respect to law enforcement activities and other efforts to defend and safeguard against threats to national security or the integrity of the Nation’s borders.”¹⁶

As the DOJ Guidance states, consideration of race and ethnicity may be used to some extent in the immigration context “because enforcement of the laws protecting the Nation’s borders may necessarily involve a consideration of a person’s alien-

age in certain circumstances.”¹⁷ Although federal agents clearly have more authority than state officials in the immigration context, by verifying the immigration status of individuals who are suspected of being in the U.S. illegally, Arizona is

The DOJ Guidance allows federal law enforcement officers engaged in border protection activities to consider race or ethnicity “to the extent permitted by the Constitution and the laws of the United States,” which almost exactly parallels the language in the Arizona law.

engaged in its duty to support the federal government in border protection.

Even if Arizona allowed officers to stop someone on suspicion of an immigration offense alone (and the Arizona law prohibits them from doing so) and race or national origin was one factor the officer took into account, the officer’s actions would still be within the Department of Justice Guidelines that allow federal law enforcement agencies to consider race or ethnicity to enforce federal immigration laws, as well as court precedent.¹⁸ As the Supreme Court said in *United States v. Brignoni-Ponce*, while apparent Mexican ancestry of a vehicle’s occupants alone could not justify stopping a car, it was one of the factors that could properly be considered by Border Patrol officers who were conducting a roving patrol close to the Mexican border.¹⁹ Similarly, the Sixth Circuit Court of Appeals held that, in general, an officer’s consideration of race as one of many reasons in determining whether to initiate

14. UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003), available at http://www.justice.gov/crt/split/documents/guidance_on_race.php.

15. *Id.*

16. *Id.*

17. *Id.*

18. To the extent that any racial profiling is allowed under the U.S. Constitution, we assume that the Justice Department Guidelines are constitutional. In its current Memorandum of Agreement for participation in the 287(g) program, which allows local law enforcement officials to assist federal immigration agencies in carrying out immigration enforcement, the Obama Administration requires local jurisdictions to comply with the DOJ Guidance. Memorandum of Agreement, U.S. Immigration and Customs Enforcement, Clause XV. Civil Rights Standards, available at <http://www.cis.org/articles/2009/moa-final.pdf>.

19. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

questioning was legal “as long as some of those reasons are legitimate.”²⁰

In *Muehler v. Mena*, the Supreme Court held that the “assumption that the officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status” was false.²¹ The police had detained Mena due to associations with an illegal gang that were discovered during her question-

The Arizona immigration law is fully in line with case law regarding racial profiling and the questioning of immigration status.

ing. Yet Arizona’s law permits questioning of people who have already been detained or arrested for other reasons *only* if the police have a reasonable suspicion about their immigration status. Thus, the Supreme Court has already upheld the right to question the immigration status of a detainee in such a situation. The First Circuit Court of Appeals also upheld as constitutional the questioning of immigration status during a traffic stop in the case of *Estrada v. Rhode Island*.²²

The Supreme Court ruled in another case, *Wayte v. U.S.*, that for illegal consideration of race to have occurred, it would have to be shown that the “enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose.”²³ Arizona houses about 460,000 illegal immigrants, and its proximity on the southern border of the United States suggests that Arizona con-

tains a high percentage of illegal aliens who are Hispanic.²⁴ The Sixth Circuit stated in *United States v. Avery* that “only in rare cases will a statistical pattern of discriminatory impact conclusively demonstrate a constitutional violation.”²⁵

Thus, the possibility that Arizona’s law could have a disparate impact on Hispanic aliens due to the statistical fact that the large majority of illegal aliens in Arizona are of Hispanic origin would not constitute racial discrimination. There is no evidence whatsoever that Arizona’s lawmakers enacted this law to discriminate against a particular race or national origin; the evidence is that their purpose was to help enforce immigration laws and protect the state from the high cost and other negative impacts of illegal aliens. Section 1 of the law states that “the provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens...in the United States.”²⁶ Therefore, it cannot be shown to have a discriminatory purpose. The Arizona immigration law is fully in line with case law regarding racial profiling and the questioning of immigration status.

Conclusion

Illegal immigration is an ongoing violation of federal law. Arizona’s new law is an attempt to address this illegal activity by helping the federal government with its enforcement efforts.

The statute is neutral. It does not permit the use of race as a factor in determining who is targeted for questioning regarding immigration status. In fact, the Arizona law prohibits racial profiling in its

20. *United States v. Travis*, 62 F.3d 170, 174 (1995).

21. *Muehler v. Mena*, 544 U.S. 93, 101–102 (2005).

22. *Estrada v. Rhode Island*, 594 F.3d 56, 68 (1st Cir. 2010).

23. *Wayte v. United States*, 470 U.S. 598, 608 (1985).

24. The Department of Homeland Security estimates that in 2009, 6,650,000 out of the 10,750,000 illegal immigrants present in the United States, or 62 percent, were born in Mexico. DEPARTMENT OF HOMELAND SECURITY OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009 (January 2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf. Another 1,330,000, or approximately 12 percent, were born in El Salvador, Guatemala, and Honduras. *Id.* Therefore, about 74 percent of illegal immigrants nationwide are of Hispanic descent according to the federal government. *Id.* The percentage in Arizona may easily be higher than that.

25. *United States v. Avery*, 137 F.3d 343, 356 (6th Cir. 1997).

26. S.B. 1070, § 1.

text and easily complies with the Guidance of the Department of Justice and the opinions of the Supreme Court and lesser courts of appeal. Arizona state Senator Russell Pearce, sponsor of the bill, correctly characterized the purpose of the law: “Illegal is not a race. It’s a crime and in Arizona—We’re going to enforce the law.”²⁷

If the Obama Administration files suit alleging that the Arizona law is illegal because it uses racial profiling and is discriminatory, it will also have to file suit against all of the federal law enforcement

agents who follow DOJ’s Guidance on racial profiling in law enforcement activities. Such a suit against Arizona is completely unwarranted and would constitute litigation based on political or other improper considerations, not the rule of law.

—*Hans A. von Spakovsky is a Senior Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation. The author wishes to thank Lauren Britsch, who contributed to this paper while an intern at Heritage.*

27. Huma Khan, *Legalizing Racial Profiling? Arizona Immigration Bill Draws Fire*, ABC NEWS, April 22, 2010, <http://abcnews.go.com/Politics/arizona-immigration-bill-draws-fire-nationally-gov-brewer/story?id=10438889>.