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# ARIZONA'S IMMIGRATION STORM

By John C. Eastman and Karen J. Lugo\*

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## Note from the Editor:

This article serves as a counterpoint to Margaret D. Stock's article *Arizona's Attempt to Enforce Federal Immigration Law: "Force Multiplier," or "Ball and Chain"*, published in Volume 11, Issue 3 of *Engage*, available here: [http://www.fed-soc.org/doclib/20101223\\_StockEngage11.3.pdf](http://www.fed-soc.org/doclib/20101223_StockEngage11.3.pdf).

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Faced with escalating murders, rapes, drug trafficking, gang activity, and one of the highest kidnapping rates in the world,<sup>1</sup> exacerbated by a lackluster federal immigration enforcement effort and a sanctuary city movement by some Arizona cities, the Arizona legislature passed SB 1070 in April 2010, a measure that in virtually all significant respects incorporated the actual provisions of relevant federal immigration law.<sup>2</sup> An author of the bill, Senator Russell Pearce, expects that SB 1070 will accomplish "attrition by enforcement" as job opportunities diminish and illegal immigrants are deterred by the real prospect of detection and deportation.

The law was promptly challenged in court, and days before it was set to take effect on July 29, 2010, federal district court judge Susan Bolton enjoined several of its provisions.

The federal government's failure to adequately enforce our nation's borders heavily burdens Arizona's taxpayers. Census data indicate that Arizona has about 500,000 illegal immigrants and that this population costs the state's taxpayers about \$1.3 billion per year for education, medical care, and incarceration.<sup>3</sup>

For the nation, federal failure to detect and expel known dangerous gang members, drug traffickers, and potential terrorists on American territory is a dereliction of the duty to provide for the common defense. Concern about the federal government's failure to control our nation's borders is not limited to Arizona and the other border states, and measures similar to Arizona's have already been introduced in at least six other states, from the South to the Northeast to the Midwest.<sup>4</sup>

Kris Kobach, former chief advisor on immigration and border security to Attorney General John Ashcroft and an author of SB 1070, has noted that "[f]our members of the 9/11 terrorist group encountered state and local law enforcement while inside the country." In his view, "state or local officers might have been able to make immigration arrests if the aliens' immigration violations had been communicated to them by federal authorities." Alternatively, these 9/11 hijackers may have been arrested "if the officers had independently developed probable cause to believe that the aliens were in violation of federal immigration law."<sup>5</sup>

The catastrophic attack that followed the federal government's failure to coordinate immigration enforcement efforts with state and local officials stands in stark contrast to

the results that obtain when that coordination is present, and when the army of state and local officials is permitted to lend its significant expertise and manpower to the effort. State and federal law enforcement cooperation allowed for the quick identification and apprehension of Lee Boyd (aka John Lee) Malvo, for example, an illegal alien and the younger of the two D.C. snipers who shot thirteen people, killing ten of them, during the 2002 Beltway sniper attacks. The killing spree could have continued if not for practical coordination. As Senator Jeff Sessions has noted, "Malvo's fingerprints, collected by Alabama police at a Montgomery, Alabama murder scene, were matched with a fingerprint, collected by INS agents at the scene of a domestic disturbance in Washington State, contained in the INS Automated Biometric Identification System (IDENT) database."<sup>6</sup>

Another example of successful state and federal cooperation to target dangerous aliens is the Alien Apprehension Absconder Initiative. After 9/11, this program was initiated to target high-risk alien fugitives—those who had overstayed legal permission to be in the United States and were from nations associated with Al Qaeda, or who had criminal records. As of November 30, 2005, 47,433 absconders had been listed in the National Crime Information Center (NCIC) database and federal officials, working with the state law enforcement, have arrested thousands of these fugitives, some with links to terror plots.<sup>7</sup> So we know what works, but the Department of Justice now touts the Administration's *policy* of non-enforcement. Are the states powerless to act to protect their own citizens and interests in the face of such a federal non-enforcement policy? That is the principle issue in the litigation challenging Arizona's SB 1070.

### I. Arizona Has Sufficient Inherent Police Power to Authorize Enforcement of Federal Immigration Law Alongside Federal Authorities.

