



Federal Judge Temporarily Blocks Part of Indiana's SEA 590

Introduction

On Friday, June 24, 2011, federal Judge Sarah Baker temporarily blocked the implementation of two sections of Indiana's controversial immigration law Senate Enrolled Act 590 (SEA 590).¹ She did so by issuing a preliminary injunction, which prevents the state of Indiana from enforcing these sections of the law until a final determination can be made by a federal court as to their constitutionality. SEA 590 was scheduled to go into effect July 1, 2011.

The first part of the law that Judge Baker blocked is Section 19,² or the portion of SEA 590 that authorizes police officers to make **warrantless** arrests of anyone who:

- (a) has been ordered to leave the U.S. by a judge (through what is known as an "order of removal");
- (b) has been issued a federal immigration detainer or notice of action; OR
- (c) has been indicted for or convicted of one or more aggravated felonies.

The second provision is Section 18,³ which made it an offense for anyone other than a police officer to knowingly or intentionally accept consular identification as a valid form of identification. This memo will discuss only Section 19.

Warrantless Arrests in Section 19

What are orders of removal, detainers, and notices of action?

"Removal" is the current legal term for deportation. A removal order is issued by a federal immigration judge if, after a hearing, the government has sufficiently proven that the person is a noncitizen and that he meets one or more of the removal grounds listed in the Immigration and Nationality Act (INA).

A detainer is a request – not a mandate or a criminal arrest warrant – made by federal immigration authorities to the local jail that is already holding someone on a non-immigration related criminal violation. The detainer asks that the jail continue to hold that person for no more than 48 hours beyond the time permitted by state law for the underlying offense. This 48-hour window allows ICE to take custody of the individual if it so chooses.

¹ *Buquer v. Indianapolis*, U.S. District Court for the Southern District of Indiana (June 24, 2011).

² Amends Indiana Code § 35-33-1-1(1) by adding new sections (a)(11)-(a)(13).

³ Adds Indiana code § 34-28-8.2.



A notice of action is merely a federal form (Form I-797) used to communicate with a person whose immigration petition is pending. The subject matter of a notice of action can be as mundane as merely acknowledging receipt of the petition.

Is it a crime to be the subject of a removal order, detainer, or notice of action?

No. Simply being the recipient of a removal order, a notice of action, or a detainer *is not a crime* under either federal or Indiana state law.

Though it may seem incredible given the severity of the consequences of deportation for the individual and for his or her family, removal is a *civil* (or administrative) remedy, not a criminal punishment, and removal proceedings take place in an administrative immigration court system, not the criminal court system.

Is it a crime to have been indicted or convicted of an aggravated felony?

No. It is not a crime under either federal or Indiana state law to have been indicted or convicted of an aggravated felony. Someone who has been indicted for a felony should not be punished until a trial is held and he is found guilty. After he has served his sentence, a person who has been convicted of a felony is not then punished again simply for being a convicted felon.

Furthermore, whether any particular criminal conviction gives rise to immigration penalties is not a straightforward calculation, and local police cannot be expected to make the complex determination that a particular criminal is removable from the United States absent a federally-issued removal order.

Aren't federal immigration officers supposed to arrest anyone who has received a removal order?

Not necessarily. Under federal law, a person *may* be arrested and detained by ICE once removal proceedings have begun and before a final decision has been made.⁴ This is not technically a criminal matter either, despite the similarity of the language (“arrest” and “detention”) used in criminal law.

But such an individual need not be detained. In fact, a person whose removal order is pending *or already has been issued* by an immigration court may be released on bond or conditional parole, and may even be legally authorized to work.⁵ A removal order is not the end of the line for an individual. He may still appeal that order -- during which time he may (or may not) be administratively detained by the federal government -- until he receives a final decision (at which time the removal order “becomes final”). Even at this late stage, in some circumstances, he may be permitted to reopen the removal proceedings.

