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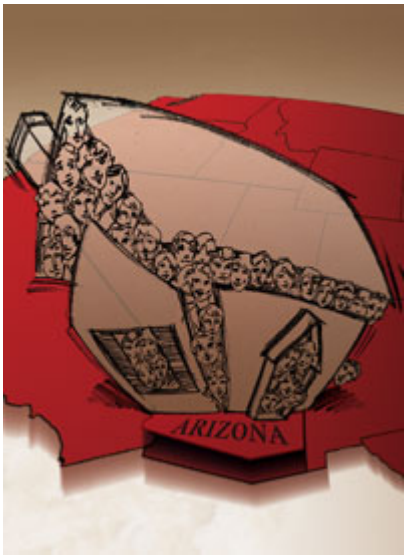
Arizona: An Allegory ... and the Reality



Mr. and Mrs. Smith were thrilled when they purchased their new home in a very desirable neighborhood in an equally desirable state. Their subdivision was gated and governed by a homeowners' association charter that promised peaceful enjoyment of their property for as long as they lived there. The couple could not have been happier, and for years they faithfully and joyfully paid dues to the association that guaranteed their continuing serenity and security.

One of the clauses in the homeowners' association charter places the responsibility for maintaining the fence that surrounds the coveted community within the exclusive jurisdiction of the association, relieving individual property owners of that duty. The association hired the security that made sure visitors had permission to enter the gated haven, and it made necessary repairs to the barrier that ran behind the properties along the border with the outside world.

Several years passed and Mr. and Mrs. Smith noticed that the wall around their idyllic enclave was falling into disrepair and that unwelcomed intruders were frequently exploiting those gaps and trespassing onto their property. The Smiths were a good, patient, and law-abiding family, and they made appropriate appeals to the homeowners' association to remedy the increasingly distressing situation along the fence.

To the dismay of the Smiths (and their neighbors), the association disregarded their pleas and the fence continued to deteriorate, the number of trespassers increased, while the number of security guards remained static and was proving insufficient to the threat. Again, the Smiths recurred to the association to do something, to live up to the covenants in the association charter and protect the home-owners from the near constant encroachment by unwelcomed intruders.

Still, nothing. Despite the occasional change in association leadership, the lassitude persisted and the situation in the once peaceful paradise grew more and more alarming.

The audacity of the invaders increased in inverse proportion to the level of response from the association. Word spread among those living near the affluent community that the homes and property inside the gates were easy pickings and that no matter how often or egregious the trespass, there would be no repercussions from the association.

Burglary, arson, assault, rape, and even murder were now nearly commonplace inside the gates of the Smiths' neighborhood. What was once a dream come true had become a living nightmare of crime, fear,

and violence. Gangs climbed freely and unchecked over the scree of the crumbled border, and the security force was outnumbered and outgunned. Try as hard as they might, the lack of resources from the association leadership rendered their noble efforts useless against the attack from outside.

Fed up with the years of association disdain, disregard, and violation of the charter that once promised them so much peace and protection, Mr. and Mrs. Smith in desperation decided to repair the fence themselves. While they didn't have the money or the material to protect their entire neighborhood, they figured they could at least rid their homestead of the interlopers.

From that day forward, every time the Smiths encountered a trespasser on their property, they promptly detained him and escorted him back across the wall. They were careful to only question those already involved in some other legal tangle, so as to avoid incriminating anybody that might be a legitimate and invited guest of one or another of their many neighbors in the community.

The association was furious. It lashed out at the Smiths and warned them that if they didn't cease and desist the detention of trespassers the association would have no choice but to seek a legal injunction against the Smiths for violation of the covenants of the homeowners' association charter.

The charter, willingly signed by Mr. and Mrs. Smith when they purchased their home, assigned to the association the primary right of controlling the border of the community and the prosecution of any accused of unlawful entry into the subdivision. The association charged the Smiths with usurping that right and assuming powers that were specifically granted to the association.

Remarkably, the Smiths agreed with the central premise of the association's argument: the association should have protected the Smiths and their neighbors; the charter did grant the association the power to monitor and manage the flow of visitors into the gated community; and the Smiths and others should have been able to rely on the association for the uninterrupted enjoyment of the rights, privileges, and safety that once made their neighborhood the envy of millions.

