Supreme Court intervention in Arizona anti-immigrant law poses threat to democratic rights

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14 December 2011

The announcement Monday by the US Supreme Court that it will review a decision striking down provisions of Arizona's unprecedented anti-immigrant law casts a shadow over what had been considered historically settled questions affecting the democratic rights of the entire population.

Arizona's reactionary Support Our Law Enforcement and Safe Neighborhoods Act (Arizona Senate Bill 1070) was passed by the state legislature in April of last year in the midst of a campaign led by the Tea Party to whip up nationalist and xenophobic sentiment. It was struck down in part by the Ninth Circuit Court of Appeals earlier this year.

There can be no doubt that the Supreme Court's intervention in the case is politically motivated, spearheaded by the right-wing four-justice bloc of Antonin Scalia, Clarence Thomas, Samuel Alito and Chief Justice John Roberts. Numerous commentators have remarked that the Court has rarely intervened in as many highly controversial and politically explosive cases in a presidential election year as the Roberts Court in the current term.

In this case, *Arizona v. United States*, the court intervened on its own initiative, not waiting for a final ruling on SB 1070 in the lower courts. Just three days before, on December 9, the Court issued a stay on the implementation of a Texas congressional redistricting plan that had been ordered by federal courts in place of a plan enacted by the Republican state legislature. The Supreme Court agreed to hear an appeal of the federal court-ordered plan, which is considered more favorable to the Democrats than the state proposal.

Last month, the court agreed to hear challenges to the Obama administration's health care overhaul law.

The court's intervention in the immigration case was cause for celebration among the right-wing supporters of the Arizona law. The state's Republican governor, Jan Brewer, announced her support for the Supreme Court's intervention in a statement. "I am confident the high court will uphold Arizona's constitutional authority and obligation to protect the safety and welfare of its citizens," she declared.

Arizona SB 1070, couched in militaristic language, purports to make "attrition through enforcement the public policy of all state and local government agencies in Arizona." Thus, the law's openly declared purpose, in the name of ridding the state of so-called "illegal aliens," is to harass, intimidate, and tyrannize Arizona's immigrant population.

The bill's provisions constitute a threat not just to the democratic rights of immigrants, but to the population as a whole. The bill grants police officers historically unprecedented powers, which the law then requires them to exercise.

Among SB1070's more draconian provisions is the authority it grants to police to demand identification papers of any person whom the police "suspect" to be an undocumented immigrant. Such a brazenly discriminatory and racist provision has long been a prominent demand of extreme right-wing and white-supremacist groups.

Arizona SB 1070 also requires police officers to investigate the immigration status of anyone they encounter, even if it is for a routine traffic stop.

With deliberately vague and expansive language, SB 1070 also makes it a crime to "conceal, harbor, or shield" an undocumented immigrant. This provision, echoing the language of the US federal government's vague "material support for terrorism" laws and the USA PATRIOT Act, threatens to criminalize broad sections of the population.

It goes without saying that these police-state measures flout the historic democratic protections in the Bill of Rights. The Fourth Amendment to the US Constitution, ratified in 1791, declares that the " right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and also that "no Warrants shall issue, but upon probable cause." Arizona's SB 1070 would empower officers, without a warrant and without probable cause, to carry out

arbitrary searches and seizures, including by demanding "identification papers" from any person, citizen or otherwise, on a mere "suspicion."

State legislatures in Alabama, South Carolina, Utah, Georgia and Indiana have recently enacted their own versions of SB 1070 attacking undocumented immigrants.

The Obama administration mounted a legal challenge to SB 1070 in July of last year. Significantly, it did *not* challenge the law on the grounds that it violated basic democratic and constitutional rights. The administration argued instead that SB 1070 interfered with powers exclusively vested in the president to set nationwide immigration policy. In April of this year, on these very limited grounds, the Ninth Circuit Court of Appeals affirmed that a number of the most onerous provisions of SB 1070 would be struck down and invalidated.

Contrary to the position of the Obama administration—which strives at every turn to accumulate unlimited power in the executive branch—the power to regulate all issues affecting immigration and naturalization has historically been vested in the federal Congress, not in the president. The US Constitution gives Congress alone the power to "establish [a] uniform Rule of Naturalization."

That SB 1070 is invalid under federal law is not particularly controversial from a historical and legal standpoint. Erwin Chemerinsky, a constitutional scholar and the author of an authoritative treatise on US constitutional law, opined that SB 1070 "is clearly preempted by federal law under Supreme Court precedents."

Obama appointee Elena Kagan, because she worked in the Obama administration's Department of Justice before joining the Supreme Court, has recused herself from the case. Kagan's recusal increases in proportion the strength of the right-wing four-justice bloc bent on ripping up the Bill of Rights.

There is a history in the United States to the question of the separation of powers between the federal and state governments. Not more than 150 years ago, the question of whether a confederation of southern states had "rights" as states to enforce black slavery was settled in a conflict in which 3 million men fought and 640,000 died.

In the 20th century, significant democratic measures were largely implemented under the framework of federal legislation. State law and so-called "states' rights" were used as bulwarks for the defense of anti-democratic laws and policies.

The civil rights legislation of the 1960s, child labor laws, minimum wage laws and countless other reform measures were implemented by the federal legislature over and against opposition from state governments. In light of this history, the assertion by the state legislature of Arizona of the "right" to enact police-state measures targeting immigrants—and the US Supreme Court's decision to hear the case after the Arizona law had already been struck down—has far-reaching significance.

Arizona Governor Jan Brewer, in her statement cited above, observed, "This case is not just about Arizona… it's about the fundamental principle of federalism, under which these states have a right to defend their people."

In yesterday's *New York Times*, journalist and lawyer Adam Liptak pointed out that in a 2009 case involving a conflict over the Voting Rights Act of 1965 and its effect on the state of Texas, Chief Justice John Roberts openly criticized the act, suggesting that provisions enabling the federal Justice Department to oversee and even veto changes in election procedures and laws in southern states with a history of racial apartheid were no longer relevant. In that case, however, the court did not actually reach and decide the question of federalism.

Liptak pointed out that the federal judges who overrode the Texas congressional redistricting scheme and ordered the plan that has now been stayed by the Supreme Court based their action on the very provisions of the Voting Rights Act that were questioned by Roberts.

Regardless of the ultimate outcome of the case, by the very fact that it has decided to hear an appeal of federal court rulings striking down key aspects of the Arizona anti-immigrant law, the Supreme Court has lent credibility to overtly anti-constitutional measures and emboldened the most reactionary political forces in the country. If the Court overrules the Ninth Circuit and allows SB 1070 to stand, this will have vast implications, opening the door for an intensified attack on the civil rights legislation of the 1960s and on democratic rights more generally.