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FROM MADISON TO MORTON: CAN PROSECUTORIAL DISCRETION TRUMP STATE ACTION IN ARIZONA V. USA?

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By Gary Endelman and Cyrus Mehta

Warning against the danger of faction in his famous Federalist Paper No. 10, James Madison sought to moderate the impact through the diffusion of power amongst the three branches of the federal government as well as between state and federal authority. This coming Wednesday, the United States Supreme Court will hear oral argument over the most contentious provisions of Arizona SB 1070. It is perhaps no small exaggeration to say that the outcome of this case will determine if prosecutorial discretion as a tool of immigration enforcement can survive.In an age of finite resources, to govern is to choose. That is why ICE Director John Morton decided this past June 2011 to exercise prosecutorial discretion in removal cases involving non-citizens who demonstrate favorable factors, such as their length of presence in the US, the person's ties to the community, including the presence of immediate relative who may be US citizens or permanent residents, the circumstances of the person's entry into the US, particularly if he or she was brought in as a young child and whether the person is likely to be granted permanent residency in the future, to name a few. Mr. Morton in a separate policy memo also included the victims and witnesses of crime, including domestic violence, and those persons who were plaintiffs in non-frivolous lawsuits or otherwise engaged in action to protect their civil rights. Director Morton elected to concentrate on deporting national security concerns or those non-citizens with a serious criminal history. This was not the first time that those who were charged with enforcement of our immigration laws embraced the virtues of prosecutorial discretion. On November 17, 2000, then INS Commissioner Doris Meissner explained it this

way:

Prosecutorial Discretion is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day…The favorable exercise of prosecutorial discretion means a discretionary decision not to assert the full scope of the INS's enforcement authority as permitted under the law…It is important to recognize not only what prosecutorial discretion is but also what it is not. The doctrine of prosecutorial discretion applies to law enforcement decisions whether, and to what extent, to exercise the coercive power of the Government over liberty and property, as authorized by law in cases when individuals have violated the law..The distinction is not always an easy bright-line rule to apply… Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations

It is an oversimplification, but still an insightful one, to conclude that, thanks largely to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), the importance of prosecutorial discretion has increased in inverse measure to the shrinking remedial actions left open to immigration judges whose ability to grant relief from removal, especially in the context of criminal convictions, has been dramatically curtailed. If the consequences of deportation can no longer be avoided or ameliorated, then the decision on whom to target and how to punish become a moments of surpassing criticality. While prosecutorial discretion is not the answer to a legislature run amuck, it may serve to limit the damage. As Assistant Attorney General Robert Raban wrote to Congressman Barney Frank on January 19, 2000, it is in bad times, more than good, when justice needs prosecutorial discretion the most:*Consequently, the IIRAIRA rendered the exercise of prosecutorial discretion by the INS the only means for averting the extreme hardship associated with certain deportation and/or removal cases…*

The State of Arizona, it would seem, has other priorities. While ICE may feel the need to choose, Arizona manifestly does not. Indeed, the four provisions of SB 1070 are precisely the ones that most flagrantly impose burdens on ICE in the absence of federal selection. In the absence of a matching federal mechanism, SB 1070 requires Arizona law enforcement officers to check the immigration status of anyone they stop, arrest or detain if they have a "reasonable suspicion " the person is unlawfully present. SB 1070 complete disregards the Morton prosecutorial discretion policy, which now allows an ICE official to grant a stay

of removal to a person who even has a removal order. While SB 1070 may still consider this person to be unlawfully present, under the federal prosecutorial discretion policy, this individual who has been granted a stay of removal, along with an order of supervision, may even apply for a work permit. Furthermore, ignorant or indifferent to federal policies that implicitly tolerate or openly protect the undocumented, SB 1070 criminalizes a failure to carry immigration registration documentation. It has already been pointed out that a battered woman who has obtained discretionary deferred action after filing an I-360 self-petition under the Violence Against Women Act will not be conferred with a registration document. Yet, such a person is allowed to remain and even work in the US until he or she obtains permanent residence. While neither the Immigration Reform Control Act of 1986 or the INA as a whole consider unauthorized employment as criminal conduct, SB 1070 does; even to apply for or solicit work is no less felonious. In the absence of federal warrant or any expression of federal interest in prosecution, SB 1070 sanctions warrantless arrest based on probable cause that the alien in question has committed a deportable offense. The New York *Times* recently but accurately termed this "an invitation to chaos:" *While Arizona says its law merely empowers law enforcement to work cooperatively with federal officers, that is demonstratively false. The four provisions at issue go beyond federal law, turning federal guidelines into state enforcement rules and violations of federal rules into state crimes. They transform a federal policy that allows discretion in seeking serious criminals among illegal immigrants into a state mandate to target everyone in Arizona illegally…*

This concern is at the core of the pre-emption argument against SB 1070, though it has not received much ink in the popular press. In effect, Arizona seeks to impose an unfunded mandate on Washington, precisely the reverse of what is the norm. As Judge Paez wrote for the Ninth Circuit Court of Appeals in

United States v. Arizona, 641 F. 3d 339, 352-53 (9th Cir.2011):By imposing mandatory obligations on state and local officers, Arizona interferes with the federal government's authority to implement its priorities and strategies in law enforcement, turning Arizona officers into state-directed DHS agents…the threat of 50 states layering their own immigration enforcement rules on top of the INA weighs in favor of preemption…

It is for this reason that the United States devoted a full 7 pages of it's appellate brief to the Supreme Court (pp.17-23) on this very issue. The curtailment of prosecutorial discretion is the negation of federal priorities. On pp. 22-23, we

get to the heart of the matter:

The framework that the Constitution and Congress have created does not permit the States to adopt their own immigration programs and policies or to set themselves up as rival decision makers based on disagreement with the focus and scope of federal enforcement. Yet that is precisely what SB 1070 would do, by consciously erecting a regime that would detain, prosecute and incarcerate aliens based on violations of federal law but without regard to federal enforcement provisions, priorities and discretion. SB 1070 cannot be sustained as an exercise in cooperative federalism when its very design discards cooperation and embraces confrontation.

It is not hard to understand or appreciate why or how Arizona is frustrated, for good people of diverse views share this same conviction that ours is a broken immigration regime. It is the particular manner in which Arizona has elected to manifest this dissatisfaction that places the prosecutorial discretion of federal authorities at risk. We must not sacrifice constitutional verities to contemporary passions. Let us return to Madison Federalist No. 51:*Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary…*

In an increasingly complex, hyper-technical system, the need for discretion as a way to make intelligent choices seems more open and obvious than ever. It is widely acknowledged that we have a dysfunctional immigration system whose systemic dislocation has contributed to the buildup of the undocumented population. In the absence of Congressional intervention to restore a permanent balance, the Administration can and must exercise discretion, devoid of ideology or sentiment, to cobble together interim solutions as the need for them arises. Despite SB 1070, rhetoric is not reality and the targeted exercise of discretion to reconcile divergent and often competing interests is something that the Supreme Court should endorse. James Madison would.*(The views expressed by guest author, Gary Endelman, are his own and not of his firm, FosterQuan, LLP)*