



NO ROOM AT THE INN: S.B. 1070 AND THE CONSTITUTIONAL RIGHT OF INTERSTATE TRAVEL

Posted on July 21, 2010 by Cyrus Mehta

By Gary Endelman and Cyrus D. Mehta

In all the media frenzy over SB 1070, the extent to which Arizona has abridged the constitutional right of interstate travel has largely been overlooked. Indeed, when seeking to strike down SB 1070, the Justice Department almost exclusively based its objections on preemption by IRCA under the supremacy clause, devoting no attention to other constitutional infirmities. We write now to raise attention to another issue, which has largely been overlooked. Realizing full well that larger issues are at stake, it remains our view that infringement of the right to travel merits serious comment and stands as yet one more reason why Arizona's initiative should trouble us all.

What about SB 1070 would discourage citizens and lawful resident aliens from travelling to Arizona? Consider the following scenarios and feel free to invent your own:

You are a naturalized American citizen born in Karachi, Pakistan. On a vacation to the Grand Canyon, you are stopped for speeding. Does the State Trooper then have "reasonable suspicion" to believe that you are "unlawfully present" in the United States?

You are a lawful permanent resident born in Honduras. Taking a vacation from your job with Kodak in Rochester, New York, you are trying to find the best directions to visit your old college roommate in Tempe. Not sure what to do, you make the mistake of asking local law enforcement at the next town. Suspicious, they demand to see your "green card" which you left in the motel safe so as not to lose it on the trip. Before you know it, the city police refuse to let you leave since there is no proof of your legal status and it will be the next day until federal authorities can verify it.

Your sister from Ciudad Juarez is getting married in Phoenix and you have to be there. Unfortunately, your car insurance has expired and, right before you leave, you file to renew it but there is not enough time to get a new insurance card before you have to drive from your home in Santa Fe, New Mexico. You get stuck at a random check point where all the drivers have to produce proof of insurance. Not having that, you show your Mexican birth certificate and most recent I-94 showing an expired H1B status for which an extension has been filed but not yet approved since your employer did not want to pay for premium processing. True, law enforcement officials in Arizona are not supposed to consider your "race, color, or national origin" but will they do that anyway under the rationale that this is permitted by the Arizona Constitution?

The semester is over and your whole dorm at Arizona State University has a keg party to celebrate. Things get louder than planned and the campus constabulary pays a not so friendly visit to see what is going on. Your friend from the University of Iowa has come to visit you and he remembers that back home in Cairo such situations do not always end happily. Will he want to come again next year?

Sure, these are made up concerns but are they that far removed from reality? In each of them, how hard is it to believe that the police officer or state trooper making the arrest or conducting the investigation would not claim probable cause to believe that you are removable from the United States? Who among us would be eager to travel to Arizona to find out? These questions are more than free-floating anxieties for they illustrate why SB 1070 strikes at one of the most basic constitutional freedoms, the liberty to travel from one state to another in a civilized and secure manner. Let's find out what is at stake.

SB 1070 provides a safe harbor by stating that a person is presumed not to be an alien who is unlawfully present in the US if the person provides, inter alia, a valid Arizona driver license. What about a license or another form of identification issued by another state or other federal or state agency? The authors credit David Isaacson for pointing this out. Section 11-1051 states that another identification will only provide a safe harbor if the governmental entity "requires proof of legal presence in the United States before issuance, any valid United States Federal, State or Local government issued identification." Not every state requires proof of "legal presence" before issuing a driver's license. For instance, a perusal through New Mexico's Department of Motor Vehicle's website,

<http://www.mvd.newmexico.gov/Drivers/Licensing/How-to-get-a-New-Mexico-Driver-License.html>, indicates that the state will accept a Matricular Consular Card, foreign birth certificate or valid foreign passport as proof of identification number and identity. If a US citizen with a driver's license issued by New Mexico, who was originally born in India, is driving from Santa Fe to San Diego, her driver's license will not help if an Arizona state trooper stops her if she was going at 58 mph instead of 55 mph and is not carrying other proof of being lawfully present, such as a US passport. If this person is prudent and aware of the dangers of SB 1070, she would rather avoid passing through Arizona and take an extremely circuitous route via Colorado, Utah, and Nevada in order to get to San Diego in California, her final destination.

