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Race, Crime, & Citizenship in American Law

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Illegal Immigration:

Evaluating the Constitutionality of SB 1070 in its Enforcement

The Support Our Law Enforcement and Safe Neighborhoods Acts, SB 1070, is one of the strictest anti-illegal immigration legislatures to date. It seeks to enforce federal immigration laws and is intended to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States” (SB 1070). The implementation and constitutionality of SB 1070 has been questioned and was last reviewed by the Supreme Court in 2012. However, Maria del Rosario Cortes is bringing the first lawsuit challenging its enforcement. Analyzing the facts of the case with the result of *Arizona v. United States*, and comparing the facts to the results of *Whren v United States*, *City of Chicago v. Morales*, and *United States v Armstrong*, brings insight to the possible ruling of the constitutionality of SB 1070 Section 2 in its enforcement – in particular, the potential violation of the Fourth Amendment from unreasonable searches and seizures.

Most significantly, *Arizona v. United States* upheld the controversial Section 2B. This provision requires state officials to make a “reasonable attempt ...to determine the immigration status” of any person they stop, detain, or arrest on some other legitimate basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the U.S.” (*Arizona v. United States*, 19). The original text held three limits. One, a detainee is presumed not to be an alien if he or she provides a valid Arizona driver’s license or similar

identification. Secondly, officers may not consider race, color, or national origin “except to the extent permitted by the United States [and] Arizona Constitution[s]” (*Arizona v. United States*, 4). And thirdly, the law must be implemented in a manner consistent with the federal law regulating immigration, protecting the civil rights of all persons, and respecting the privileges and immunities of the U.S. citizens.

Rather than a clear go ahead, the Supreme Court indicated the possibility of shutting down Section 2B after the law was implemented. The Court acknowledged that even with the above three limits, the State’s verification requirements pose an obstacle to the framework Congress put in place. The first concern is the mandatory nature of the status check and the second is the possibility of prolonged detention while the checks are being performed. There was no indication as to what a “prolonged detention” entails. Most interesting to the case of study is the example given by the court. “A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission” (*Arizona v. United States*, 22). The Supreme Court felt it was improper to preempt the section before “the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives” (*Arizona v. United States*, 25). Maria del Rosario Cortes’ case will try to prove the unconstitutionality in the law’s enforcement. The facts of the case, as stated by the Complaint, are given below and is freely provided through the ACLU website.

On September 29, 2012, Maria del Rosario Cortes was pulled over by a Pinal County Sheriff’s Office deputy, Defendant Carl Lakosky, for a cracked windshield. When asked for a driver’s license, and then her visa, Ms. Cortes replied she had a pending U-visa application

and a copy of it in her glove compartment. Deputy Lakosky was not interested in seeing it. After checking her name and confirming her identity, he called for backup. Defendant Stoltz arrived several minutes later and performed a pat down of Ms. Cortes before handcuffing her and locking her in the back of her squad car. Deputy Stoltz asked Ms. Cortes about her immigration status during the trip to the U.S. Customs and Border Patrol office in Casa Grande, Arizona (thirteen miles away from the site of the traffic stop). Once there, she was finally given a traffic citation and Defendant Stoltz then left. The traffic citation included three civil traffic violations: a cracked windshield, driving without a license, and failing to show proof of insurance. There was no mention of handcuffing and arrest by PCSO, or transportation to and continued detention by US Customs and Boarder Patrol, CBP¹. She remained in the CBP, separated from her children, for five days.

Ms. Cortes is a thirty-one year old Mexican national and U-visa holder. She resided in Eloy, Arizona since 2005 and is the mother of three young children. The two youngest children are U.S. citizens, and the oldest has derivative status through Ms. Cortes' U-visa. Her former husband was abusive Ms. Cortes suffered serious physical and psychological injury, including Post-Traumatic Stress Disorder and depression. Because of her husband's abuse and her cooperation with the Eloy Police Department and the Pinal County Attorney's Office in his prosecution, Ms. Cortes applied for a U-visa in February 2012². The

¹ After calling the Pinal County Sheriffs Office for the arrest report of Maria del Rosario Cortes, only a sheet with limited information was provided stating the officers involved and the type of offense (traffic offense). No mention of the transportation and detention by CBP was included.

² The U-visa is set-aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity.

complaint notes “Plaintiff Cortes suffered loss of her fundamental rights and liberty, as well as emotional distress, as a result of this action by Defendants”.

There are two parts of S.B. 1070 that were taken into account in this case as stated in the Complaint. First, Section 2B requires state and law enforcement officials, “where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States” to make a “reasonable attempt...when practicable, to determine the immigration status of the person...” Furthermore, Section 2D states “notwithstanding any other law, a law enforcement agency may seemly transport an alien who the agency has received verification is unlawfully present in the United States and who is the agency’s custody to a federal facility in this state or to any other point of transfer into federal custody that is outside the jurisdiction of the law enforcement agency” (Cortes v Lakosky and Stoltz Complaint).