It is a mainstay of our federal system of government that, as James Madison himself observed, "The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."<sup>8</sup> These powers are "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people."<sup>9</sup> The Supreme Court has held that state police power should not be preempted by federal law unless it "plainly and palpably violates a right previously granted to the federal government."<sup>10</sup>

In *Chicanos Por La Causa, Inc. v. Napolitano*,<sup>11</sup> the U.S. Court of Appeals for the Ninth Circuit upheld the Legal Arizona Workers Act on principles of state police power against

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from Congress or the U.S. Constitution. They derive it from their state constitutions, to the extent not expressly prohibited by the Federal Constitution. All of these federal provisions therefore have to be couched as authorization to the Department of Justice to cooperate with the states, not the other way around. States remain free to act unless specifically prohibited. Indeed, where, as here, the legislative scheme so clearly manifests a policy of cooperative enforcement of federal immigration laws, the requirement of clear intent to preempt the very assistance of state and local law enforcement that is otherwise so broadly encouraged is even more pronounced. And there is no intent to preempt expressed in the statutes adopted by Congress.

### III. The Federal Government's Plenary Power Over Immigration Is Assigned to Congress, Not to the President Acting Alone.

That the states retain significant police power to act in ways that impact immigrants is not the end of the inquiry, of course. The overlapping state authority cannot be used to set national immigration policy or otherwise interfere with national immigration laws adopted by Congress. Yet the federal lawsuit against Arizona's SB 1070 complains that Arizona is assisting with the enforcement of federal immigration law, not undermining it. The lawsuit is therefore based on a rather unique contention, namely, that the national executive's decision *not to enforce* federal immigration law preempts state efforts to further federal immigration law. The lawsuit thus pits the federal executive not just against the states but against Congress as well.

The Supreme Court's pronouncements about where the Constitution assigns plenary power over immigration policy have been clear. The power lies with Congress, not with the President acting alone. Under the U.S. Constitution, Congress is vested with the power to "establish [a] uniform Rule of Naturalization."<sup>26</sup> "For more than a century it has been universally acknowledged that *congress* possesses authority over immigration policy as 'an incident of sovereignty.'<sup>27</sup> In *Kleindienst v. Mandel*, the Supreme Court specifically referred to the immigration powers of Congress as "plenary," and similarly referred to them as "sweeping" in *United States v. Hernandez-Guerrero*.<sup>28</sup> "[T]hat the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."<sup>29</sup> Indeed, the Supreme Court has made it clear that over "no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens.<sup>30</sup>

Given this frequent recognition of *Congress's* plenary power to set immigration policy, it is quite odd for the Justice Department to contend that the *executive branch* has plenary power not only *not to enforce* congressional immigration policy but to preemptively prohibit the states from doing so.

The oddity of the Justice Department's position becomes even more stark when viewed in light of the Supreme Court's presumption against preemption of state law. In the immigration context, any claim that the federal government has occupied the field should be associated with clear congressional authority and express intent to exclude state law enforcement.

The Supreme Court established in *De Canas v. Bica*, when it upheld a California statute penalizing employers who hired illegal immigrants, that "[not] every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by [federal] power, whether latent or exercised."<sup>31</sup> The Court acknowledged that the pre-emption "impermissibility test" in this policy domain is whether the state legislation "imposes additional burdens not contemplated by Congress," noting that states can "neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states."<sup>32</sup> The Arizona statute does not violate that test.

*Hines v. Davidowitz*, so heavily relied upon by the Department of Justice and other opponents of Arizona SB 1070, is not to the contrary. At issue in that case was Pennsylvania's Alien Registration Act, which imposed processes and penalties well beyond what Congress had provided. The Court defined state efforts to "restrict, limit, regulate, and register aliens as a distinct group [as] not an equal and continuously existing concurrent power of state and nation" but, importantly, the analysis turned on whether "Congress [had] acted in such manner that its action should preclude enforcement of Pennsylvania's law."<sup>33</sup> Thus, congressional legislative intent and action continues to establish the parameters of immigration policy and its preemptive effect. Unless *Congress* affirmatively prohibits consistent and cooperative state enforcement efforts, the states are not barred from the exercise of their inherent police powers. As the Supreme Court in both *De Canas* and *Hines* seemed to recognize, but the Department of Justice in the present litigation has not, the states do not draw their authority from the Federal Constitution. They do not need Congress's permission to exercise police powers, even if the exercise has a collateral impact on immigration or immigrants. They only need not to have been barred by Congress, acting to further in a valid way a power assigned to the Congress.

