

JUSTICE NEWS

Assistant Attorney General Tony West Speaks at the American Constitution Society Southeast Symposium on State Immigration Laws

Atlanta ~ Tuesday, February 7, 2012

Good afternoon. Thank you very much. Thank you, Caroline [Fredrickson], for that warm introduction. And thank you to the American Constitution Society for having me here today. My thanks also to the State Bar of Georgia for hosting this incredible and incredibly timely symposium. And let me express my appreciation to Kara Stein for all her help to ensure today's success.

There are so many VIPs in the room--judges, attorneys, professors, members of the Georgia General Assembly--I'd quickly get into trouble if I tried to start naming names, so I won't. But please know how honored we are by your presence and how grateful we are for your service to the bench, the bar, this state and our nation.

And it's also good to be with so many friends and folks who play such a significant, consequential role in our national conversation about law and policy; whose work embodies the spirit of positive change, hope and progress from which our Constitution itself was born. It's an honor to be with you today.

And although this organization came to life several years after I myself had graduated from law school, ACS is a part of my family: my daughter, Meena, a 3L at Harvard Law, has been very active in the leadership of that school's ACS chapter during her time there and she's very proud of that association, and I'm very proud of her. And I very much appreciate the opportunity you've given me to be a "cool" dad to my daughter.

This spring will mark my three-year anniversary as head of the Civil Division. And I have to say, with all due respect to my fellow AAGs, I think I've got the best job in the building.

Because one of the best things about my job -- and one of the most challenging -- is that the Civil Division is, essentially the federal government's law firm. With over 1,000 attorneys and more than 400 support staff, it's the Justice Department's largest litigating component. And that means I'm privileged to handle a diverse docket of cases on behalf of the American people.

Issues you are familiar with, like defending the Affordable Care Act against constitutional challenges; litigating some of our most sensitive cases national security cases in a manner that both keeps us safe and respects the rule of law; aggressively pursuing fraud, whether it's health care fraud that imperils the safety of patients or mortgage fraud that has victimized the most vulnerable homeowners -- and in so doing recovering record amounts of the public's money lost to fraud -- over \$12 billion since January 2009; litigating the Defense of Marriage Act's constitutionality in federal courts around the country; and, of course, challenging the efforts of several states to pass their own comprehensive immigration statutes -- our topic today.

In many ways, there is no better proof that comprehensive immigration reform is long overdue than these state statutes. People are understandably frustrated with our broken immigration system, and some states have turned to “self-help” measures like enacting these local statutes.

The problem with that approach, of course, is that our immigration challenges aren't confined to the borders of a handful of states; they are national in scope. And they require a national and comprehensive response. Because, as we're beginning to see, a piecemeal, state-by-state approach that creates a patchwork of inconsistent immigration laws only invites more problems than it solves.

So, to provide a bit of context -- and I apologize if I'm repeating some of what you've heard this morning - let me give you a quick overview of the four cases the Department of Justice currently has pending in four different states around the country.

As you know, the first lawsuit we filed was against Arizona's S.B. 1070 in 2010. By establishing a policy of what the law's sponsors called “attrition through enforcement,” S.B. 1070 attempted to establish Arizona's own independent immigration policy. It created new immigration crimes that didn't exist under federal law; it required police to verify a person's citizenship whenever they had “reasonable suspicion” to believe that a person was in the country unlawfully; it provided for the warrantless arrests of undocumented individuals; and it authorized a private right of action against law enforcement officials who failed to fully enforce the provisions of SB 1070.

In the district court, we were successful in obtaining a preliminary injunction on most of the provisions we challenged, which the Ninth Circuit affirmed. And, of course, that case will now be argued before the Supreme Court.

Alabama's H.B. 56 was the second statute we challenged. It was designed to affect virtually every aspect of an unauthorized immigrant's daily life, from employment and housing, to education and transportation, to entering into and enforcing contracts.

The case was argued in the district court and is currently before the Eleventh Circuit with oral argument scheduled for March 1. While we have achieved partial success in enjoining some provisions of the statute, some key provisions of that statute have gone into effect and are having an impact on the ground.

We also recently brought suit against South Carolina's Act No. 69. It, too, creates new immigration crimes regarding transporting or harboring undocumented individuals; has a registration provision; and, like the stop provisions in the Arizona law, it mandates a status check during any lawful stop if there is “reasonable suspicion” that the person stopped is unlawfully present.

There, we were successful in obtaining a preliminary injunction against South Carolina's mandatory status verification system and the new immigration crimes the state created. And a few weeks ago, South Carolina appealed that decision to the Fourth Circuit.

Finally, we've filed a complaint challenging Utah's H.B. 497, one of three immigration laws that state recently passed.

Like the other state statutes, H.B. 497 creates new immigration crimes, provides for mandatory and discretionary status verification of arrestees, and permits warrantless arrests of undocumented individuals in some circumstances.

Oral argument on the department's and private parties' separate motions for preliminary injunctions will be heard by the district court later this month.

Now these state statutes, and the lawsuits that challenge them, are important. They're important because they implicate legal issues of constitutional dimension, questions that are as old as the union itself about the respective authority of the federal government and the states.

