DID OBAMA SCREW HIMSELF ON SB1070 WITH SECURE COMMUNITIES?

As the press is reporting, SCOTUS largely overturned AZ's "Papers Please" law. It left just one part—but the most important part—in place for further court review: the part that required cops to check the status of people they stop and require them to check the status of people they arrest.

> Section 2(B) of S. B. 1070 requires state officers 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 United States." Ariz. Rev. Stat. Ann. §11–1051(B) (West 2012). The law also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." Ibid. The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records.

In deciding not to overturn this part of the law, Anthony Kennedy's opinion noted that Congress already encourages local officials to consult on immigration status.

> Consultation between federal and state officials is an important feature of the immigration system. Congress has made clear that no formal agreement or special training
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> needs to be in place for state officers to "communicate with the [Federal

> Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States." 8 U. S. C. §1357(g)(10)(A). And Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status. See §1373(c); see also §1226(d)(1)(A) (requiring a system for determining whether individuals arrested for aggravated felonies are aliens).

So the ruling says we will have to wait to see how AZ courts interpret the breadth of the law before finding it conflicts with US law by permitting, for example, the detention of suspected aliens until a status determination can be completed.

> Some who support the challenge to §2(B) argue that, in practice, state officers will be required to delay the release of some detainees for no reason other than to verify their immigration status. See, e.g., Brief for Former Arizona Attorney General Terry Goddard et al. as Amici Curiae 37, n. 49. Detaining individuals solely to verify their immigration status would raise constitutional concerns. See, e.g., Arizona v. Johnson, 555 U. S. 323, 333 (2009); Illinois v. Caballes, 543 U. S. 405, 407 (2005) ("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"). And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision. Cf. Part IV–C, supra (concluding that Arizona may not authorize warrantless arrests on the

> basis of removability). The program put in place by Congress doesnot allow state or local officers to adopt this enforcement mechanism. But §2(B) could be read to avoid these concerns. To take one example, a person might be stopped for jaywalking in Tucson and be unable to produce identification. The first sentence of §2(B) instructs officers to make a "reasonable" attempt to verify his immigration status with ICE if there is reasonable suspicion that his presence in the United States is unlawful. The state courts may conclude that, unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry.
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> There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that creates a conflict with federal law.

SCOTUS has basically permitted this part of the law to remain on the books until AZ is shown to be overstepping Federal jurisdiction on detention decisions.

But while that happens, the Obama Administration will be (and has been) expanding a mandatory status check program at the federal level, Secure Communities. Just since this litigation began, for example, the Administration has made it mandatory for local law enforcement entities to participate in Secure Communities.

And while that only pertains to those booked into jail—so not the jaywalking Latino used in Kennedy's opinion—it does make it easier for AZ

to justify part of the program. And it makes the process of checking status more routine by mandate.

Ultimately, what happens with this part of the law may come down to the fight between DOJ and Joe Arpaio as much as anything else. He’s precisely the kind of person who will abuse the provisions, and this will give DOJ an additional lever to respond if and when he does and is upheld by state courts.

But all that may lead to some Latinos spending a lot of time in jail before then.