Absent clearly expressed intent *by Congress* to preempt state law, therefore, "state law is not preempted."<sup>34</sup> When a state exercises its police powers, the presumption is *against* preemption. When Congress legislates "in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>35</sup>

Surely the letter and spirit of SB 1070 passes even a generic preemption test like that recognized by the Supreme Court in *Gade v. National Solid Wastes Management Association* where "any preemption case" should be a task of "determin[ing] whether state regulation is consistent with the structure and purpose of federal law as a whole."<sup>36</sup>

### IV. Even if the President Has Foreign Policy Powers Sufficient to Permit Non-Enforcement of Federal Immigration Law as a Permissible Policy, in the Face of Contrary Congressional Policy, Those Decisions Must Be Made More Formally than Has Been Done Here.

The DOJ has also contended that the President's policy of non-enforcement is permitted by the President's powers in the realm of foreign affairs, and that any attempt by Arizona

or any other state to assist in the enforcement of immigration statutes adopted by Congress would interfere with those powers and are therefore necessarily preempted. While DOJ's premise is undoubtedly correct—the President is clearly the nation's chief organ in the foreign affairs arena,<sup>37</sup> the superstructure DOJ tries to erect on that premise presses the authority well beyond the breaking point.

The President could negotiate a treaty that touches on immigration policy, for example, and once ratified by the Senate, that treaty would have the force of law.<sup>38</sup> Yet, significantly, even a treaty would give way to a subsequent act of Congress in areas within the legislative authority of Congress, particularly including Congress' plenary power over immigration.<sup>39</sup>

This is particularly true in matters affecting domestic laws and the internal policy of the country. As the Supreme Court has recently held, although the President has an array of political and diplomatic means available to enforce international obligations, “the responsibility for transforming an international obligation arising from a non-self executing treaty into domestic law falls exclusively to Congress, not the executive.”<sup>40</sup> In *Medellin*, the President sought to transform international obligations under a non-self executing treaty into binding federal law, operative against the states, without an act of Congress.<sup>41</sup> The court reasoned that “a non-self-executing treaty, by definition, is one that is ratified with the understanding that it is not to have domestic effect of its own force,” and such an “understanding precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result.”<sup>42</sup>

The Supreme Court emphasized that the President's authorization to represent the United States in the international context speaks to his international responsibilities, and does not grant him unilateral authority to create domestic law.<sup>43</sup> The Court clarified that the combination of a non-self-executing treaty without implementing legislation does not mean the President is precluded from complying with an international treaty obligation, only that he is constrained from giving it domestic effect, and cannot rely on it to “establish binding rules of decision that preempt contrary state law.”<sup>44</sup> The Court concluded by holding that in the absence of implementing legislation, the President's international obligations under a non-self-executing treaty do not create binding domestic law.<sup>45</sup>

What was true in *Medellin* is even more true here, since DOJ does not even purport to rely on a treaty obligation, but merely on the President's amorphous authority over foreign affairs and diplomacy.<sup>46</sup> Whether such an interest could ever suffice to trump a state's attempt to assist with enforcement of immigration laws duly enacted by Congress, *Medellin* clearly requires more than the President's informal say so. Yet, absent the more formal process for creating domestic law that *Medellin* holds is required, state judges and other state officials remain obligated to enforce federal law as it is written, not as the President would like it to be.<sup>47</sup>

## CONCLUSION

Exercising its inherent police powers, Arizona has sought to protect its citizens and lawful residents from the

collateral consequences of illegal immigration and the federal government's failure to control our nation's borders. It has done so by authorizing its own law enforcement officials to assist with the enforcement of federal immigration law, and thus is furthering the immigration policy actually adopted by Congress, without adding to or detracting from requirements established by Congress. Under a proper understanding of Congress's plenary powers over immigration and naturalization, and the separate but complementary role that states play in “our federalism,” Arizona was well within its rights to adopt SB 1070. Indeed, given the border lawlessness that Arizonans are facing, it is not a stretch to argue that the Arizona government may well have been duty-bound to take some such action.