They implicate strongly held beliefs about who we are as a nation and what it means to be American, and they implicate practical concerns about how the states and the federal government will use scarce resources to address the difficult challenges posed by illegal immigration.

Now, it's our belief that all of these laws we've challenged run afoul of the same federal principle: preemption. More about that in a moment.

But importantly, these laws are not identical. Indeed, one of the key challenges posed by individual immigration solutions forged locally is that they reflect different, often conflicting approaches to what is, at its core, a national problem.

Because as long as we have been a republic, we've had to wrestle with the fundamental question of who can and cannot enter this country. We are, as the President and the Attorney General have often said, a nation of immigrants. This is how we define ourselves. It is part of our proud and rich heritage; one that says that each of us, no matter who we are or where we're from, can be a co-author in the grand story of our country.

Yet, we are also a nation of laws. That, too, is part of our heritage. And that dual reality means that the immigration issue stirs deep emotions, carries significant national and international implications, and results in decisions that carry real consequences for our families and communities.

All of this puts a premium on our ability to address the immigration question as one nation, not as a patchwork of individual states; to speak with one voice, not fifty.

And that principle is the foundation for all four of the lawsuits we've filed, in which we argue that each of these state immigration laws is constitutionally preempted, because it is the federal government, and not the states, that is vested with the primary authority and responsibility in immigration matters.

And it's our belief that preemption principles have special force in the immigration area. Not only is this space constitutionally committed to the federal government; there is also a close connection between immigration policy and foreign policy, and this historic and important linkage underscores the federal interests in this area.

So when it comes to regulating who enters the United States, or who is removed, or the conditions by which those who have entered may remain, only the federal government may do that.

While the Supreme Court has said that states may adopt laws that have an indirect or incidental effect on immigrants, when it comes to establishing the consequences for unlawful presence, or criminalizing certain civil immigration violations, only the federal government may do that.

And when it comes to enacting laws that reflect the various immigration and foreign policy goals that have been set by Congress and the Executive Branch, only the federal government may do that.

Because when a state acts to set its own immigration policy, it necessarily limits the federal government's authority, ability and flexibility to set national immigration policy and to determine how limited federal immigration resources will be deployed. That, in our view, is not constitutionally permissible.

Now, this is not to say that states aren't valuable partners in immigration enforcement or can't play a substantive role in implementing immigration policy – far from it. Every day, we in the federal government rely on the assistance and cooperation of state and local law enforcement in many of our immigration efforts, such as working with state and local law enforcement agencies to curb illegal immigration and halt drug and human trafficking.

But these laws are not about cooperation. While these state laws aren't identical, each attempts, to varying degrees, to create its own immigration policy that interferes with, not supports, federal immigration law enforcement efforts. And it's that attempt to displace the federal with the state that is prohibited by our Constitution.

One voice, not fifty.

And while the vindication of important legal principles are rightly front and center in our lawsuits challenging these state measures, our concerns extend beyond legal formalism. They reach our shared belief that the rule of law is most authoritative when it serves the interests of justice.

So we are concerned when we see the real-world, detrimental and often unintended consequences that can flow from these laws. I think the Alabama experience is instructive, as it is the one state in which key provisions of one of these immigration statutes have actually taken effect.

My colleague, Civil Rights Assistant Attorney General Tom Perez, and I have traveled to Alabama several times where we've heard accounts of children being kept out of school by fearful parents, and school officials who told us of the precipitous drop in the enrollment of Latino students when the school year started this past September; utility companies denying or discontinuing heat, water or electricity, citing their concerns about violating the contracting prohibitions of the Alabama statute; and landlords evicting immigrants and their families as fall and winter approached.

So the human consequences of these laws are very real indeed.

In closing let me say that one of the things I've always treasured about working at the Department of Justice, whether it was as a young prosecutor in the U.S. Attorney's Office or now as Assistant Attorney General, is the mandate, the independence -- really, the freedom -- that we as DOJ lawyers are given to leave popularity, partisanship and politics aside to make decisions based solely on the merits of the facts and the law.

So before we filed any lawsuits against these four states, we engaged them. Following longstanding Justice Department policy which counsels that filing a lawsuit against a state should come only after efforts are made to resolve the dispute short of litigation, Tom Perez and I traveled the country speaking with state officials, sheriffs, police chiefs, community members, business leaders, state attorneys general and state legislators. We listened to their arguments and spent time considering and analyzing their positions.

The views we heard were diverse. Some we spoke with supported the state measures; others expressed concerns. Indeed, many law enforcement officials expressed concerns about the lack of adequate

implementation training or funding, as well as the impact such laws would have on their ability to build relationships with diverse communities.

Those discussions were extremely illuminating. And while they did not ultimately avert legal challenges by the Justice Department in four states, the dialogue we have had with the stakeholders in these states continues.

It continues because the national conversation about the shape and manner of immigration reform in this country continues. Will it be comprehensive or will it be piecemeal?

Will it unite and strengthen us? Or will it divide and separate us, one from another?

And thanks to organizations like ACS, these conversations will continue, not just in courtrooms and in lawyers' offices, but in statehouses, in classrooms, at dinner tables across the country.

Conversations that will, I think, lead us closer to realizing that aspirational promise of becoming a more perfect union.

Thank you very much.