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DREAMING IN ARIZONA: CAN PROSECUTORIAL DISCRETION CO-EXIST WITH SHOW ME YOUR PAPERS?

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In our blog, From Madison to Morton: Can Prosecutorial Discretion Trump State Action In USA v. Arizona?, we speculated whether the federal government's ability to decide not to remove certain non-citizens from the US would be its trump card in *Arizona v. USA*, 567 U.S ___ (2012). A few days prior to *Arizona v. USA*, the Obama administration announced deferred action for young persons via a June 15, 2012 memorandum, which will prevent the deportation of over a million people who fell out of status of no fault of their own while Arizona's SB 1070 aims at driving away these very people through an attrition policy. These young people who will benefit under administrative deferred action would have otherwise been eligible under the DREAM Act, which narrowly failed to pass Congress in December 2010.

We were almost correct. In a 5-3 ruling (with Justice Kagan recusing), the Supreme Court invalidated most of the provisions of SB 1070 on the grounds that they were preempted by federal law such as criminalizing the failure to carry registration documents (section 3), criminalizing an alien's ability to apply for or perform work (section 5(c)), and authorizing state officers to arrest a person based on probable cause that he or she has committed a removable offense (section 6). On the other hand, the Supreme Court, 8-0, narrowly upheld section 2(B), the "show me your papers" law, which requires state officers to make "a reasonable attempt....to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." Section 2(B) further provides that "ny person who

is arrested shall have the person's immigration status determined before the person is released."

Before we analyze the Court's narrow upholding of section 2(B) and how it would impact the federal government's prosecutorial discretion policies, the following extract from Justice Kennedy's majority opinion acknowledging the federal government's ability to exercise prosecutorial discretion is worth noting:

A principal feature of the removal system is the broad discretion exercised by immigration officials..... Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal....

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state maybe mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

Arizona v. USA, supra, Slip Op. at pages 4-5.

It is indeed unfortunate that despite noting the role of the federal government in formulating immigration policy, the Court did not, at least for the moment, invalidate 2(B), which essentially legalizes racial profiling. *See US v. Brignoni-Ponce,* 422 US 873 (1975) (Mexican ancestry on its own cannot be an articulable fact to stop a person). The Court was obviously mindful of concerns relating to racial profiling, but the case that the United States brought against Arizona is more about whether federal immigration law preempts 2(B) and the other provisions of SB 1070. Both conservative and liberal justices did not think so since 2(B) was not creating a new state immigration law as the other invalidated

provisions did. All that 2(B) does is to allow Arizona police officers to determine if someone was unlawfully present in the context of a lawful stop by inquiring about that person's status with the federal Department of Homeland Security, and such communication and exchange of information has not been foreclosed by Congress.

The question is whether 2(B) will interfere with the federal government's dramatic new prosecutorial initiative to not deport over a million young undocumented people if they met certain criteria. The June 15 memorandum on deferred action directs the heads of USCIS, CBP and ICE to exercise prosecutorial discretion, and thus grant deferred action, to an individual who came to the United States under the age of 16, has continuously resided in the US for at least 5 years preceding the date of the memorandum and was present in the US on the date of the memorandum, and who is currently in school, or has graduated from school or obtained a general education certificate, or who is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States. Moreover, this individual should not be above the age of thirty and should also not have been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety. This directive further applies to individuals in removal proceedings as well as those who have already obtained removal orders. The grant of deferred action also allows the non-citizen to apply for employment authorization pursuant to an existing regulation, 8 CFR § 274a(c)(14).

Even though the new deferred action policy has not been implemented, the memorandum instructs ICE and CBP to refrain from placing qualified persons in removal proceedings or from removing them from the US. How does this very explicit instruction to ICE and CBP officials square with Arizona's section 2(B)? While Justice Scalia, who fiercely dissented and blasted the Obama administration from the bench, saw no need for preemption of any of Arizona's provisions based on the federal government's ability to exercise prosecutorial discretion, the majority, fortunately, were more mindful of this factor. Suppose a young DREAMer who prima facie qualifies under the deferred action program was stopped for jaywalking in Tuscon, and the Arizona police officer had a reasonable suspicion that her presence was unlawful, would it be reasonable for the police officer to detain this person even though she would not ordinarily be detained for the offense of jay walking? Even if the Arizona officer could

query ICE about her status, how long would it take for ICE to respond? Moreover, even though she may qualify for the deferred action program, how would ICE be able to tell if there is no record of her application at all? DHS has yet to even create an application process, but it has instructed its officers from immediately refraining placing such persons in removal proceedings or removing them from the US. Even once an application is lodged, it may take weeks or months before the DHS is able to grant deferred action. While this person should not be apprehended by the federal government under its deferred action policy, Arizona could potentially hold her.

