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A PRELIMINARY LOOK AT SOME OF THE CONSTITUTIONAL AND PRACTICAL PROBLEMS WITH ARIZONA'S NEW IMMIGRATION LAW

Posted on April 27, 2010 by David Isaacson

On April 23, 2010, Governor Jan Brewer of Arizona signed into law SB 1070, a multipronged effort by the Arizona legislature to, in the words of the statute, "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[1] Among other things, SB 1070 creates an Arizona state criminal offense of failure to comply with certain federal alien registration requirements or carry alien registration documentation[2] (from which "a person who maintains authorization from the federal government to remain in the United States" is exempted[3]). It further instructs that upon any "lawful contact" between Arizona law-enforcement and any person, "where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation."[4] In addition, the law allows any legal resident of Arizona to sue any official or agency within the state "that adopts or implements a policy or practice that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law."[5]

The new Arizona law has already attracted a great deal of media attention,[6] and it is not the intention of this article to attempt to outline all of the many problems presented by SB 1070—a comprehensive list would require much more than a short Web article. However, a few issues which have received relatively less attention in the media to date seem worth highlighting. The

Arizona law carries within it a stronger implication of deliberate racial discrimination than has been heretofore acknowledged, and it appears to criminalize the presence in Arizona of some battered women granted benefits under the Violence Against Women Act (VAWA).

First, there is the issue of whether the Arizona law is directed, formally as well as informally, against persons of Hispanic/Latino ethnicity to a greater extent than the population at large. Some defenders of the law have noted that it is, on its face, race-neutral, and Governor Brewer's statement upon signing the bill emphasized that it contained "language prohibiting law enforcement officers from 'solely considering race, color, or national origin in implementing the requirements of this section…'."[7] The language omitted by that ellipsis at the end of the Governor's statement, however, suggests a more sinister mindset with regard to racial neutrality: the omitted text appears to declare an intent to engage in exactly as much racial profiling or other discrimination as the state can constitutionally get away with.

To quote more completely from the newly added section 11-1051(b) of the Arizona Revised Statutes (with the language omitted by Governor Brewer emphasized):

A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not solely 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.

The logical implication is that to the extent sole consideration of race, color or national original may be constitutional under the United States Constitution or the Arizona Constitution (or perhaps whichever of the two is considered to be more permissive on the subject, since the exception is phrased in the disjunctive), the law enforcement officials and agencies of Arizona are invited to engage in it.

Moreover, so long as race is not "solely" considered, even the language quoted by Governor Brewer suggests that consideration of race as one of several factors in the determination whether to detain someone on suspicion of unlawful presence would be permitted by SB 1070—perhaps even if it would violate the U.S. Constitution! If this was not the intent of the statute, why does it not simply say that "A law enforcement official or agency . . . 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"? Why does it restrict its prohibition to cases in which race, color or national origin is "solely" considered? Even without "solely" considering race, sufficiently discriminatory enforcement of the law might well lead it to be considered unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. As the Supreme Court instructed more than a century ago:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886).

Beyond SB 1070's peculiar stance towards racial discrimination, there are severe practical problems that may arise from taking a complex statutory scheme meant to be enforced by the federal government, and turning over enforcement of the complex statutory scheme to state officials unqualified to appreciate its niceties. One of the most significant and heretofore unremarked-upon problems in this respect has to do with the practice known as "deferred action", by which DHS determines that certain individuals are a low enforcement priority and will, as a practical matter, not be deported.[8] Deferred action is provided to, among others, many battered spouses with approved self-petitions under the Violence Against Women Act (VAWA) who have not yet been able to apply for adjustment of status to that of a lawful permanent resident, often because the spouse who battered them was a Lawful Permanent Resident of the U.S. rather than a citizen of the U.S., and a visa number for their adjustment of status to lawful permanent resident is not yet available. Deferred action has also been used recently to stop the deportation of widows and widowers subject to the "widow penalty" following the deaths of their U.S. citizen spouses,[9] before Congress removed the penalty as a matter of statute,[10] and was used before that to provide interim relief to crime victims eligible by statute for "U" nonimmigrant status[11] before the Department of Homeland Security promulgated regulations allowing for a final grant of such

status.[12] Although largely non-statutory, it is explicitly authorized in the portion of the INA pertaining to certain VAWA self-petitions.[12]