The Smiths agreed with all of those assertions. Willingly and happily the Smiths would have acceded to the association's exercise of that lawful obligation. The association failed to fulfill that obligation, however. Despite years of fervent pleas for relief, the association neglected the fence and turned a blind eye to the influx of criminals and encroachers that devalued the Smiths' property and tacitly encouraged hordes of others to flow through the holes in the fence, knowing that the association would be unlikely to punish anyone lucky enough to make it into the lush land of milk and honey lying just beyond the unguarded gates.

Reluctantly, the Smiths (and some of their similarly frustrated neighbors) stepped in to fill the void caused by the association's lamentable lack of compliance with the obligation placed on them by the charter. It was the mutual rights and obligations set out in the charter that made the neighborhood such an attractive location. When the association decided that its only responsibility was the collection of dues and the prodigal spending thereof, without the concomitant constraint of the protection of the homeowners, then the Smiths knew it was time to act in their own self-defense. Mr. and Mrs. Smith solemnly believed that their right to protect themselves and their property from invasion was theirs regardless of clauses in the charter or lawsuits filed by the association. Thus, with courage and dismay, they decided to assert that right no matter the cost or the consequence.

The Feds Fiddle While the ?States Call Out the Fire Brigades

On April 23, 2010, Governor Jan Brewer of Arizona signed Senate Bill 1070 into law. The act, officially styled the Support Our Law Enforcement and Safe Neighborhoods Act, passed both houses of the

Arizona legislature after weeks of vigorous debate. In her remarks on the occasion of the bill signing, Governor Brewer expressed her exasperation in an indictment of the federal immigration and Border Patrol bureaucracy: "The bill I'm about to sign into law — Senate Bill 1070 — represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix." Governor Brewer continued, "We in Arizona have been more than patient waiting for Washington to act. But decades of federal inaction and misguided policy have created a dangerous and unacceptable situation."

In the rest of her statement, Governor Brewer recognized the controversy surrounding the bill and her decision to endorse it. Rarely is a new law so vehemently and viciously assailed as is S.B. 1070. Various provisions of the new law, which were scheduled to go into effect on July 29, have come under intense scrutiny by activists on the Right and Left of the political spectrum. Already federal Judge Susan Bolton granted an injunction against the State of Arizona stopping the implementation of some parts of the new law. Recriminations abound, with opponents signaling toward the specter of "racial profiling" and "police state" tactics that they predict will accompany the law.

Arizona is but the newest front in the ever-widening war between the states and the federal government over which is to be the ultimate sovereign. The skirmish over the noxious ObamaCare mandates is a battle whose lines are still being drawn, and this new theater regarding S.B. 1070 demonstrates a curious nuance of the state/federal relationship that contrasts sharply with that of the ObamaCare law.

In the ObamaCare statutes, several states have accused the federal government of legislating in an area outside of its clearly established constitutional boundaries, and as a result, the states have begun the process of officially rejecting the federal overreach by enacting their own statutes nullifying the federal law.

If nullification is defined as the refusal of a state to enforce federal law it deems unconstitutional, then the Arizona law may be seen as reverse nullification — that is to say, it is the positive action by a state to legislate in an area where the federal government is constitutionally required to act, but has steadfastly refused to do so. The federal government's lackadaisical behavior is contrary to the typical federal propensity to grab for power and assume the right to act where none exists. A spokesman for the Americans for Legal Immigration PAC praised the bill: "It is incumbent upon our states to protect the jobs, wages, health, taxes, and lives of American citizens, when Presidents fail to honor their oaths of office and Constitutional requirements to enforce the laws of Congress and protect all states from invasion," said William Gheen. "Bush and now Obama refuse to secure our borders and adequately enforce our existing immigration laws, despite the mass casualties of innocent Americans each year," Gheen added.

Anticipating the resistance to the law on the part of civil rights organizations, the Governor and the Arizona legislature (in the preamble to the bill) reminded citizens that this act neither creates new nor abridges established civil rights of anyone legally present in their state. In fact, the law merely "enforces federal immigration laws" already enacted by Congress. It would seem, then, that enforcement of existing law is per se lawful and not something liable to certain of the accusations being made by its foes. If there is any "profiling" in the law, it is the underlying federal law that is suspect, not Arizona's specific intent to carry it out within its own sovereign borders.

