



Federal District and Appeals Courts Refuse to Block Alabama's HB 56 Policing Provisions (Sections 12, 18, 19 and 20)

Introduction

On September 28, 2011, federal District Court Judge Sharon Lovelace Blackburn refused to temporarily block four policing provisions of Alabama's controversial immigration law, "The Beason-Hammon Alabama Taxpayer and Citizen Protection Act," or "HB 56."¹ She did so by denying two motions (one made by a coalition of civil rights organizations and the other by the U.S. Department of Justice) for a preliminary injunction, which would have prevented the state of Alabama from enforcing these sections of the law until a final determination could be made as to their constitutionality. These policing provisions of HB 56 therefore went into effect on September 29.²

Judge Blackburn was asked to review four sections of the law related to policing practices:

Section 12, which addresses the treatment of individuals stopped by police when the officer has a "reasonable suspicion" that they are unlawfully present;

Section 18, which addresses the treatment of individuals who are charged with the crime of driving without a valid driver's license;

Section 19, which addresses the treatment of individuals who are charged with any crime for which bail is required and individuals who spend any amount of time confined in jail; and

Section 20, which addresses the treatment of unlawfully present immigrants who have been convicted of a state crime.

Judge Blackburn ruled that the plaintiffs do not have standing to challenge Section 20, and did not consider that section further.

Judge Blackburn further ruled that Sections 18 and 19 could not be blocked on Fourth Amendment grounds. The Constitution's Fourth Amendment prevents unreasonable searches and seizures (including detention) by the police.

Finally, Judge Blackburn ruled that Sections 12 and 18 do not violate the Supremacy Clause in Article VI of the Constitution, which states that federal law is the "supreme Law of the Land" and that states are bound to uphold it. Generally, states are prevented (or "preempted") from legislating in a way that undermines Congressional efforts in the same area. Judge Blackburn did not find that to be the case with Sections 12 and 18.

¹ *Hispanic Interest Coalition of Alabama, et al. v. Bentley*, Civil Action No. 5:11-CV-2484-SLB, United States District Court for the Northern District of Alabama (September 28, 2011); *United States v. Alabama*, Civil Action No. 2:11-CV-2746-SLB (September 28, 2011).

² Both of these motions challenged other, non-policing provisions of HB 56 as well, as did a third motion made by a coalition of Alabama faith leaders. Future CLINIC memoranda will analyze Judge Blackburn's rulings on these additional provisions of HB 56.



Fourth Amendment: Sections 18 and 19

Sections 18 and 19 each have two parts. The first part requires police, in certain circumstances, to check an individual's immigration status with the federal government ("verification requirement"). The second part requires that, in certain circumstances, the police maintain physical custody of individuals who the federal government determines to be unlawfully present ("custody requirement"). Section 18(d) states that, whenever a person is stopped while driving and cannot show the officer a valid driver's license, the officer must ask the federal government within 48 hours to check the person's immigration status (verification requirement). Then, if this check reveals that the person is unlawfully present in the U.S., the local police must hold the person in jail (and deny him bail if it would otherwise be required) until he is prosecuted or until the federal immigration authorities take charge of him (custody requirement).

Similarly, Section 19 states that, any time a person is charged with a crime for which bail is required or is confined for any time in jail, the officer must ask the federal government within 48 hours to check the person's immigration status (verification requirement). Then, if this check reveals that the person is unlawfully present, the local police must hold the person in jail (and deny him bail if it is offered) until he is prosecuted or until the federal immigration authorities take charge of him (custody requirement). In her decision, Judge Blackburn addressed the verification requirements and the custody requirements separately.

Does it violate the Fourth Amendment to require police to check the immigration status (within 48 hours) of someone who has been lawfully stopped on the street or arrested?

No. Judge Blackburn rejected the plaintiffs Fourth Amendment argument. Sections 18 and 19 give police a 48-hour window in which to send an immigration status inquiry to the federal government. The plaintiffs argued that local police might end up detaining individuals for a full two days pending an immigration status check even when the officer has **no other reason** to detain the person. They argued that this would amount to detaining someone solely on **suspicion** of a federal **civil** immigration violation (unlawful presence), which would be unreasonable under the Fourth Amendment. The Fourth Amendment requires that any detention be reasonable, and detention is only reasonable if the officer has **probable cause** to believe that some **criminal** offense has been or is being committed.

Judge Blackburn rejected this argument, saying that the Section 18 and 19 verification requirements "do not **explicitly** require that the arrested individual be detained or otherwise restricted during the verification inquiry." [emphasis added]

Does it violate the Fourth Amendment to require police to automatically hold unlawfully present persons in jail without bail just because of their civil federal immigration violation?

No. As previously outlined, in addition to their verification requirements, both Sections 18 and 19 have custody requirements – that is, they both require that anyone determined pursuant to these Sections to be unlawfully present must be detained in jail without benefit of bail until prosecution for the underlying criminal charge or until transfer to federal immigration custody.

Judge Blackburn ruled that HB 56 challengers could not be successful in their Fourth Amendment challenge to these custody requirements **at this time**. She found that some people "[u]nquestionably" would be lawfully



detained pursuant to these provisions, while others might not be. Therefore, Judge Blackburn could not find that these provisions would necessarily, in all circumstances, be unconstitutional. Therefore, she instructed that any Fourth Amendment challenges to Sections 18 and 19 must wait until these sections actually go into effect, at which time one or more people who allege that they were in fact improperly held by police could then bring what is called an “as-applied” challenge to the law.