A grant of deferred action does not, strictly speaking, bestow any lawful status on the alien granted it. Indeed, USCIS has at times been quite specific that "he grant of deferred action by USCIS does not confer or alter any immigration status."[14] Rather, deferred action is a formal exercise of the federal government's "prosecutorial discretion not to pursue removal of a particular alien for a particular period."[15] It is described in regulation (in the context of establishing the terms under which some aliens granted it may seek employment authorization) as "an act of administrative convenience to the government which gives some cases lower priority".[16]

Because deferred action is not an immigration status, a grant of deferred action will not necessarily result in the acquisition of a new alien registration document for purposes of federal law, and thus for purposes of the portion of SB 1070 that penalizes failure to comply with that federal law. By regulation, the list of forms prescribed as applications for alien registration includes Form I-94, completed by most nonimmigrant entrants at the time of their admission to the United States, and Form I-485, used to apply for adjustment of status to that of a lawful permanent resident, but does not include, for example, the Form I-360 used by battered spouses to petition for themselves under VAWA.[17] Similarly, the documents acceptable as evidence of alien registration under the regulations include, among other documents, the Form I-766 Employment Authorization Document in addition to the Form I-551 "green card", but do not include the Form I-797 approval notices on which approval of an I-360 self-petition or a grant of deferred action are reported.[18]

Thus, if an alien granted deferred action has not been granted employment authorization, he or she can quite easily have either no evidence of alien registration at all (if his or her original entry was without inspection), or only an I-94 evidencing a nonimmigrant stay that expired some time ago. Moreover, employment authorization is not automatic for aliens granted deferred action: by regulation, it is available only "if the alien establishes an economic necessity for employment".[19] Some substantial number of aliens granted deferred action, therefore, will be in the position of having either no evidence of alien

registration, or solely evidence of alien registration showing that their right to remain in the United States expired many years ago.

Under the regime established by SB 1070, it appears that such deferred action grantees would be guilty of "willful failure to complete or carry an alien registration document" under revised Arizona Rev. Stat. § 13-1509 if they either had never received an I-94, or were not carrying with them their old I-94s from, say, entry as a tourist years ago. (Carrying such an ancient I-94, which showed on its face that the bearer's authorized stay had expired a decade ago, would itself seem likely to risk arrest under SB 1070 as an alien presumed to be illegally present in Arizona.) Such a deferred action grantee, if present in Arizona, would appear to be guilty of a class 1 misdemeanor under SB 1070, and liable to imprisonment for up to six months. To put it more bluntly: SB 1070 appears to condone the imprisonment of a substantial number of battered women whose status as such has been officially recognized by the Department of Homeland Security, and who can look forward to adjusting status in the United States within a few years if they are not removed in the interim.[20]

Even worse, it appears that any official or agency of the state of Arizona that adopted a policy of not arresting such battered women could be held civilly liable to any citizen of Arizona who wished to sue them. New Ariz. Rev. Stat. § 11-1051(g), the reader will recall, allows for a civil lawsuit against any official or agency within the state "that adopts or implements a policy or practice that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law."[21] By definition, federal law permits the enforcement of federal immigration laws against persons granted deferred action; that is precisely why they are subject to an exercise of Federal prosecutorial discretion. Thus, a policy which limits or restricts the enforcement of immigration laws against aliens who are removable but have been granted deferred action would appear to fall within the ambit of § 11-1051(g).

