

Arizona Immigration Law: What The Supreme Court Is Considering, And Why It Matters

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In January, Gov. Jan Brewer of Arizona made headlines when she was photographed thrusting an accusatory finger in President Barack Obama's face during a confrontation on a Phoenix tarmac. Brewer later explained that the president was "a little disturbed" about her book, in which she described Obama as weak on immigration.

The fleeting exchange filtered quickly out of the news cycle, but the image encapsulated the underlying legal issue as the U.S. Supreme Court takes up Arizona's new immigration law on Wednesday. Fundamentally, the case pivots on the relationship between states and the federal government when it comes to enforcing immigration law.

Arizona's deeply polarizing new immigration law, enacted in April 2010, provided the impetus for similar new laws in Georgia, South Carolina, Alabama and Utah. The common premise was that the federal government had neglected its responsibility to mitigate illegal immigration, and the states took it upon themselves to act.

The U.S. Department of Justice challenged the law, saying that Arizona was effectively trying to supplant the federal government. Congress passes immigration laws, and the government enforces them.

Law's Most Controversial Provision

The most controversial provision in the Arizona law -- one that sparked demonstrations and boycotts on one hand, and was emulated by lawmakers in Alabama and Georgia on the other hand -- requires police officers to verify the immigration status of people they suspect to be in the country illegally. That effectively deputizes local and state law enforcement to perform a task reserved for agents of the federal Immigration and Customs Enforcement agency, the Obama administration argues.

"Arizona has adopted its own immigration policy, which focuses solely on maximum enforcement and pays no heed to the multifaceted judgments that the (Immigration and Nationality Act) provides for the Executive Branch to make," the administration's brief says. "For each state, and each locality, to set its own immigration policy in that fashion would wholly subvert Congress's goal: a single, national approach."

Collaboration between local law enforcement and federal immigration agents is hardly unprecedented. A program known as 287(g), for example, allows Immigration and Customs Enforcement officers to delegate some authority to participating state and local law officers.

Similarly, a Bush-era initiative called Secure Communities requires state and local law enforcement officers to share the fingerprints of anyone they arrest with Immigration and Customs Enforcement, which can then use those fingerprints to identify undocumented immigrants and start deportation proceedings. The Obama administration has expanded Secure Communities despite vociferous criticism from immigration advocates.

Arizona's case is different because the state, not the federal government, has created the enforcement mechanisms. In addition to the police stops provision, the Supreme Court is weighing a provision making it a state-level crime to be in the country illegally (immigration is a civil offense) and a provision criminalizing immigrants working without authorization.

"By hijacking the process, Arizona is not helping the government," said Ben Winograd, a staff

attorney at the American Immigration Council in Washington. "If anything it's confronting the federal government. It's Arizona saying we think we can do it better how we want to do it, notwithstanding how you want to do it."

"Maximum Enforcement"

The administration's use of the phrase "maximum enforcement" is also illustrative. Immigration law clearly establishes who is or isn't in the country legally, but there's flexibility in how immigration officials choose who to target, and why. Arizona opts for an all-of-the-above approach.

"A lot of immigration law is not just what's on the books but what's enforced with discretion by individual law enforcement, so there's a lot of discretion in who actually gets arrested or deported," said Hiroshi Motomura, a professor and immigration expert at the University of California, Los Angeles School of Law. "We have 11 million people in the country here illegally, and the apparatus just covers a fraction of that."

Because enforcing immigration law is the federal government's prerogative, the executive branch is able to dictate how the law is carried out. In a move that infuriated conservatives and immigration restrictionists, the Obama administration recently unveiled a policy instructing ICE agents to focus on immigrants with criminal records or those who posed public safety threats. By telling ICE where to channel its resources, the guidelines effectively provide relief to immigrants who aren't targeted.

The Department of Justice has acknowledged the centrality of the discretion factor, noting in its brief that "the need for that discretion is especially strong in the area of immigration" and warning that Arizona is subverting "federal enforcement provisions, priorities, and discretion."

That doesn't sit well with proponents of tougher immigration laws, who argue that the Obama administration has circumvented Congress.

"There's a need to define how much discretion the administration has in whether they can simply substitute their policies for laws that have been passed by Congress," said Ira Mehlman, a spokesman for the Federation for American Immigration Reform, an organization that advocates less immigration. "The reason you have Arizona and a bunch of other states that have passed laws like this is because the federal government has neglected its responsibilities and the states are saying look, we're the ones who are bearing the impact of the federal government's failure or refusal to enforce these laws."

But under the model Arizona is championing, states are simply substituting their own set of priorities for that of the federal government. And the alternative to a unified national policy, the administration argues, is chaos -- a patchwork of immigration laws that could vary substantially from state to state.

That's the status quo on issues like same sex marriage. But it would be untenable when it comes to enforcing immigration law, in part because immigration law is a matter of foreign policy, the administration says.

"As the framers understood, it is the national government that has ultimate responsibility to regulate the treatment of aliens while on American soil, because it is the nation as a whole -- not any single state -- that must respond to the international consequences of such treatment," U.S. Solicitor General Donald Verrilli, who will argue the government's side, wrote in the brief.

Critics of the Arizona law also dismiss as absurd the notion that Obama has ignored immigration laws. They note that he has overseen an unprecedented number of deportations, nearly 400,000 a year.

"It's not a matter of the current administration not wanting to enforce immigration law," said Justin Cox, a staff attorney for the American Civil Liberties Union's Immigrants' Rights Project. "They just want actual priorities in who you go after."

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