

The Wrong-Headed Arizona Challenge

Obama and Attorney General Eric “Ignore the Voting Rights Act” Holder cannot reasonably argue that Arizona should not be allowed to enforce a state law that is consistent with federal immigration laws while at the same time allowing the city of San Francisco to intentionally ignore those same federal laws with its sanctuary policy.

If Obama and Holder continue to argue that federal law preempts state law—in only an *implied* rather than a *specific* situation—it will be interesting to see how they react to California Proposition 19. If passed by the state’s voters on November 2, Proposition 19 will allow individuals over the age of 21 to possess one ounce of marijuana for personal use even if not medically necessary, will allow marijuana to be used in non-public places or licensed public places, and will allow cultivating marijuana at home. But inasmuch as marijuana is illegal under federal laws, Obama and Holder must—to be consistent—challenge Proposition 19 in court, arguing that federal law preempts state law.

They cannot have it both ways, using the preemption argument for some state laws and not for others. In fact, allowing Proposition 19 to go unchallenged is less justifiable than challenging the Arizona law because federal law specifically prohibits marijuana, while there is of course no federal prohibition against arresting illegal immigrants. Obama and Holder are challenging the Arizona law on the basis of an *implied* federal preemption; they cannot very well ignore a *specific* preemption in the case of marijuana. (But of course they will.) If the Supreme Court were to side with Obama and Holder on their challenge of the Arizona immigration statute, then it will necessarily also have to strike down Proposition 19 if it is challenged.

Federal law preempts state law when there is a *conflict* between the two. If, for example, Congress were to enact a national 50-mph maximum speed limit, Arizona could not enact a 70-mph maximum speed limit. Because of the conflict, federal law would take precedence. But if Arizona also passes a 50-mph maximum speed limit law, there is no conflict. The Obama and Holder challenge of Arizona’s illegal immigration statute is the equivalent of their arguing, “*How dare you enact and enforce a 50-mph speed limit! That is our responsibility!*” At the same time, the fact that Obama and Holder are ignoring “sanctuary city” policies would be the equivalent of their looking the other way if San Francisco were to allow its residents to drive 100 mph without being stopped for violating a national 50-mph limit.

The Supreme Court will side with Arizona on the Obama/Holder challenge. (It *should* be a unanimous decision, based on the law, but Ginsberg, Breyer, and Sotomayor might follow politics rather than the law and make it a 5–3 decision. If Elena Kagan is confirmed in time for her to participate, she may make it 5–4.) Some may wonder why the lawsuit was filed inasmuch as the Arizona law is most certainly going to be upheld. The answer of course is that Obama has to show that he “sides with Hispanics” before the November 2 elections. He knows that if black and Hispanic turnout is low, Democrats may face a worse fate than they did in the 1994 mid-term elections. But Obama’s

problem is that by opposing Arizona, he is also opposing two-thirds of all American voters. And their memories are likely to stay fresh through the 2012 election...

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July 15, 2010