It is conceivable that this sad state of affairs might be avoided by a very broad interpretation of new Ariz Rev. Stat. § 13-1509(f), which exempts from the new Arizona criminal statute regarding alien registration "a person who maintains authorization from the federal government to remain in the United States." To do so, however, would require recognizing deferred action as "authorization . . . to remain in the United States" despite the fact that DHS itself has explicitly said

deferred action "does not confer or alter any immigration status" and "cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status."[22] It is true that deferred action qualifies as a period of stay authorized by the Secretary of Homeland Security for purposes of not being included in the calculation of unlawful presence for purposes of future inadmissibility under INA § 212(a)(9)(B) and (a)(9)(C),[23] but presumably lack of "unlawful presence" in the sense in which that term is used in INA § 212(a)(9) does not establish "authorization . . . to remain in the United States" for purposes of SB 1070—it seems unlikely that aliens who overstay their student visas by years or decades would be considered exempt from Ariz. Rev. Stat. § 13-1509 as aliens authorized to remain, and yet they, too, would not accumulate "unlawful presence" for purposes of INA § 212(a)(9) if they were (as most students today are) admitted for "duration of status". At the very least, this is a close enough question that the risk of arrest and prosecution of battered women granted deferred action, but lacking employment authorization, would appear to be unacceptably high.

In a system that relies in some contexts on discretionary non-enforcement of the law to serve important policy goals – such as the goal of not deporting battered women while they are awaiting the availability of a visa number, or the goal of not deporting widows and crime victims while Congress or DHS is taking action to allow them to regularize their status – a state statute declaring that the state shall enforce the law if the federal government declines to do so will inevitably have awkward consequences. The arrest of battered women granted deferred action is merely the most egregious possibility that has so far occurred to this author; it is quite likely that other potential anomalies exist as well. Aliens granted withholding of removal under INA § 241(b)(3) due to likelihood of persecution in their home country could potentially face the same problems under SB 1070 if they did not have in their possession an employment authorization document, for example, although in the case of withholding of removal the issuance of an employment authorization document is supposed to be automatic[24] and thus the nightmare scenario is somewhat less likely.

This practical tension with federal immigration policy is related to another possible constitutional problem with SB 1070: it may be pre-empted by federal immigration law.[25] As explained recently by the District Court that struck down

an effort by Farmer's Branch, Texas to require rental occupancy licenses premised on proof of immigration status:

The Supreme Court has "long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders," *Toll v. Moreno,* 458 U.S. 1, 10, 102 S.Ct. 2977, 73 L.Ed.2d 563 (1982), and it is well settled that "the authority to control immigration is vested solely in the Federal government." *Traux v. Raich,* 239 U.S. 33, 421, 36 S.Ct. 7, 60 L.Ed. 131 (1915). Moreover, "the States enjoy no power with respect to the classification of aliens," a power that is 'committed to the political branches of the Federal Government.'." *Plyler v. Doe,* 457 U.S. 202, 225, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 61, 61 S.Ct. 399, 85 L.Ed. 581 (1941); *Matthews v. Diaz,* 426 U.S. 67, 81, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)).

Villas at Parkside Partners v. City of Farmers Branch, ___ F. Supp. 2d ___, Nos. 3:08-CV-1551-B, 3:03-CV-1615, 2010 WL 1141398 (N.D. Tex. March 24, 2010), at *14. Although the U.S. Supreme Court upheld state regulation of unauthorized employment by aliens in *De Canas v. Bica*, 424 U.S. 351 (1976), it distinguished that regulation from "a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas*, 424 U.S. at 325. Arizona's SB 1070 speaks to immigration in this more fundamental sense, and likely "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA," *De Canas*, 424 U.S. at 364 (internal quotation omitted), in a way that the employment regulation at issue in *De Canas* did not.

