**Statement of Joseph M. Knippenberg, Professor of Politics, Oglethorpe University and Member, Georgia Advisory Committee, U.S. Commission on Civil Rights**

I am a member of the Georgia Advisory Committee of the U.S. Commission on Civil Rights and a professor of politics at Oglethorpe University in Atlanta. My areas of expertise are political philosophy and constitutional law, with special reference (in both fields) to the relationship between religion and politics. I have no particular scholarly expertise in contemporary immigration law or policy.

We are precluded by the parameters of this briefing from discussing the issues taken up by the Supreme Court in its recent decision on Arizona’s S.B. 1070, in many ways the model for Georgia’s H.B. 87, signed into law by Governor Nathan Deal last year. So I will not discuss my views on whether federal law or the current Administration’s policy preempts the enforcement efforts of the states, or, more precisely, my views of the Court’s decision and its implications for Georgia law, not to mention the way federal courts will handle the Georgia law.

I believe that I am best suited to contribute to our discussion today by recurring to first principles, the understanding of natural or human rights that serves as the ground of any and every government’s fundamental responsibility to its citizens and other human beings. For our purposes, the clearest statement of these first principles can be found in the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed….

Government exists above all to secure the rights of the individuals who joined together to constitute it. Its principal responsibility is to those who are, so to speak, on the inside, the members of the community, the participants in the social contract. In other words, every legitimate government distinguishes between citizens and non-citizens, between those who are parties to the social contract and those who are not. Furthermore, it is the right and responsibility of the government, on behalf of those who are parties to the social contract, to decide who (if anyone) shall be permitted to join the political community. I cannot legitimately be governed without my consent, but that most emphatically does not imply that I have a right to join—or even to reside in—any community I please. To state it again, those who are inside are entitled to exclude those who are outside, to decide what precisely shall be the conditions of membership in the political community. If I dare to allude to the recent Supreme Court decision, this is, as Justice Scalia puts it, one of the attributes of sovereignty.

Another consideration is implicit in this first one. Because government is meant to secure rights, it is reasonable to ask how best those rights can be secured. Most of those who have thought seriously about the subject will tell you that one of the absolute prerequisites of this security is the rule of law, enacted by legislators who are answerable to an electorate (or, if you will, to the citizenry) and administered impartially by an independent executive. I have to be able to know the consequences of my actions. Those who are responsible for arranging those consequences have to have an incentive to put themselves in my shoes. And those responsible for enforcing the laws should not be able to play favorites; if they did, the entire framework of legislative responsibility and the consent of the governed would fall apart.

Having thus sketched very briefly the results of more than 300 years of serious and profound thinking on this subject, let me draw out some implications for our topic today. The first is that when discussing civil rights and immigration law and policy, we should not focus too narrowly. *Anytime* any law is enacted and enforced, *everyone’s* civil rights are at stake. I do not mean by this only that one set of victims could succeed another or that one set of abuses could give birth to another. In *Federalist* #84, Alexander Hamilton said that “the Constitution is itself, in every rational sense, and to every useful purpose, a bill of rights.” What he meant by this is what I mean today, that laws enacted in accordance with a constitutional structure are meant to protect everyone’s rights, those of the majority as well as those of the proverbial “discrete and insular minority.” Thus we must always ask not only after the effect of the law on some without also inquiring after how the law is intended to secure the rights and liberties of all. To take one not altogether trivial example: I would be more secure driving on the streets and highways of DeKalb County in the Atlanta metropolitan area if all the drivers had jumped through the hoops necessary to obtain driver’s licenses. (That this is at present not necessarily the case was, so to speak, driven home to me by an evening spent sitting with my teenage son in the Chamblee traffic court: the most frequent citation brought before the judge that evening was driving without a license.)

I can make my next point by continuing the consideration of this example. That the law rightly requires that every operator of a motor vehicle have the requisite license and that the public safety is promoted when this is the case does not mean that all our enforcement resources should be devoted to ascertaining whether every driver has a license. There is and indeed must be room for executive discretion in how the limited available enforcement resources are to be deployed. I expect that most license checks are conducted when drivers are stopped for other apparent violations, and that (it goes without saying) that not all of our public safety resources are devoted to traffic enforcement. The responsible officials decide where their resources are most needed and deploy them accordingly. If they make errors egregious enough to be noticed by the voters, they will not win reelection, so they have at least some incentive to get it right. (I take it for granted that reasonable people can disagree about what a community’s enforcement priorities ought to be and that errors in judgment are simply part of the human condition.)

At the same time, such discretion can be abused, either by the politically responsible executives (e.g., police chiefs or sheriffs, in this case) or by their subordinates (e.g., police officers or sheriff’s deputies). Through racial or ethnic bias, inordinate zeal, or personal pique, an executive could use his or her discretion in such a way as to harm those whose protection is his or her responsibility. Fortunately, our system contains a remedy for such abuses, as it does for garden-variety mistakes. First of all, we separate law enforcement from adjudication, so that those who lay charges and gather evidence have to make a case before an impartial judge and jury. Second, there are at least two other checks on the executive—the oversight of those who make the laws and the judgments of the voters. (A third check follows from the different levels of government in our system, so that localities are subject to some state control, while states and localities are in some instances subject to federal influence and supervision.)

