



Written by [Joe Wolverton, II, J.D.](#) on June 25, 2012

## Supreme Court Upholds One of Four Challenged Provisions of Ariz. Immigration Law

On Monday [the Supreme Court issued its ruling](#) on the constitutional challenge filed against the Arizona immigration statute. In the decision, one of the four provisions at issue was upheld, while the remaining three were struck down.

The part of the law (Arizona State Bill 1070) upheld by the justices is that permitting law enforcement to verify the immigration status of anyone even briefly detained as a part of a routine stop.



The justices struck down the three remaining provisions of S.B. 1070 that were up for review. Those three parts of the law are:

- Making it a crime for an illegal immigrant to work or to seek work in Arizona;
- Authorizing state and local law enforcement to arrest a suspect without a warrant if the officers can show probable cause to believe that the suspect is illegally present in the state; and
- Mandating that all immigrants register with the federal government.

In the majority opinion, Justice Kennedy wrote:

The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

The justices were divided in their decision, with Justice Kennedy (who wrote the majority opinion) joined by Chief Justice John Roberts, Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor in the majority. Justices Antonin Scalia, Clarence Thomas, and Samuel Alito agreed with the majority in upholding the constitutionality of the one provision, but dissented from the majority's decision to strike down the remaining three parts of the Arizona statute.

In a decision replete with references to the sovereignty of the states, Justice Scalia wrote:

Today's opinion, approving virtually all of the Ninth Circuit's injunction against enforcement of the four challenged provisions of Arizona's law, deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there. Neither the Constitution itself nor even any law passed by Congress supports this result.

In defense of his position, Justice Scalia called on one of the Founding Fathers' favorite philosophers — 18th-century Swiss jurist Emerich de Vattel:



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As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty. Emer de Vattel's seminal 1758 treatise on the Law of Nations stated: "The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this, that does not flow from the rights of domain and sovereignty: every one is obliged to pay respect to the prohibition; and whoever dares violate it, incurs the penalty decreed to render it effectual." The Law of Nations, bk. II, ch. VII, §94, p. 309 (B. Kapossy & R. Whatmore eds. 2008).

In his dissenting opinion, Scalia strikes a very constitutional chord, repeatedly reminding the Court that the United States is a creation of the states and that as such it was granted only that authority specifically enumerated in the Constitution. Scalia wrote:

There is no doubt that "before the adoption of the constitution of the United States" each State had the authority to "prevent [itself] from being burdened by an influx of Persons...." And the Constitution did not strip the States of that authority. To the contrary, two of the Constitution's provisions were designed to enable the States to prevent "the intrusion of obnoxious aliens through other States." Letter from James Madison to Edmund Randolph (Aug. 27, 1782)."

Then, questioning whether the United States would ever have been created given the impact of today's ruling, Justice Scalia wrote:

So the issue is a stark one. Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws?

A good way of answering that question is to ask: Would the States conceivably have entered into the Union if the Constitution itself contained the Court's holding? Today's judgment surely fails that test.

Finally, in his own inimical way, Justice Scalia puts the finest of points on his argument against striking down S.B. 1070: "If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State."

The reaction from across the political spectrum was predictable.

In [a statement released Monday](#) in the wake of the Supreme Court's decision, Arizona Governor Jan Brewer (who signed the bill into law) seemed to miss the greater import of the court's decision, choosing instead to thank the high court for its permission to exercise a small portion of Arizona's sovereignty. Brewer wrote:

Today's decision by the U.S. Supreme Court is a victory for the rule of law. It is also a victory for the 10th Amendment and all Americans who believe in the inherent right and responsibility of states to defend their citizens. After more than two years of legal challenges, the heart of SB 1070 can now be implemented in accordance with the U.S. Constitution.

Ironically, the truth is that three-fourths of the court's ruling struck at the heart of the 10th Amendment, state sovereignty, and the concept of federalism by granting the federal government broad powers over immigration that are not a part of the limited slate of powers granted it in the Constitution.

Monday morning, Republican presidential hopeful Mitt Romney weighed on the court's decision, as well. In a statement, Romney said:



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Today's decision underscores the need for a President who will lead on this critical issue and work in a bipartisan fashion to pursue a national immigration strategy. I believe that each state has the duty — and the right — to secure our borders and preserve the rule of law, particularly when the federal government has failed to meet its responsibilities.

Not everyone was pleased with decision, of course. The court's affirmation of the provision of S.B. 1070 granting police the power to ask to see a person's proof of legal presence was particularly singled out by those who advocated a complete refutation of the entire statute. The [Arizona DREAM Coalition](#) issued the following statement:

We believe the section being upheld are conducive to racially profiling citizens, legal residents, and undocumented immigrants and therefore do not provide equal treatment under the law. We respectfully disagree about the constitutionality of the decision and we will continue to educate our community on how we can overcome the implementation of this section so the impact to the people in our state is minimized.

As readers will remember, this Supreme Court decision comes just days after [President Obama issued his decree](#) exempting hundreds of thousands of illegal immigrants from deportation.

The Supreme Court's ruling on the Arizona immigration law and President Obama's usurpation of the law-making authority demonstrate that no branch of the federal government will be hemmed in by constitutional restrictions on their power. Congress will continue passing bills exceeding its constitutional authority, the President will sign those bills into law, or, in the absence of congressional action, will issue edicts claiming the force of law, and the Supreme Court will continue the removal of those barriers that once protected the power of the sovereign states from the reach of the central government.



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