

Immigration, Racism & the Courts

Blocked on comprehensive immigration reform, the Obama administration has won some piecemeal victories against GOP demands for more draconian moves against “the undocumented.” Deportations of “dreamers” have been stopped and much of an Arizona law was overturned, but more battles lie ahead, writes Marjorie Cohn.

By Marjorie Cohn

The issue of immigration has been tossed about like a political football for some time. Democrats argue that migrants who have spent many years in the United States should be permitted to apply for lawful status. Republicans criticize these proposals as “amnesty.” But Congress has been unable to agree on comprehensive immigration reform.

Three and one-half years into his term, President Obama announced on June 15 a policy to halt deportations for many undocumented immigrants who came to the United States as children. They must be under age 30, have come to the United States when they were under age 16, have lived in the U.S. for at least five years, be either an honorably discharged veteran or a high school graduate, and have suffered no felony or “significant” misdemeanor convictions.

Ten days after Obama revealed his new program, the Supreme Court issued its long-awaited decision on Arizona’s SB 1070. Arizona had enacted a repressive law aimed at “attrition [of undocumented immigrants] through enforcement.” Five other states followed suit and waited as the high court considered the constitutionality of Arizona’s law.

In a victory for those who support a humane immigration policy, the Court overturned three sections of SB 1070: Arizona cannot criminalize unlawful presence in the United States, or working without papers; and the decision to arrest someone for unlawful presence in the U.S. is solely a federal issue. The Court made clear that the enforcement of immigration law is reserved to the federal government.

But unfortunately, the Court unanimously upheld the most controversial provision of SB 1070, at least for the time being. Section 2(b) requires state officers to determine the immigration status of anyone they stop, detain or arrest if they have “reasonable suspicion” the person is an undocumented immigrant. Although the Court didn’t address racial profiling in its opinion, how can this statute possibly be enforced without considering skin color, language and clothing?

Section 2(b) says that Arizona officers “may not solely consider race, color or

national origin" in the enforcement of this section. But 2(b) effectively requires the consideration of race, color and national origin because it is unfathomable how a law enforcement official could avoid considering those factors in deciding whom to investigate under the new law. Even the most well-meaning officer cannot possibly determine whether an individual may be undocumented without making judgments based on apparent race, color and national origin.

As Tucson Police Chief Roberto A. Villasenor noted, "It says you can't use race and ethnicity. If you're not paying attention to race and ethnicity, what other elements are there? If it's 95 percent based on race and ethnicity, what's the other 5 percent? No one knows."

The Supreme Court's decision was apparently a compromise, leaving open the possibility of additional constitutional challenges. A majority of the Court was not prepared to rule at this point that section 2(b) will interfere with federal immigration enforcement. Future lawsuits will argue that 2(b) in practice is preempted by the federal government's exclusive jurisdiction over immigration, and that it invariably leads to racial profiling which violates the Due Process and Equal Protection Clauses of the Constitution.

One justice who refused to compromise with his fellow justices jumped inappropriately into the political battle in his dissenting opinion. Antonin Scalia personally attacked Obama's new policy (on not deporting young people brought into the country by their parents), writing:

"The President said at a news conference that the new program is 'the right thing to do' in light of Congress' failure to pass the administration's proposed revision of the Immigration Act. Perhaps it is, though Arizona may not think so. But to say, as the court does, that Arizona contradicts federal law by enforcing application of the Immigration Act that the president declines to enforce boggles the mind."

Aside from the impropriety of this cheap shot which led one Washington Post columnist to call for Scalia's resignation the justice is wrong about Obama refusing to enforce the immigration law. There have been more deportations during the Obama presidency than in any other administration.

But to its credit, Immigration and Customs Enforcement (ICE) has directed its officials to use particular care in considering the cases of veterans, members of the armed forces, long-time lawful permanent residents, minors and elderly individuals, those present in the United States since childhood, pregnant or nursing women, victims of domestic violence and trafficking, individuals who suffer from a serious mental or physical disability, and those with serious

health concerns.

After the Court issued its opinion, the Department of Homeland Security (DHS) said it will send a directive to federal agents in Arizona that they must continue to enforce the immigration law consistent with the administration's priorities, and should not initiate deportation of those who have not committed serious crimes or are not repeat offenders.

DHS also announced it was suspending 287g joint agreements in Arizona. Under these pacts, the federal government had deputized state and local law enforcement officials to detain undocumented immigrants. The program had led to serious civil rights abuses.

Several civil rights and immigrants rights organizations have signed a letter to Janet Napolitano, Secretary of Homeland Security, urging her to terminate the 287g agreements in Alabama, Georgia, Indiana, South Carolina and Utah, the five states that have enacted laws like SB 1070.

The letter also requests that DHS collect data to determine whether state and local police in all six states (including Arizona) are engaged in racial profiling and illegal detentions. This data could be helpful for future lawsuits.

In its opinion, the Court made clear that Arizona police who request an immigration status check from the federal authorities may not extend a detention longer than would normally occur merely because they have not received a response from the federal authorities.

Although the Court struck down three provisions of SB 1070, section 2(b) remains on the books. Instead of gratitude for the back-breaking work migrant laborers contribute to our society, there is an increasingly virulent strain of racism that leads to the targeting of non-citizens. Republican lawmakers are joining together to oppose federal immigration reform, opting instead for a "states rights" approach where each state is free to enact its own racist law.

There is a hopeful sign in California, however, where the legislature recently approved a bill that prevents state police officers from turning over a detained person to federal immigration authorities unless the detainee has been convicted of a felony.

Migrants, no less than U.S. citizens, are entitled to dignity, respect, and human rights. Let us join the voices of compassion and oppose the mean-spirited actions that aim to legalize racial profiling and scapegoat immigrants. Laws like SB 1070 demean us all.

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