

ISSUE BRIEF

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Childish Reaction to Supreme Court Immigration Ruling: Obama Administration Ends a Key Joint Program with Arizona

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Although both Arizona and the United States prevailed in different parts of the Supreme Court's immigration ruling this week, the Obama Administration's immediate response seems like a childish slap in the face of the Supreme Court, Arizona, and any other state that might challenge its authority.

Justice Antonin Scalia noted in his dissenting opinion, which would have upheld the entire Arizona law, that the Administration's policy seems to be not to enforce federal immigration laws.¹ The Court's majority avoided that characterization, but as if to justify it, the Administration announced that it was unilaterally ending a cooperative program between the U.S. Department of Homeland Security (DHS) and Arizona that both sides agreed was lawful.

The Supreme Court Decision. In a blow to the Obama Administration's position that state laws that contradict the enforcement (or lack thereof) policy whims of the executive branch are unconstitutional under the Supremacy Clause, the Court held that a key provision (Section 2(B)) of Arizona S.B. 1070—the legal status verification section—is indeed constitutional, at least on its face, and that, absent a clear expression of congressional intent to the contrary, states have a role to play in addressing the adverse impact that illegal immigration has within their borders.

As the majority stated, “Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.”²

Yet one of the provisions that was invalidated by the Court was Section 6, which provided that a state officer could make a warrantless arrest of a person if the officer had probable cause to believe that the suspect had committed “any public offense” that made him “removable from the United States.” The Court held that this provision went further than federal law allowed and that Congress

had specified “limited circumstances in which state officers may perform the functions of an immigration officer.”

A Contemptuous Executive Branch Response. One of those circumstances arises when state and local law enforcement officers operate under Section 287(g) of the Immigration and Nationality Act, which authorizes the federal government to deputize designated state and local enforcement officers to perform immigration law enforcement functions, including arresting illegal aliens for violations of federal immigration laws.

Before yesterday, Arizona and the federal government had been cooperating in the joint program in compliance with the federal law that encouraged the same. Immediately after the Supreme Court issued its decision, the Obama Administration did the equivalent of taking its marbles and going home.

First, the media noted that the Obama Administration “issued a directive telling federal authorities to decline many of the calls reporting illegal immigrants that [DHS] may get from Arizona police.”³ One federal official commented: “We will not be issuing detainers on individuals unless they clearly meet our defined

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priorities.”⁴ If the illegal immigrant has not been convicted of a felony, the Obama Administration will direct the state or local law enforcement official to release him.

Then, in violation of at least the spirit of the immigration law and the spirit of the Take Care Clause of the Constitution, which commands that the President “shall take Care that the Laws be faithfully executed,” DHS announced that it was suspending all Section 287(g) agreements with all Arizona law enforcement agencies.⁵

It is unclear whether the Administration made these announcements because it lost its challenge to Section 2(B)—what *The New York Times* called the “center-piece” of the Arizona law⁶—but it strains credulity to think the timing of the announcement was a coincidence. Nor is it logical if one actually believes that the Administration wants to encourage further cooperation with Arizona and other state officials.

As we have noted:

Congress clearly provided state and local governments with the ability to leverage Section 287(g) to enforce federal immigration law. Yet the Obama

Administration has gone beyond its executive branch power to enforce the law by ending the Section 287(g) program. Beyond its erroneous understanding of the Constitution, the Obama Administration’s flawed stance would mean that the federal government could cease all border security operations and that states and localities would be forced to stand by idly as millions of illegal immigrants put severe strains on their welfare, health care, infrastructure, and educational systems.⁷

Even the Supreme Court recognized this reality:

Arizona bears many of the consequences of unlawful immigration. Hundreds of thousands of deportable aliens are apprehended in Arizona each year.... Unauthorized aliens who remain in the State comprise, by one estimate, almost six percent of the population.... And in the State’s most populous county, these aliens are reported to be responsible for a disproportionate share of serious crime.... Statistics alone do not capture the full extent of Arizona’s

concerns. Accounts in the record suggest there is an “epidemic of crime, safety risks, serious property damage, and environmental problems” associated with the influx of illegal migration across private land near the Mexican border.... Phoenix is a major city of the United States, yet signs along an interstate highway 30 miles to the south warn the public to stay away. One reads, “DANGER—PUBLIC WARNING—TRAVEL NOT RECOMMENDED / Active Drug and Human Smuggling Area / Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed.”... The problems posed to the State by illegal immigration must not be underestimated.⁸

Finally, not only did the Obama Administration refuse to answer the phone when Arizona law enforcement officials called to transfer illegal immigrants and suspend Section 287(g) agreements, but it started a hotline specifically aimed at reporting Arizona law enforcement officials for alleged civil rights violations.⁹

As the Supreme Court observed, “the provisions must be ‘implemented

1. *United States v. Arizona*, 567 U.S. --, 2012 WL 2368661, * 18 (2012).

2. *Arizona*, 2012 WL 2368661 at * 7.

3. Stephen Dinan, *Homeland Security suspends immigration agreements with Arizona police*, Wash. Times (June 25, 2012); available at <http://www.washingtontimes.com/news/2012/jun/25/homeland-security-suspends-immigration-agreements-/>.

4. *Id.*

5. *Id.*

6. Adam Liptak, *Blocking Parts of Arizona Law, Justices Allow Its Centerpiece*, N.Y. Times (June 25, 2012), http://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html?_r=1&ref=arizonaimmigrationlaws1070.

7. Matt Mayer, *ILLEGAL IMMIGRATION: HOUSE SENDS STRONG SIGNAL WITH INCREASED FUNDING FOR SECTION 287(G) PROGRAM*, HERITAGE FOUNDATION ISSUE BRIEF NO. 3642 (June 19, 2012); available at <http://www.heritage.org/research/reports/2012/06/illegal-immigration-strong-signal-with-increased-funding-for-section-287g-program>.

8. *Arizona*, 2012 WL 2368661 at * 7 (internal citations omitted).

9. *Federal hotline set up on Arizona immigration*, Assoc. Press (June 25, 2012), http://hosted.ap.org/dynamic/stories/U/US_SUPREME_COURT_IMMIGRATION_HOTLINE?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2012-06-25-18-30-49.

in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.”¹⁰ Notably, the Obama Administration did not challenge S.B. 1070 on civil rights grounds; thus, this last action by the Administration is simply petty.

Time for a Reset. The Supreme Court and Congress have repeatedly found that the states play an important role in immigration enforcement. Instead of continued belligerence, the Supreme Court’s rejection of the White House’s imperial position that the President’s

immigration priorities must trump the laws passed by both Congress and the states should have led to a reset and a renewed partnership between the Obama Administration and the states.

The Obama Administration should rescind the actions it took in its initial reaction and treat Arizona as a true and legitimate partner. Congress should use its power of the purse to push the Administration to enforce federal law.

Beyond its disregard of Congress’s intent, it goes without saying that the Obama Administration will be responsible for any future criminal

activity committed by those released individuals, including the serious injury to or death of American citizens.

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10. *Arizona*, 2012 WL 2368661 at * 15.