Preemption: Sections 12 and 18

Section 12 mandates that Alabama police officers verify the immigration status of anyone lawfully stopped when the officer has a “reasonable suspicion” that the person is undocumented. Judge Blackburn discussed this “reasonable suspicion” provision strictly as a verification requirement. She ruled that this provision is **not** preempted by federal immigration law. In doing so, Judge Blackburn came to a conclusion directly contrary to that reached earlier this year by the Ninth Circuit Court of Appeals, which blocked an almost identical “reasonable suspicion” provision in Arizona’s SB 1070. The disagreement between these courts hinges on differing interpretations of Congressional intent.

Prior to Judge Blackburn’s decision in this case, federal courts in Arizona,³ Georgia,⁴ and Indiana⁵ all agreed that Congress intends states to have authority to enforce federal civil immigration law only under the close supervision of the U.S. Attorney General (as in the case of “287(g) agreements”).⁶ These courts inferred this Congressional intent from the sections of the Immigration and Nationality Act (INA) that expressly address states’ roles in immigration enforcement.

These federal courts temporarily blocked some state immigration laws because the laws tried to enforce federal civil immigration law without the necessary federal supervision. The laws tried to give state officers the enforcement discretion that Congress had intended to give to the federal Executive Branch. The state laws would therefore have stood as an obstacle to the purposes of Congress in passing the INA.

Consequently, these courts blocked several state immigration provisions in addition to Arizona’s “reasonable suspicion” requirement. For example, they held that Arizona could not permit police to arrest a person without a warrant just because the police have probable cause to believe that the person is “removable” from the U.S.; that Georgia could not permit police to check the immigration status of any arrestee they choose and then detain whoever cannot establish a valid immigration status; and that Indiana could not permit police to arrest a person without a warrant just because he or she is the subject of a federal removal order, detainer, or notice of action.

In reviewing Alabama’s “reasonable suspicion” provision, however, Judge Blackburn took a different view. She looked at the same provisions of the INA and came to a different conclusion about Congressional intent. Congress actually intended that states **should** assist federal officials in enforcing federal immigration law, she found, especially as to the identification of unlawfully present immigrants. Judge Blackburn agreed with the Department of Justice that state police do not have any inherent authority to stop and arrest an individual merely for being unlawfully present in the country, which is a civil rather than criminal violation of federal law. But

³ *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011).

⁴ *Georgia Latino Alliance for Human Rights v. Deal*, Civil Action No. 1:11-CV-1804-TWT, United States District Court for the Northern District of Georgia (June 27, 2011).

⁵ *Buquer v. City of Indianapolis*, No. 1:11-cv-708-SEB-MJD, 2011 WL 2532935 (S.D. Ind. June 24, 2011).

⁶ Immigration and Nationality Act, § 287(g).



she did find that states have some inherent authority to assist federal immigration enforcement if the police merely “cooperate” in some way with the federal government. The cooperation contemplated by Section 12 is sufficient, Judge Blackburn held, for three reasons: (1) all final determinations of status are made by the federal government; (2) unlawful presence is defined by the federal government, not the state; and (3) state police will only transfer people to federal custody if federal agents so request. Thus, the federal government retains its discretion as to what to do with a person identified as unlawfully present. Therefore, Alabama’s “reasonable suspicion” requirement is **not** an obstacle to the purposes of Congress.

Judge Blackburn therefore found that Section 12 is consistent with rather than antithetical to the purposes of Congress. She also held (again, contrary to the Ninth Circuit) that there is insufficient evidence to establish that the “reasonable suspicion” provision conflicts with federally-established foreign policy goals.

Update

As mentioned in the Introduction to this memorandum, Judge Blackburn’s ruling allowed Sections 12, 18, 19, and 20 (as well as many other provisions) of HB 56 take effect on September 29.⁷ The plaintiff civil rights organizations and the Department of Justice quickly appealed Judge Blackburn’s ruling to the federal Eleventh Circuit Court of Appeals. But the plaintiffs recognized that it would take months for the Eleventh Circuit to consider their case. In the meantime, the state’s enforcement of much of what remained of HB 56 would likely do irreparable harm to immigrants in Alabama. So these plaintiffs made an emergency motion to the Eleventh Circuit to temporarily block some parts of HB 56 (including Sections 12, 18 and 19) while the appeal of Judge Blackburn’s decision progressed. On October 14, the Eleventh Circuit followed Judge Blackburn in declining to temporarily block these policing provisions. The Eleventh Circuit did, however, agree to temporarily block (1) Section 28, which requires parents and students to provide information on immigration status to schools; and (2) Section 10, which makes it a state crime to have failed to comply with certain federal registration requirements if a person is unlawfully present in the country. These two provisions, therefore, were in effect for only about a week and a half.

What’s next for HB 56?

After the Eleventh Circuit rules on the appeal of Judge Blackburn’s preliminary holding, the case will go back to the District Court for a final determination of the provisions’ constitutionality. That decision may then be appealed to the Eleventh Circuit. All of this will take a while. CLINIC will continue to monitor the case and to provide updates.

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⁷ This excludes the E-Verify portions of HB 56, which are slated to go into effect in April of 2012.