Although SB 1070 is drafted to rely on Federal immigration law in an apparent attempt to avoid conflicting with it, avoidance of conflict is likely impossible in a system in which Federal prosecutorial discretion is such an important component that it has been explicitly noted in the statute.[26] If the Federal government has chosen not to remove certain technically removable aliens from the United States, and not to penalize them for technical noncompliance with alien registration requirements, because it considers their circumstances to be especially sympathetic, it is not the place of the State of Arizona to decide otherwise. Whether SB 1070 is used against battered women, or simply against otherwise undistinguished aliens whom the Federal government does not consider it worthwhile to commence removal proceedings against, it is both

constitutionally and practically problematic.

End Notes

[1] http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf, Section 1.

[2] *Id.* at Section 3, new Ariz. Rev. Stat. § 13-1509 (citing 8 U.S.C. §§ 1304(e), 1306(a)).

[3] *Id.* at new Ariz Rev. Stat. § 13-1509(f).

[4] http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf at Sec. 2, new Ariz. Rev. Stat. § 11-1051(b).

[5] *Id.* at § 11-1051(g).

[6] *See*, *e.g.*, http://www.latimes.com/news/nationworld/nation/la-na-arizona-immigration14-2010apr14,0,4677282.story; http://www.nytimes.com/2010/04/24/us/politics/24immig.html?ref=us ; http://www.nytimes.com/2010/04/26/us/26immig.html; http://www.azcentral.com/arizonarepublic/news/articles/2010/04/25/20100425immigration-bill-jan-brewer-arizona.html.

[7] http://www.azcentral.com/news/articles/2010/04/23/20100423arizona-immigration-law-brewer-statements-CR.html.

[8] For additional information (some of it slightly imprecise or out of date, but nonetheless useful) regarding deferred action, see the exchange of letters between former USCIS Ombudsman Prakash Khatri and former USCIS Director Emilio T. Gonzales that is available at http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf and http://www.dhs.gov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_respo

nse_08-07-07.pdf.

[9] *See* http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/August%202009/surviving_spouses_faq_0831.pdf and http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/August%202009/surviving_spouses_update_0831.pdf.

[10] The "widow penalty" was removed as part of the Department of Homeland Security Appropriations Act, 2010, Public Law 111-83 (Oct. 28, 2009).

[11] *See* INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U).

[12] *See* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/uprcd050604.pdf.

[13] *See* INA § 204(a)(1)(D)(i)(IV).

[14]http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/August%202009/surviving_spouses_fact_sheet_0831.pdf at 1.

[15]http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/August%202009/surviving_spouses_fact_sheet_0831.pdf at 1.

[16] 8 C.F.R. § 274a.12(c)(14).

[17] *See* 8 C.F.R. § 264.1(a).

[18] *See* 8 C.F.R. § 264.1(b).

[19] 8 C.F.R. § 274a.12(c)(14).

[20] The May 2010 Visa Bulletin, available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4805.html, provides a cutoff date in the 2A preference category (which includes spouses of lawful permanent residents) of December 1, 2006, for most countries and June 1, 2005

for those from Mexico. Thus, the waiting time prior to filing for adjustment of status (or applying for an immigrant visa) would be expected in most cases to be less than approximately four years after the filing of the petition.

[21] *Id.* at § 11-1051(g).

[22]http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/August%202009/surviving_spouses_faq_0831.pdf at 1.

[23] *Id.*

[24] *See* 8 C.F.R. § 274a.12(a)(10) (listing aliens granted withholding of removal among those who are "authorized employment incident to status" and not requiring that they show economic necessity, or anything other than their grant of withholding, in order to be provided with evidence of employment authorization).

[25] The letter sent by the Mexican American Legal Defense Fund to Governor Brewer prior to her signing SB 1070 provides a helpful overview of the preemption arguments. It is available at http://maldef.org/news/releases/Letter_Brewer_SB1070_4-16-10.pdf .

[26] *See* INA § 204(a)(1)(D)(i)(IV), referring to deferred action for certain VAWA self-petitioners.