A Patchwork Quilt Covers Quite Nicely

Of course, for decades the national government has assailed the ramparts of state sovereignty,

repeatedly thrusting the sharp but hollow battering ram of the "supremacy clause" against them. To wit, current Secretary of Homeland Security, Janet Napolitano, issued the following statement regarding S.B. 1070:

> The Arizona immigration law will likely hinder federal law enforcement from carrying out its priorities of detaining and removing dangerous criminal aliens. With the strong support of state and local law enforcement, I vetoed several similar pieces of legislation as Governor of Arizona because they would have diverted critical law enforcement resources from the most serious threats to public safety and undermined the vital trust between local jurisdictions and the communities they serve. I support and am actively working with bipartisan members of Congress to pass comprehensive immigration reform at the federal level because this issue cannot be solved by a patchwork of inconsistent state laws.

Actually, Madam Secretary, a "patchwork of inconsistent state laws" is exactly the way issues will be solved and be solved most effectively. States are more capable than the national government of identifying and rectifying problems that affect them directly, particularly the continued physical and fiscal well-being of its citizens. This is the arrangement anticipated by our Founding Fathers in establishing our federal system of government — that is to say, a government comprised of a national government endowed with an enumerated slate of limited powers, and state governments empowered by the people themselves to carry out other governmental functions not delegated to the national government.

Papers and Profiling: ?The Poison Down the Well

Much of the most sustained criticism of the Arizona legislation points to the supposed vagaries of the law's terms. Detractors fear that the lack of clear and coherent definitions of various crucial strictures in the law's text will lead to overly broad interpretation by local police officers and will result in a concomitant denial of basic civil rights.

Of paramount concern to those who attack the law for being too vague is the phrase "lawful contact." The section of the law in question reads:

> For any lawful contact made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation.

Obviously, a clear understanding of the requirements for a "lawful contact" is fundamental to the faithful execution of this law. As stated in this section (Title 11, Chapter 7, Article 8, Paragraph B), law-enforcement officials will be the ones interpreting this restriction on the police's power to stop and question a suspected illegal alien.

Larry Dever is the sheriff of Cochise County, Arizona, and in an interview with *The New American* he confirmed that his officers (and officers throughout Arizona) will interpret the "lawful contact" element of the law in the same manner that that identical phrase is interpreted in other parts of the Arizona Code. "We will only ask for proof of legal status if we have some other reason to stop that person, such as if he is believed to be a witness, victim, or violator [of another law]," Sheriff Dever said.

Sheriff Dever clarified the point by stressing that the requirements for detaining an individual

established by the U.S. Supreme Court in *Terry v. Ohio* (392 US 1) will be observed and that only in the case of a valid "Terry Stop" with the existence of additional "reasonable suspicion" of illegal status would a person be required to produce some official document verifying his right to be in Arizona. "Reasonable suspicion of being an illegal alien is not reason enough to question a person," said Dever.

Per the provisions of the statute, the documents that qualify as prima facie proof of legal residency include a valid Arizona driver's license, a valid Arizona non-operating identification license, and a valid tribal enrollment card or other form of tribal identification.

Understandably, though, the power of law enforcement to require presentation of documents sends chills down the spine of enemies of totalitarianism and that fearsome phrase: "Show me your papers, please." This bugaboo is the most pernicious of all the attacks on the new law because it is made by opponents who otherwise are in favor of deporting illegal aliens and the securing of our southern border.

Such concern is appropriate, and zealous opposition to any law that would give the police power to demand demonstration of documents is well founded. However, such a sinister scenario is not the situation anticipated by the legislature of Arizona and not the modus operandi of the majority of the hardworking men and women serving diligently in the police and sheriffs' departments in Arizona and the United States.

Perhaps an analogy would serve to buttress the point and allay fears. Consider, every time you are pulled over by a policeman and asked to see your driver's license, registration, and proof of insurance, are you not in effect being asked to "show your papers"? And for the same purpose — to produce evidence of your legal right to enjoy a privilege that could be revoked for your failure to comply with the laws governing that privilege? In one instance it is driving a car on a public road;___ in another it is living and working in Arizona.

Obama Administration Sues Arizona for Doing What the Feds Failed to Do

On July 6, the U.S. government filed suit against Arizona to enjoin the scheduled implementation of the law. The complaint explicitly asserts federal supremacy over the states in all matters relating to immigration and insists that a "patchwork of state and local immigration policies throughout the country" would interfere with the federal government's authority "to set and enforce immigration policy."