The Constitution requires that, once a removal order becomes final, a person may only be detained by the federal government for 90 days. If the federal government cannot deport an individual by the end of the 90 days, he *must* be released from detention subject to supervision.

Why is Section 19 unconstitutional?

⁴ 8 U.S.C. § 1226(a).

⁵ 8 U.S.C. § 1226(a)(3).

Judge Baker declared that Section 19 is likely unconstitutional on two grounds. First, it violates both the Fourth Amendment and constitutional due process requirements. Second, it violates the Supremacy Clause in Article VI of the Constitution.

Fourth Amendment and Due Process

“Section 19 authorizes state and local law enforcement officers to effect warrantless arrests for matters that are not crimes,” wrote Judge Baker. That is the crux of the Fourth Amendment problem. The Fourth Amendment requires that arrests be reasonable, and arrests are only reasonable if the officer has probable cause to believe that some *criminal offense* has been or is being committed.

Judge Baker also objected to the “deafening silence” in Section 19 about what happens to a person after his arrest. That is, Section 19 did not spell out any due process protections for the person arrested as required by the Fifth and Fourteenth Amendments. Will he be eligible for bail? What if ICE does not want to take custody of him? Will he be detained indefinitely? These are questions that Section 19 leaves unanswered.

The Supremacy Clause and “Preemption”

The Supremacy Clause in Article VI of the Constitution declares 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.

Federal regulatory schemes (like our nation’s vast system of immigration laws) block state action when “compliance with both federal and state regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

Judge Baker held that states generally have no authority to enforce federal immigration law in the absence of an appropriate partnership with the federal government (such as a “287(g) agreement”⁶). Indiana currently has no such agreement with the federal government, and Section 19 authorizes arrests in circumstances that are much broader than those permitted to states working in partnership with the federal government.

The problem with Section 19 is that it interferes with federal discretion to set enforcement priorities and select enforcement methods. Relying on the U.S. Ninth Circuit Court of Appeals’ recent decision to block many sections of Arizona’s infamous SB 1070, Judge Baker ultimately held that it is “reasonable to predict” that many arrests made pursuant to Section 19 – that is, state-level arrests of people who may not actually be subject to federal detention – “will be in direct contravention of ‘the carefully calibrated scheme of immigration enforcement that Congress has adopted.’”

Is anything left of SEA 590 after this decision?

Yes. Among other things, SEA 590 also: prevents the establishment of any “sanctuary” locality or agency; prohibits officers from checking the immigration status of victims of and witnesses to crime (Section 3); creates

⁶ 8 U.S.C. § 1357(g)(1).



certain tax consequences for hiring unauthorized workers (Sections 4-7); verifies the immigration status of any “committed criminal offender” (Section 8); requires that the immigration status anyone over 18 who applies for federal or state public benefits be verified, with certain exceptions (Sections 13 and 14); mandates that businesses use the federal E-Verify program to determine work authorization (Section 16); permits police officers to submit a complaint to ICE if they have probable cause to believe that an individual has engaged in day labor in violation of federal immigration law (Section 17); places restrictions on bail for unlawfully present individuals (Section 22); and punishes transporting, moving, harboring or concealing an unlawfully present immigrant for the purpose of commercial advantage or private financial gain (Section 24).

For more information on SEA 590 and what the law means in practice, please visit CLINIC’s “Indiana Immigration Law Q & A” podcast at <http://cliniclegal.org/programs/center-immigrant-rights/state-and-local-immigration-enforcement/0811/state-and-local-immigr.>

What’s next for SEA 590?

The Attorney General of Indiana, Greg Zoeller, has announced that he will not appeal Judge Baker’s preliminary injunction. That means that Sections 18 and 19 will not be able to go into effect for the time being. The next step is for the federal court to make a final determination of the sections’ constitutionality. That may take a while.

It is always possible that civil rights groups will mount yet another court challenge to SEA 590, targeting parts of the law that have not yet been addressed and remain in effect. CLINIC will follow all developments with respect to SEA 590 and will continue to keep our affiliates informed.