In conclusion, I would like to focus my remarks on Article 5 of Georgia’s HB 87, which tracks Section 2(B) of Arizona’s S.B. 1070, the sole provision the Supreme Court did not strike down. The Georgia law states:

(b) [D]uring any investigation of a criminal suspect by a peace officer, when such officer has probable cause to believe that a suspect has committed a criminal violation, the officer shall be authorized to seek to verify such suspect’s immigration status when the suspect is unable to provide [appropriate identification demonstrating immigration status]….

(c) When attempting to determine the immigration status of a suspect pursuant to subsection (b) of this Code section, a peace officer shall be authorized to use any reasonable means available to determine the immigration status of the suspect….

(d) A peace officer shall not consider race, color, or national origin in implementing the requirements of this Code section except to the extent permitted by the Constitutions of Georgia and of the United States.

(e) If during the course of the investigation into such suspect’s identity, a peace officer receives verification that such suspect is an illegal alien, then such peace officer may take any action authorized by state and federal law, including, but not limited to, detaining such suspected illegal alien, securely transporting such suspect to any authorized federal or state detention facility, or notifying the United States Department of Homeland Security or successor agency….

Much ink has been spilled—at least with respect to the Arizona law—about whether a provision like this would permit authorities to detain suspects solely for the time it takes to ascertain their immigration status. The Supreme Court majority—quite properly, to my mind—averred that, on the basis of the record available, it could make no determination regarding whether these verification efforts would unduly prolong anyone’s detention. I believe that it is appropriate to wait to see how laws like these are in fact executed and to let the courts adjudicate on the basis of properly developed factual record. Right now, we can only speculate about the effects of these enforcement measures. And it may be that the issue is less with the law itself than with how authorities in different jurisdictions choose to enforce it. As I said earlier, I take it for granted that there will be some variation in how rigorously the law is enforced. That goes with the territory of executive discretion. If and when the discretion is abused, our system provide a variety of sorts of recourse for the aggrieved parties.

Indeed, I find it hard to formulate a compelling *prima facie* objection to this particular section of the Georgia law. For the immigration status inquiry to be initiated in the first place, there has to be probable cause for suspicion of the commission of a *crime*, not (for example) a mere traffic violation. Furthermore, the inquiry begins only when the suspect cannot provide adequate documentation of his or her immigration status. This is unexceptionable, since presumably every criminal suspect would have either to provide identification or be identified. Appropriate identification would seem to preclude any further inquiry. (I note in passing that federal law requires that aliens carry proof of their registration.) As for the possibility of profiling, the law permits consideration of race, color, or national origin only “to the extent permitted by the Constitutions of Georgia and the United States.” Again, since the inquiry can begin only with the failure of the suspect to produce adequate identification, it is hard to see how the mere consideration of race, color, or national origin enters separately into the circumstances here. If the issue is that the suspicion of criminal activity itself is prompted by these impermissible considerations, then the problem is not with Georgia’s immigration laws, but rather with police practices in the enforcement of criminal law, which do not comprise the focus of this briefing.

Before proceeding further, let me add a merely “political” consideration here. All the polling data I have seen suggests that, nationally, roughly 60 – 65% of those questioned favor laws permitting local authorities to determine the immigration status of suspects apprehended for other reasons. I know that, granted such authority, some police officers will make mistakes or abuse it. That is the case with *any* law enforcement regime. It is easier credibly and persuasively to call attention to such abuses and to work across the lines to remediate them if one seems to be friend of the law in the first place. The words of those who present themselves as inveterate opponents of the law are going to be discounted by those who favor the law.

Finally, there is the question of the action taken in response to the finding that a suspect is in the U.S. illegally, which (I take it) is different from any action taken in response to the alleged criminal activity that provided the occasion for the inquiry in the first place. The law provides that authorities may take “any action authorized by state and federal law,” including transportation to an appropriate detention facility. Obviously we need to await an authoritative state judicial interpretation of this passage, but it strikes me that “state *and* federal law” carries a different meaning from “state *or* federal law.” The former seems to imply that state legal authorization is not by itself adequate to justify any action, or at the very least that, without anything else, state law cannot operate apart from federal law. Georgia appears to concede what the Supreme Court held in its recent decision. If there is a further question here, it relates to the difference between the authority of federal *law* and that of federal *policy* (i.e., the law enforcement priorities of a particular administration). Pursuing this question is beyond the scope of this statement.

Permit me now to bring this statement to a conclusion. I end where I began, with the insistence that the purpose of government is to protect the rights of all, which includes maintaining the integrity of the rules of entry into the community. Concern with civil rights places a presumption on behalf of the right and responsibility of a government to control its borders and admit into its jurisdiction only those it wishes to admit. Its first responsibility is to its citizens, in other words. To secure these rights, to make government live up to its responsibilities, certain sorts of institutions and institutional mechanisms have to be created—separation of powers, checks and balances, frequent elections, and so on. These are the principal means by which our civil rights are to be protected. Making certain that they remain vital should be our foremost concern.