Therein lies the rub. If the federal government had effectively exercised this authority it assumes for itself, then there would be no S.B. 1070 and there would be no corresponding federal challenge.

Additionally, however, there would not be an 80-mile-wide swath of southern Arizona that has been all but surrendered to the criminal cartels that have made living along the border akin to living in a combat zone. Notably, our federal government's response to this hostile and adverse possession by drug and human traffickers was not to repel the invasion; rather it was to erect signs warning citizens not to venture into the area.

Adding insult to injury, a federal judge, that is to say, a judge nominated by the President and confirmed by the Senate, has granted the government of Mexico the right to submit a legal brief in support of one of the several lawsuits currently pending against Arizona's enforcement of S.B. 1070 scheduled for July 29. Since that decision, seven other Latin American nations have requested the right to file similar briefs.

Arizona is not without its allies in this battle, however. On July 14, Michigan Attorney General Mike Cox filed a legal brief on behalf of nine states supporting Arizona's immigration law. Cox, who is running for Governor of Michigan, announced that Michigan is leading several other states into the legal fray on the side of Arizona. Alabama, Florida, Nebraska, Pennsylvania, South Carolina, South Dakota, Texas, and Virginia have joined Michigan in the amicus brief filed with the federal district court.

In a statement to the press, Attorney General Cox, one of five Republicans running for Governor in Michigan, says that the states are authorized to enforce immigration laws and protect their borders. He insisted that under the federal government's theory, "There is no cooperative effort on immigration but only a one-way street where states lose control over their borders and are left to guess at the reality of the law."

In addition to the complex and crucial question of states' rights and the 10th Amendment, this decision on the part of a federal judge gives rise to another constitutional question, this in regard to the 11th Amendment, which protects states from legal action filed against one or more of them by citizens or subjects of foreign nations. Is it not the role of the Justice Department to enforce such constitutional provisions and protect the states from any violations thereof?

In a statement released on the Justice Department's website, Attorney General Eric Holder expressed his sympathy with Arizonans who are "understandably frustrated with illegal immigration." But, he countered, "diverting federal resources away from dangerous aliens such as terrorism suspects and aliens with criminal records will impact the entire country's safety."

If resources are the issue, then why has neither the Attorney General nor his boss, President Barack Obama, made an issue of the reported $113 billion a year that it costs the American people to harbor illegal immigrants? And why is there no mention of the $2 trillion it will cost American taxpayers (that's nearly $20,000 per household per year for life) to provide social benefits to the millions of newly minted citizens if the President's amnesty plan is made law? If resources are the real issue, then the consistent enforcement of existing federal immigration policy and the disavowal of amnesty proposals will instantly free up enough money to continue the "war on terror" and avoid plunging the country into the jaws of danger, as Holder desires.

The Invited Invasion

Finally, the complaint filed by the Departments of State, Justice, and Homeland Security argues that "S.B. 1070's mandatory enforcement scheme will conflict with and undermine the federal government's careful balance of immigration enforcement priorities and objectives." When reviewed even casually, the priorities and objectives of the federal government vis-a-vis illegal immigration have been to obviate such a concept by granting amnesty to those already illegally present in the United States in unrepentant violation of the current law and altering the present legal immigration process so radically as to facilitate (and invite) the continued invasion of the United States by an army of foreign conquerors carrying visas stamped by our own national government.

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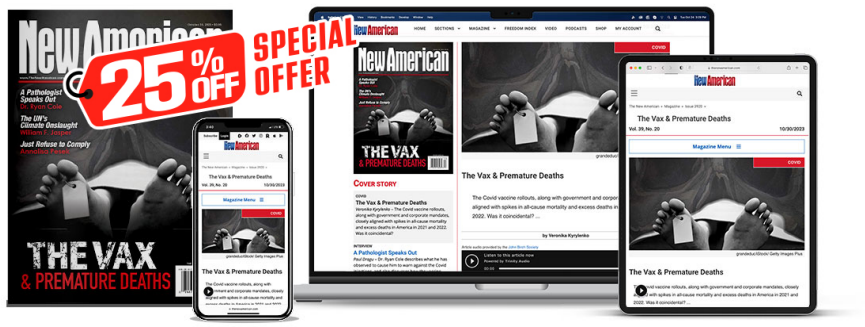

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