But not for long.The majority explicitly held that 2(B) should be read to avoid the hold of a person solely to verify his or her immigration status. The Court noted in connection with the jaywalker hypothetical, "The state courts may conclude that unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry." Slip Op. at 22 (citation omitted). Even in a case where a person is held in state custody for a non-immigration offense, the Court cautioned that the delay in obtaining verification from the federal government should not be a reason to prolong that person's detention. The Court also suggested that 2(B) ought to be "read as an instruction to initiate a status check every time someone is arrested…rather than a command to hold the person until the check is complete no matter the circumstances. Slip Op. at 23. This temporal limitation harkens back to the Court's rationale for justifying warrantless stops by roving patrols in the border regions with Mexico in *Brignoni-Ponce:*

The intrusion is modest. The Government tells us that a stop by a roving patrol "usually consumes no more than a minute." Brief for United States 25. There is no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside…(citation omitted) . According to the Government ;"ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States. 422 US at 880.

Finally the Court noted that its opinion did not foreclose other preemption and constitutional challenges as the law as interpreted and applied after it goes into effect. This is particularly the case if delay in the release of a detainee flowed from the requirement to check their immigration status. Indeed, it is only if such status verification took place during a routine stop or arrest and could be

accomplished quickly and efficiently could a conflict with federal immigration law be avoided.

As for Justice Scalia, who concurred with the majority on 2(B), but also dissented as he would have upheld all of the other provisions, it is ironic that he is willing to have Arizona add to penalties imposed by Congress but not willing to let the President, a co-equal branch whose role in federal immigration policy is certainly less subject to challenge than that of the states, relieve the harsh impact of such penalties for a discretely delineated protected class. It is also ironic that theAdministration is actively moving ahead to find an administrative solution to our broken immigration system by granting DREAM act relief while Arizona seeks to uphold its right to put in place an enforcement mechanism it may not seek to enforce, if only to avoid further constitutional challenge.

It does not require a crystal ball to imagine that 2(B), if enforced, will cause mayhem for young DREAMers and their ability to remain in the US through further administrative remedies, despite the Court's narrow upholding of the provision. It will be difficult, if not impossible, for ICE to communicate with certainty to overzealous Arizona officials like Sheriff Joe that a young person who qualifies for the deferred action program is not unlawfully present. In fact, such a person continues to be unlawfully present even though he or she may qualify for deferred action presently, prior to the filing of the application. Moreover, even after an application is filed, it is not clear how long DHS will actually take to grant deferred action and such a person will still remain unlawfully present during the pendency of the application. Although the grant of deferred action stops unlawful presence for purposes of the federal 3-10 year bars to reentry, it is not clear whether the Arizona definition of lawful presence would recognize someone who has an outstanding removal order but who has also been granted deferred action. This situation, and many others, such as a potential US citizen being detained for being suspected of being unlawfully present, will result in further challenges to 2(B), which hopefully, the next time around, will be successful.

The Court upheld 2(B) because there was no evidence that Arizona was yet enforcing it. Indeed, for all practical purposes, it had yet to go into effect. Given the natural judicial reluctance to fray the bonds of federalist comity, the Supreme Court stayed its hand for now so that state courts could determine whether SB 1070 could be consistently administered within the straitjacket of

the Supreme Court's ruling. So, in this sense, the issue was not ripe for a determination on pre-emption. When will this change? How many will have to suffer the consequences before the Supreme Court will act? For this reason, knowing what the future will bring, the nation and its liberties would have been better served if 2(B) had been invalidated. It is hard to imagine how Section 2(B) can survive if and when Arizona tries to make it come alive. Let us not forget that, despite Arizona Governor Brewer's protestation to the contrary, the real guts of this law, the warrantless arbitrary arrest powers granted by Section 6, did not survive today. The rule of law did. The status check authorized by Section 2(B) can only happen after there is probable cause to believe that a non-immigration law violation has taken place, and they happen very quickly so as not to prolong any stop or detention. For all our concerns, and despite our fondest hopes for a more sweeping victory, the Supreme Court has reaffirmed our oldest national tradition, that here in America, there is still much room to dream- in Arizona and beyond.