Let's read the Constitution for a bit. The Fourteenth Amendment reminds us that Arizona cannot "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The term "person" when used for this purpose includes both citizens and aliens here under color of law. *Yick Wo v. Hopkins*, 118 US 356 (1886). Any attempt by Arizona to classify travelers based on their where they come from is "inherently suspect and subject to close judicial scrutiny." *Graham v. Dept. of Pub. Welfare*, 403 US 365, 372 (1971). Taken together, each of the individuals noted above belong to a "discrete and insular" minority, *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938) and we would do well to remember that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Takahasi v. Fish & Game Comm'n*, 334 US 410, 420 (1948). All those who come here, not just citizens, can claim the Constitution as their own.

We take for granted our freedom to move from state to state but, precisely because not everyone can, the Constitution protects it. The right to mobility has repeatedly been recognized and upheld by the Supreme Court. See, e.g., *Memorial Hospital v. Maricopa County*, 415 US 250, 255 n.7 (1974); *Oregon v. Mitchell*, 480 US 112, 237(1970); *Edwards v. California*, 314 US 160(1961); *Twining v. New Jersey*, 211 US 78, 97 (1908). This is a right that is "firmly embedded in our jurisprudence," *United States v. Guest*, 383 US 745, 757 (1966), a freedom so central that it is "assertable against private interference as well as governmental action...a virtually unconditional personal right, guaranteed by the Constitution to us all." *Shapiro v. Thompson*, 394 US 618, 643 (1969) (Stewart, J, concurring). Whoever they are, wherever they began, regardless of

why they arrive, those who come to Arizona enjoy the “right to be treated as a welcome visitor rather than an unfriendly alien...”*Saenz v. Roe*, 526 US 489, 500-501 (1999). Whatever authority Arizona has, it is not so great as to decide who has the right to live or visit; indeed, the very exclusivity of SB 1070 runs directly counter to the fundamental spirit and essential character of the Fourteenth Amendment itself, an expression in Mr. Justice Cardozo’s ringing words of the “theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.” *Baldwin v. G.A. F. Seelig, Inc.*, 294 US 511, 523 (1935)(Cardozo, J). The chilling effect that SB 1070 must have on the right of interstate travel can “produce nothing but discord and mutual irritation, ” as Chief Justice Taney so eloquently expressed in his celebrated dissent in *Passenger Cases*, 7 How. 283, 492, 12 L.Ed. 702 (1949).

Those who defend SB 1070 correctly note that the right of interstate travel has traditionally been regarded as a privilege of national citizenship. While the Supreme Court has not taken a step further to establish an explicit nexus between the right to travel and alienage, it is no less true that the Court has neither prohibited such a connection nor opined against it. “There are millions of aliens within the jurisdiction of the United States, “Mr. Justice Stevens reminds us in *Matthews v. Diaz*, 426 US 67, 77(1976), “ The Fifth Amendment, as well as the Fourteenth Amendment, protects everyone of these persons from deprivation of life, liberty, or property without due process of law...(citations omitted) Even one whose presence in this country is unlawful, involuntary or transitory is entitled to that constitutional protection.”

Critics will rightly note that the word “travel” nowhere appears in the text of the Constitution itself. Some liberties are so intrinsic that they need not be mentioned by name. Before we had our present charter, Article IV of the Articles of Confederation, our first constitution, guaranteed that “ the people of each State of each State shall have free ingress and regress to and from any other State.” Professor Zechariah Chafee teaches us that, whatever its constitutional provenance, freedom to travel, no less than freedom of speech, press, religion or assembly, is a basic human right whose exercise comes under the full panoply of due process of law. Zechariah Chafee, *Three Human Rights in the Constitution of 1787* at 185. http://www.constitution.org/cmt/zc/zc_3hrc.htm

Why oppose SB 1070? Mr. Justice Jackson gave us the answer in *Edwards v. People of State of California*, 314 US 160, 184 (1941) when he refused to allow

California to bar poor people : indigence was not a contagion that must be quarantined. The Arizona legislature has already recognized why SB 1070 is so troubling to so many and, through its subsequent enactment of HB 2162, advised law enforcement authorities not to “consider race, color or national origin,” except to the extent allowed under the Arizona or US constitutions. Despite this, we know in our bones that the impermissible invocation of these invidious and immutable characteristics is the only way for this evil law to be enforced; its very existence is an irresistible invitation to government overreaching the protection against which is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 US 319, 325 (1937)(Cardozo, J).