



Federal Judge Temporarily Blocks Part of Georgia's HB 87

Introduction

On Monday, June 27, 2011, federal Judge Thomas W. Thrash, Jr. temporarily blocked the implementation of two sections of Georgia's controversial immigration law House Bill 87 (HB 87).¹ He did so by issuing a preliminary injunction, which prevents the state of Georgia from enforcing these sections of the law until a final determination can be made by a federal court as to their constitutionality.

The first part of HB 87 blocked by Judge Thrash is Section 8, which authorizes the police to investigate the immigration status of a criminal suspect and to detain him if he has no lawful status in the U.S.

The second blocked provision is Section 7, which makes it a crime to transport or harbor an undocumented immigrant or to induce an undocumented immigrant to come to Georgia.²

Judge Thrash held that Sections 7 and 8 are likely to be found unconstitutional because they 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.

Section 8: Why can't state police investigate and detain individuals who have violated federal immigration laws?

Section 8 is a problem, Judge Thrash reasoned, because it gives so much discretion to local police officers. Under Section 8, police officers may *choose* whether to investigate a criminal suspect's immigration status, and may also *choose* whether to detain or release any given suspect who is unlawfully present. Thus, Section 8 substitutes the discretion of the local police for that of the federal government in setting immigration enforcement priorities. It "poses a serious risk that HB 87 will result in inconsistent civil immigration policies not only between federal and state governments, but among law enforcement jurisdictions within Georgia."

This is why, Judge Thrash explained, the federal Immigration and Nationality Act (INA) does not permit states to enforce immigration law **except** in certain very limited circumstances, when the Attorney

¹ *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).

² A person does not violate Section 7 unless he or she is also found to be engaging in a second separate criminal offense. However, a violation of the federal law that criminalizes very similar behavior could serve as the requisite predicate criminal offense. Thus, the requirement is essentially meaningless, Judge Thrash noted.



General has specifically authorized and continues to monitor the enforcement (for example, in the case of what are known as “287(g) agreements”).³

Why doesn’t Section 8 violate the Fourth Amendment?

In addition to arguing that Section 8 violates the Supremacy Clause of the Constitution, with which Judge Thrash agreed, the plaintiffs in this case also argued that Section 8 violated the Fourth Amendment. The Fourth Amendment prevents unreasonable arrests and detention by law enforcement. Detention that is not based on an underlying crime is unreasonable. Simply residing in the United States without documents (by overstaying one’s visa, for example) is not a crime, Judge Thrash correctly noted. It is a civil violation. The Fourth Amendment would not permit police to hold a person solely on that basis.

But investigating someone’s immigration status pursuant to Section 8 *would not necessarily* prolong his detention, Judge Thrash reasoned. Section 8 allows officers to investigate someone’s immigration status when they have cause to believe that the person has committed or is committing another crime.⁴ If, for example, an officer arrests a person for selling drugs, taking the time to check his immigration status while he is detained would not extend his detention beyond that which the law already considers appropriate for that offense. But if an officer detains a person solely to check his immigration status, or lengthens his detention only to perform such a check, that officer likely would be violating the Fourth Amendment.

Section 8 would not always, in every circumstance, create a Fourth Amendment problem. Therefore, Judge Thrash could not block Section 8 wholesale on this ground. If the judge had been presented with particular examples of officers acting in an unconstitutional manner, he might then have ruled that Section 8 violated the Fourth Amendment as applied to those individuals.⁵ But that was not the nature of the case before him. The point of this case was to try to block Section 8 before any local officer had an opportunity to enforce it.

Section 7: Can states criminalize the transportation and harboring of individuals who have no legal status in the U.S., or is this also blocked by federal law?

Section 7 defines the term “harboring” much more broadly than federal immigration law does, Judge Thrash noticed. Section 7 therefore creates new and different immigration crimes at the state level.

Thus, both Section 7 and Section 8 try to create a separate state system for identifying and punishing immigration violators, giving state officers substantial discretion to establish their own immigration

³ In this, Judge Thrash closely followed the federal Ninth Circuit Court of Appeals’ recent decision to block critical parts of Arizona’s SB 1070. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011).

⁴ It is important to note, however, that this “other crime” could be something as minor as speeding, because speeding is a criminal misdemeanor in Georgia. Ga. Code Ann., § 40-6-1.

⁵ By contrast, a federal judge in Indiana blocked a portion of that state’s immigration law because it did violate the Fourth Amendment. *Buquer v. City of Indianapolis*, No. 1:11-cv-708-SEB-MJD, 2011 WL 2532935 (S.D. Ind. June 24, 2011). Indiana’s SEA 590, Section 19, is so broad that it permits officers to arrest without a warrant anyone who has received official communications during an immigration proceeding.



enforcement priorities separate and apart from those identified by the federal government. Judge Thrash therefore would not let these sections go into effect.

Judge Thrash easily distinguished the United States Supreme Court's recent decision to permit Arizona to mandate the federal E-Verify system in that state and to punish businesses that hire unauthorized workers by revoking their business licenses.⁶ Unlike Section 7, Arizona's employer sanctions statute fits neatly into an explicit Congressional carve-out for state efforts. Furthermore, while Arizona's employer sanctions statute falls within a field traditionally regulated by the states (the employer-employee relationship), Section 7 (which Judge Thrash described as regulating the movement of immigrants) does not.

Judge Thrash used some very strong language in opposition to the policies underlying the entire bill. "The widespread belief that the federal government is doing nothing about illegal immigration is a myth," he said. The assertion that the federal government has been "passive" in enforcing immigration law "has no basis in fact." He further described HB 87 as an attempted "end-run" around the comprehensive federal immigration enforcement scheme that was designed to allow the Executive Branch to set enforcement priorities.

But he saved his most vigorous condemnation for Section 7:

The Defendants' claim that the new criminal statutes [in Section 7] will prevent exploitation of illegal aliens is **gross hypocrisy**. The apparent legislative intent is to create such a **climate of hostility, fear, mistrust and insecurity** that all illegal aliens will leave Georgia. [emphasis added]

Is anything left of HB 87 after this decision?

Yes. Among other things, HB 87 also: enacts a mandatory E-Verify program (Sections 3 and 12); creates a new crime of "aggravated identity fraud" (Sections 4-6); authorizes federal/state law enforcement partnerships (Sections 9-11); mandates that officers use "a reasonable effort" to verify whether any foreign nationals confined in county or municipal jails had been "lawfully admitted to the United States and if lawfully admitted, that such lawful status has not expired" (Section 13); mandates that any undocumented immigrant in custody be "detained, arrested, and transported as authorized by state and federal law" (Section 13); requires certain documentary proof of "lawful presence" for the receipt of public benefits (Section 17); and creates the "Immigration Enforcement Review Board" (Section 20). None of these Sections were addressed in this case.

What's next for HB 87?

The Attorney General of Georgia, Sam Olens, has appealed Judge Thrash's ruling to the 11th Circuit U.S. Court of Appeals. That may take a while. In the meantime, Sections 7 and 8 remain blocked. CLINIC will follow all developments with respect to HB 87 and will continue to keep our affiliates informed.

⁶ *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).