Written by **Joe Wolverton, II, J.D.** on March 8, 2012

11th Circuit Will Await SCOTUS Before Ruling in Ga. and Ala. Cases

Last week, a three-judge panel of the 11th Circuit Court of Appeals in Atlanta told representatives of Alabama and Georgia that they were going to wait for the highest court's decision in the Arizona immigration case before handing down a ruling of their own.

The decision was a somewhat anticlimactic conclusion to this latest round of legal arguments over the constitutional situs of immigration authority.

Judges listened to about three hours of oral arguments from attorneys for the federal government and for the state governments of Alabama and Georgia. The former argued that the Constitution grants exclusive power to the federal government to set and administer laws for the control of immigration to the United States. For their part, state Attorneys General argued that the feds were derelict in their duty to thwart the unchecked influx of illegals into their respective state borders.

According to U.S. Deputy Assistant Attorney General Beth Brinkmann (pictured above), speaking on behalf of the Department of Justice, if enforced, the state laws in controversy would unlawfully conflict with federal immigration statutes and would contribute to a patchwork of state and local laws, many of which would contradict currently operative federal immigration policies and principles.

Specifically, the federal government claims that in its interpretation of the Constitution, Washington has exclusive and preeminent authority to promulgate immigration regulations. This power, it says, derives from the Constitution, as well as from numerous laws passed by successive Congresses.

Nowhere, however, has the government been able to point to the exact location in the Constitution where there is found exclusive congressional authority to regulate immigration.

The enumeration in the Constitution of specific powers delegated to the federal government is the cornerstone of American political theory and of the constitutional Republic established in 1787. The basic definition of enumerated powers is that the best limitation on power is to not give it in the first place. Powers, as understood by Madison, Jefferson, et al., were legitimate only if they had been granted to the government by the people and written specifically in the document through which the governed gave life to the government — the Constitution.

"We the People, of the United States" established this government. All powers assigned to the government in the document were originally (and ultimately) held by the people. No original, organic, or self-possessed powers exist in any government. All government is an artificial creation of the people and is powerless but for their endowment of a specific roster of limited powers to it.

In all the complaints filed by the Obama administration against the various states that have enacted Arizona-style immigration laws, U.S. Attorney General Eric Holder insists that the federal footprint has marked the legal limits within which a state may make laws in the field of immigration.

In light of the lack of an enumeration of such exclusive legislative power in the Constitution (other than the power granted to Congress "to establish an uniform rule of naturalization…."), the question becomes whether the U.S. government enacted a slate of laws creating a *de facto* (if not *de jure*, or legal) impediment to the passage and enforcement of state laws that, if nothing else, could effectively function to take up the slack in the irrefutably dysfunctional federal immigration policy.

In the absence of explicit, enumerated authority to legislate, the power remains with the states and the people. The responsibility, therefore, for deciding who may or may not enter a state falls upon the government of that state, and not exclusively upon the national government. (It is to be presumed, however, that under Article IV, Section 2 of the Constitution, that *legal* citizens of one state have the right to travel to another state unimpeded, to wit: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.")

The issue of the legal locus of control over immigration was at the core of every question posed by the judges to counsel for the states and the Justice Department.

For example, at one point Judge Beverly Martin peppered Alabama Solicitor General John Neiman with questions about the intent of provisions of his state's law that prohibit those illegally present in the state from entering contracts for utilities and housing.

Judge Martin asked: "You say this is not a policy of expulsion. I mean, you're not trying to get these folks to leave Alabama."

Neiman responded: "Well, Your Honor, it's — the — obviously, the purpose — one purpose of the entire act was to bolster Congress' policy against illegal immigration…."

Martin pressed on: "I got that. But are you — is it your position that this law is not intended in Alabama to force undocumented aliens to leave Alabama?"

Neiman countered: "I certainly would not take the position that — I would not take the position that that is not the intent. The question here is what the actual effect of the law is and…"

Neiman finished his reply informing the judges that Alabama didn't intend to deport anyone, but to leave that decision up to the feds, where it rightly belonged.

Regarding the measurable effects of the enforcement of the laws, Alabama Attorney General Luther Strange released a statement expressing his hope that the proceedings before the 11th Circuit would "clear up misconceptions about the immigration law."

Speaking of the proper relationship between state and federal laws, Strange said, "Congress has a policy against illegal immigration. Alabama's law is consistent with what Congress wanted. It is ironic that in this case, the Obama Administration is hoping to stop the operation of Alabama's law and to undermine the purposes of Congress."

In the inquiry that followed, Judge Charles Wilson returned the focus of questioning to the proper role of the state legislature in passing laws in the field of immigration.

In one such exchange, Judge Wilson asked Neiman: “Don’t we have a strictly legal issue to decide and that’s whether or not these Alabama laws are pre-empted by federal law even though they may be harsh?”

Lawyers for the federal government averred that the federal government has exclusive jurisdiction over immigration and states are preempted from entering that field.

In fact, once the feds have “occupied the field,” so their argument went, of this or that area of the law or policy, then no other government (state or local) may trespass therein.

The Justice Department is joined as plaintiffs in these cases by several civil rights groups and immigrant advocacy organizations.

After the court’s decision was announced, the speechifying moved outside as protesters and plaintiffs made their case against enforcement of the laws passed by Alabama and Georgia.

One of those addressing reporters gathered outside the courthouse was ACLU Immigrants’ Rights Project director Cecillia Wang. Wang appeared before the court arguing that the state laws were harsh and she continued pressing her point on the sidewalk.

“These laws are intended to drive immigrants out of these two states, Alabama and Georgia. And that is simply not consistent with the Constitution. It’s up to the federal government to decide what to do with people who don’t have lawful status in the United States,” Wang claimed.

Another statement was made by Sharon Gruner of Dalton, Georgia. Gruner is a plaintiff in the complaint filed against the state of Georgia. She’s a member of a collaboration of leaders in the large Latino community living in the Peach State. This coalition insists that their efforts to give aid to needy Hispanics are being hampered by the “chilling effect” caused by strictness of these state statutes.

Said Gruner, “Then we can’t really help people. We have to ask for document status before loading them in our cars. And so it just restricts our personal freedom of where we want to serve and who we want to serve with and who we want to be associated with.”

Judge Wilson, speaking for the bench ruled that he and his colleagues of the 11th Circuit would defer making a final disposition until after the U.S. Supreme Court hands down its decision in the Arizona case. Arguments in that matter will begin on April 25.