The Complaint filed by the Plaintiff claims defendants Lakosky and Stoltz unlawfully detained Ms. Cortes without any additional justification after the original purpose of the stop was completed, and beyond a reasonable time required to issue her citation, solely on the basis of her suspected or actual immigration status. At no time during the stop did the Defendants have either probable cause or reasonable suspicion that Ms. Cortes was involved in criminal activity and at no time was Ms. Cortes told that she was under arrest for any reason. Like the Supreme Court, the Complaint stresses that it is not a crime for a removable alien to remain present in the United States. The complaint further spells out what the defendants were apparently unaware or had not been adequately trained by the PCSO to know or do. First, an extension of a stop for a period longer than required to complete the purpose for the initial stop constituted an unreasonable seizure. Secondly,

suspicion or knowledge of a person being in the U.S. unlawfully could not serve as a basis for reasonable suspicion to extend a stop or probable cause to make an arrest. Lastly, handcuffing and involuntary transportation to a different location was an arrest requiring probable cause of involvement in a crime.

Another Supreme Case involving a routine traffic stop that lead to further action by the police was *Whren v United States*. Michael A. Whren and James L. Brown were stopped due to a traffic violation and arrested after Officer Soto observed two large plastic bags of what appeared to be crack cocaine in Mr. Whren's hands. Several types of illegal drugs were retrieved from the vehicle. The petitioners challenged the legality of the stop and the resulting seizure of the drugs. The Court of Appeals confirmed the conviction and held that "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation" (*Whren v United States*, 2). While the court agreed with the petitioners "that the Constitution prohibits selective enforcement of the law based on considerations such as race," it states, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probably cause Fourth Amendment analysis" (*Whren v United States*, 5). This is most likely the reason Ms. Cortes is not claiming racial profiling in her lawsuit.

The Cortes case is similar in that there could have been a potential racist intention behind the officers' action and that there was indeed a traffic violation which overcomes the possible racist intentions behind the action. However, the cases diverge in the specific

violation of the Fourth Amendment that each case is seeking to prove. For Whren and Brown, they were arrested because of drugs found in plain sight when the vehicle was stopped. Possession of illegal drugs is a crime. For Ms. Cortes, she was detained for her immigration status for an unreasonably long time. Being a removable alien that remained present in the United States is not a crime.

Another case, which took into consideration the constitutionality of a law before it was enforced, is *City of Chicago v Morales*. In *City of Chicago v Morales* the court shut down Chicago's Gang Congregation Ordinance, which prohibits " 'criminal street gang members' from loitering in public places" (*City of Chicago v Morales*, 1). Justice Stevens, who delivered the opinion of the Court, concluded that the ordinance violates the requirement that a legislature establish minimal guidelines to govern law enforcement. Furthermore, there was not a sufficient limitation on police discretion. "It fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty" (*City of Chicago v Morales*, 1). In this case, the "liberty" is the freedom to loiter for innocent purposes.

In comparison to *Arizona et al v United States*, there are clear differences and subtle, important similarities with the *City of Chicago v Morales* case. First, the degree of discretion is similar in both cases. One of the reasons the Chicago ordinance was shut down was the unconstitutionality of giving a policeman too much discretion in every case. Although a valid Arizona driver's license or similar identification would release someone from suspicion of being an alien (unlike the Chicago rule which cannot as clearly distinguish who is or is not a gang member) the discretion of who to stop is still up to the police officer. The argument may be that the same situation occurs with speeding violations

– the choice of who to stop is ultimately up to the officer’s discretion. However, like the Chicago case, SB 1070 does not give guidelines as to how a police officer has “reasonable suspicion” that the person is an alien (which differs from a traffic violation which can be confirmed by a speedometer or a cracked windshield).

It is important to note that despite the potential and very likely unequal application of the law to all aliens in Arizona (not just those of Hispanic background), the Cortes case does not appear to bring in the racial cost of such a law. This is most likely due to the history of Equal Protection cases, which ultimately make proving discriminatory intent close to impossible if not simply discouraging to fight for as seen through the decision in *United States v. Armstrong*.

The facts of Ms. Cortes’ case, as well as the Supreme Courts’ decision to not eliminate the possibility of shutting down Section 2B pending of the constitutionality of its enforcement, seem favorable for those outraged by this newest and strictest anti-illegal immigration legislature. Most promising is the Supreme Court’s example in *Arizona v United States* that it is unlawful to prolong a warning ticket to a driver than beyond the time reasonably required to complete that mission. Ms. Cortes’ five-day detention served beyond the simple traffic violation. And her status as a U-visa applicant makes it a situation in which the State is causing “unnecessary harassment of some aliens...whom federal officials determine should not be removed” – the reason for removing SB 1070 Section 6 (*Arizona v. United States*, 17). Nonetheless, the length of the trial, in conjunction to the recent political shift in the past election, may leave people hoping for a swift change and a more favorable illegal immigration legislature disappointed and waiting a long time.

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