## Endnotes

1 Phoenix reported over 370 kidnapping cases in 2008. *McCain Says Phoenix is the Second Kidnapping Capital in the World*, AUSTIN-AMERICAN STATESMAN, available at <http://www.politifact.com/texas/statements/2010/jun/28/john-mccain/mccain-says-phoenix-second-kidnapping-capital-worl/>.

2 See, e.g., AZ. REV. STAT. §§ 41-1724(B)-(C) (providing, respectively, that “[t]he terms of this act regarding immigration shall be construed to have the meanings given to them under federal immigration law”; and that “[t]his act shall be implemented in a manner consistent with federal laws regulating immigration”). See also AZ. REV. STAT. § 13-2928(G)(2) (defining an unauthorized alien as “an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 United States Code section 1324a(h)(3)”; AZ. REV. STAT. § 23-212(H) (providing that “the court shall consider only the federal government's determination pursuant to 8 United States Code section 1373(c)” to determine “whether an employee is an unauthorized alien”).

3 See Jack Martin & Ira Mehlman, *The Costs of Illegal Immigration to Arizonans*, FAIR (May 2004), available at [http://www.fairus.org/site/News2?page=NewsArticle&cid=17198&security=1601&news\\_iv\\_ctrl=2061](http://www.fairus.org/site/News2?page=NewsArticle&cid=17198&security=1601&news_iv_ctrl=2061).

4 As of November 10, 2010, similar bills had been introduced in six state legislatures: South Carolina, Pennsylvania, Minnesota, Rhode Island, Michigan, and Illinois. See Arizona's Immigration Enforcement Laws, <http://www.ncsl.org/?tabid=20263> (last visited Apr. 4, 2011).

5 Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 184 (2006). “All four of the hijackers (Hamzi, Atta, Hanjour, Jarrah) who were stopped by local police prior to 9/11 had violated federal immigration laws and could have been detained by the state or local police officers.”

6 U.S. Senator Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 329 (2005).

7 Kobach, *supra* note 5, at 190. “Between November 2003 and November 2005, 3,944 absconders were apprehended by state and local law enforcement officers utilizing the NCIC,” and “[a]s of early 2003, INS/ICE authorities had reported fourteen absconder cases to the FBI due to apparent links between the absconders and terrorist activity.” *Id.*

8 THE FEDERALIST NO. 45, at 292-93 (Madison) (Clinton Rossiter ed., 1961).

9 *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

10 *Plumley v. Massachusetts*, 155 U.S. 461, 479-80 (1894).

11 *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted*, 130 S.Ct. 3498 (2010).

12 *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983).

13 The Supreme Court has recognized that state law controls the validity of such an arrest. See *United States v. Di Re*, 332 U.S. 581, 591 (1948) (“Law of state where arrest without warrant for federal offense takes place determines its

validity, in absence of applicable federal statute.”); *Miller v. United States*, 357 U.S. 301, 305, (1958) (“[T]he lawfulness of the arrest without warrant is to be determined by reference to state law.”); *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983) (“The general rule is that local police are not precluded from enforcing federal statutes”); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984); *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999); *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001) (quoting *Vasquez-Alvarez*, 176 F.3d at 1295); *United States v. Bowdach*, 561 F.2d 1160, 1167-68 (5th Cir. 1977) (holding that both 18 U.S.C. § 3041 and state law authorized state law enforcement officers to arrest suspects for federal offenses).

14 LISA SEGHELLI, KARMA ESTER & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 4 (Mar. 11, 2009) (emphasis added), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf>.

15 8 U.S.C. § 1103(a)(10).

16 8 U.S.C. § 1373(a)-(c). Section 1373(a)-(c) collectively requires federal immigration officers to provide local law enforcement officers with detailed information regarding a subject’s immigration status, and prohibits federal agents from preventing local law enforcement from maintaining and exchanging the information they receive. *Id.* If the states may enforce immigration law only to the degree they are deputized by other provisions of federal law, then Section 1373 is pointless. There is no reason to provide local law enforcement with this information if they may only act upon it by being deputized. The only rational explanation is that federal law anticipates that local law enforcement may enforce federal immigration law, so it provides them with the information necessary to accomplish this task.

