Written by **Joe Wolverton, II, J.D.** on February 5, 2012

S.C. Attorney General Asks Court to Unblock Immigration Law

Wilson represents the Palmetto State in its defense of the immigration law passed last year. The challenge to the law's constitutionality was filed by a group of civil rights organizations and the U.S. Department of Justice.

Of the 20 sections of the South Carolina law, four of them were challenged and, since the ruling handed down in December by District Court Richard Gergel, are now temporarily enjoined from being carried out. These four include provisions which that state criminal sanctions for: "harboring and transporting of unlawfully present persons"; "failure to carry alien registration materials"; "the creation of fraudulent identification documents"; and the directive to state and local law enforcement officials to "determine the immigration status of certain persons encountered in routine traffic stops and other contacts in which there is a 'reasonable suspicion' that the person may be in the United States unlawfully."

The civil rights groups challenging the law argue that enforcement of the law requires de facto racial profiling. The Justice Department argues that the Constitution places all power over the establishment of immigration policy in the hands of the federal government and that the legislature of South Carolina is thus preempted from passing legislation in that area of the law.

The argument is that once the feds have "occupied the field" of this or that area of the law or policy, no other government (state or local) may trespass therein. In short, the Obama administration insists that the federal government has such a compelling interest in establishing laws and policies in a certain area, any legislation in that area passed by another entity (the legislature of South Carolina in this case) would interfere with the enforcement of the federal statutes.

According to the complaint filed by the Justice Department, the South Carolina law, if enforced, 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 filing claims:

> In our constitutional system, the federal government has preeminent authority to regulate immigration matters and to conduct foreign relations. This authority derives from the Constitution

> and numerous acts of Congress.

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 only legitimate 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 of the complaints filed against the various states which 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, the question becomes whether the U.S. government enacted a slate of laws creating a de facto (if not de jure) 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.

Gergel's opinion in the South Carolina case reflects his agreement with the Obama administration's position on this question of constitutional law: "This state-mandated scrutiny is without consideration of federal enforcement priorities and unquestionably vastly expands the persons targeted for immigration enforcement action."

Furthermore, he held that the "balance of equity" tipped in favor of the position of the federal government, that it has exclusive control over immigration and that state laws interfering with this power would "create a chaotic situation in immigration enforcement."

Despite the ruling, a few portions of the new law were not included in Gergel's injunction and they took effect as scheduled on January 1, 2012. These now actively enforced provisions include a requirement that businesses use the federal E-Verify system to confirm the immigration status of applicants for employment. Any business not found violating this section of the law faces penalties including the revocation of its operating license.

The Associated Press reports that the future of the law is unclear after the district court ordered a continuance of the case:

> pending the outcome of a U.S. Supreme Court decision on a similar challenge in Arizona. The Obama administration is also challenging that law, arguing that regulating immigration is the job of the federal government, not states.

As has been reported by *The New American* and other outlets, laws similar to that passed in South

Carolina have been challenged in court by the Obama administration.

In mid December, motions were filed in the 11th Circuit Court of Appeals by Attorneys General of Alabama, Georgia, and South Carolina asking the court to temporarily halt challenges currently proceeding against their immigration laws pending a ruling by the Supreme Court in the case of *Arizona v. United States*, scheduled to be heard by the highest court sometime during this term.

That motion was denied by the Appeals Court and thus the legal challenges to the immigration laws of Alabama and Georgia will proceed without delay.

The Obama administration has challenged the constitutionality of all three recently enacted immigration statutes, arguing that the federal government has exclusive jurisdiction to legislate in the arena of immigration.

Last December, the Supreme Court announced that it will hear oral arguments in the matter and ultimately issue a ruling deciding whether the legislature and Governor of the Grand Canyon State were preempted by federal law from enacting a law establishing immigration policy.

The new Utah immigration statute is currently under review and the enforcement of a recently enacted Indiana immigration law was blocked by a federal judge.

The law passed by the Utah legislature was signed by Gov. Gary Herbert in March 2011, but was also enjoined from enforcement when U.S. District Judge Clark Waddoups granted the American Civil Liberties Union and the National Immigration Law Center a temporary restraining order.

It is scheduled to be heard in federal court on February 17.

The Fourth Circuit Court of Appeals has yet to set date for the hearing on the South Carolina Attorney General's motion.

Photo: South Carolina Attorney General Alan Wilson