17 See 8 U.S.C. §§ 1103(a)(11); 1369(a); 1370.

18 See 8 U.S.C. §§ 1226(d)(1), (3); 1366.

19 See 8 U.S.C. §§ 1358; 1227(a)(2)(B)(i).

20 8 U.S.C. § 1357(g)(1).

21 “ICE Agreements of Cooperation in Communities to Enhance Safety and Security,” available at <http://www.ice.gov/pi/news/factsheets/access.htm>. At least seven of Arizona’s major law enforcement agencies are authorized by agreement with the Attorney General to participate in the ICE program, including: the Arizona Department of Corrections, Arizona Department of Public Safety, City of Phoenix Police Department, Maricopa County Sheriff’s Office, Pima County Sheriff’s Office, Pinal County Sheriff’s Office, and Yavapai County Sheriff’s Office. In addition to this program, ICE also launched a program in 2005 called Operation Community Shield (OCS) to further cooperate with state and local law enforcement for the purpose of addressing cross-border gang activity. Delegation of Immigration Authority Section 287(g) Immigration Nationality Act: 287(g) Results and Participating Entities, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Apr. 4, 2011).

22 See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 1(a), 133, 110 Stat. 3009-546, 3009-563 (codified as amended in scattered sections of 8 U.S.C.).

23 SEGHELLI, ESTER & GARCIA, *supra* note 14, at 15-16.

24 James Jay Carafano, *Testimony Before the House Select Committee on Homeland Security*, June 14, 2004, available at <http://www.heritage.org/research/testimony/before-the-house-select-committee-on-homeland-security>.

25 SEGHELLI, ESTER & GARCIA, *supra* note 14, at 17-18 (providing that under the Arizona MOA, correctional officers have the following authorities: (1) interrogate an alien to determine whether there is probable cause for an immigration violation, (2) complete required arrest reports and forms, (3) prepare affidavits and take sworn statements, (4) prepare immigration detainers and I-213 Record of Deportable/Inadmissible Alien reports, and (5) prepare Notice to Appear or other removal charging documents).

26 U.S. CONST. art. I, § 8, cl. 4.

27 *United States v. Hernandez-Guerrero*, 147 F.3d 1075 (9th Cir. 1998) (emphasis added) (citing *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)).

28 *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *Hernandez-Guerrero*,

147 F.3d at 1078.

29 *Galvan v. Press*, 347 U.S. 522, 531 (1954) (emphasis added).

30 *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

31 *De Canas v. Bica*, 424 U.S. 351, 355 (1976). Like in *De Canas*, Sections 5, 7, 8, and 9 of SB 1070 regulate illegal immigrant employment for the purpose of protecting lawful workers. Section 5 makes it illegal for an illegal alien to apply for, solicit, or perform work in Arizona; and Sections 7, 8, and 9 prohibit the knowing employment of unlawful aliens by requiring employers to verify eligibility.

32 *Id.* at 358 n.6.

33 *Hines v. Davidowitz*, 312 U.S. 52, 68-69 (1941).

34 *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

35 *United States v. Locke*, 529 U.S. 89, 108 (2000) (internal quotation marks omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

36 *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51); see also *id.* at 100 (Kennedy, J., concurring) (“[T]he existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.”).

37 See, e.g., *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

38 U.S. CONST. art. VI, cl. 2.

39 *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889).

40 *Medellin v. Texas*, 552 U.S. 491, 525-26 (2008) (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829)).

41 *Id.*

42 *Id.* at 527.

43 *Id.*, at 529.

44 *Id.* at 530.

45 *Id.*

46 Even more troubling is the notion, hinted at by the government of Mexico in the amicus curiae brief it submitted to the Ninth Circuit in this case, that Arizona’s efforts to enforce federal immigration law “conflict[s] . . . with the U.S. government’s efforts, priorities, and commitments.” Brief of Amicus Curiae United Mexican States in Support of Plaintiff-Appellee at 2, *United States v. Arizona*, No. 10-16645 (Sept. 30, 2010). Just what those secret “commitments” may be, Mexico does not say.

47 U.S. CONST. art. VI, cl. 2 (“[T]he Judges in every State shall be bound” by the Constitution, laws, and treaties of the United States.); U.S. CONST. art. VI, cl. 3 (“[A]ll executive officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”).

