

2008

## Administrative Law: Immigration, Amnesty, and the Rule of Law, 2007 National Lawyers Convention of the Federalist Society

John Baker

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Baker, John (2008) "Administrative Law: Immigration, Amnesty, and the Rule of Law, 2007 National Lawyers Convention of the Federalist Society," *Hofstra Law Review*: Vol. 36: Iss. 4, Article 8.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol36/iss4/8>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

*John Baker\**

These Remarks are a wonderful example of what Justice Thomas was referring to when he said that this society is foremost in promoting non-ideological exchange. The problem, however, is that it makes for boring television.

How can we connect this non-ideological exchange with what is on television? I would like to attempt to make this connection by beginning with a reference to my twenty-one-year-old son. He is a faithful fan, some would say a fanatical fan, of Rush Limbaugh and Bill O'Reilly. And therefore, he knows exactly how to solve the immigration mess. He says we should fence the border, then round up all the illegal immigrants and send them back to their home country. After this, they may get in line and come back legally if they choose. He believes that is a very simple solution to illegal immigration.

We agree on the basic principles. That is, I agree on securing the border. But for me, it is not only about the border. It is a question of United States sovereignty, terrorism, and our relationship to the rest of the world. My son and I agree that all immigration ought to be according to law. That is the only kind of immigration we need. In relating immigration to the rule of law, however, it is often forgotten that the rule of law also includes issues of separation of powers and federalism. Thus, it seems to me that we must ask ourselves about the means to the end of curtailing illegal immigration. We agree on an end, but what are the legal and constitutional issues regarding the means? Such questions rarely get discussed on television.

This Remark discusses what I see wrong with the simple solution and how we might approach illegal immigration in ways that are both more effective and more consistent with the Constitution. The federal government may be able to fence the border if the voters want that to be done. However, there are a number of obstacles to consider. First,

---

\* John Baker is the Dale Bennett Professor of Law, Louisiana State University; B.A., University of Dallas, 1969; J.D., University of Michigan Law School, 1972; Ph.D., University of London, 2003.

fencing the borders is going to take a long time.<sup>1</sup> And second, there is a lot of evidence to the effect that some of the past efforts with fences along the border have only compounded the problem.<sup>2</sup> As briefly mentioned in Professor Neuman's Remark, some of the government's "get tough" policies have actually exacerbated the problem. Most notably, the 1996 reforms motivated illegal immigrants to stay in the United States, rather than voluntarily returning to their own country.<sup>3</sup> According to immigration lawyers, illegal immigrants went home because they learned from their lawyers that, by doing so, they would be able to return legally.

The fundamental problem with immigration policy since the 1996 legislation is that it imposes bars to legal reentry against those who have come here illegally. There is a three-year bar, a ten-year bar, and a permanent bar.<sup>4</sup> So this whole notion that we can solve the problem by getting illegals to go back to their country, stand in line, and come back legally is simply based on a false premise. It is not possible to do that under current law without some kind of waiver.

As for a roundup, Homeland Security—contrary to popular impressions—has increased enforcement, especially during the last six months.<sup>5</sup> Round-ups have focused particularly on businesses.<sup>6</sup> However, Homeland Security has realized that they do not have the resources to do all that is needed. This is why there has been an emphasis, as discussed by Professor Kobach, on getting state law enforcement involved.<sup>7</sup> But we have to face the facts. The Department of Justice simply is not taking cases at the same rate that they are being filed. Part of the issue may be that the Department of Justice has brought some bad cases. Part of the enforcement problem may also be that United States attorneys do not completely take direction from Washington. Many in Congress do not think that United States attorneys should be directed by the White House

---

1. See GORDON H. HANSON, COUNCIL ON FOREIGN RELATIONS, THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 30 (2007).

2. See Gerald L. Neuman, Remark, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 2007 National Lawyers Convention of the Federalist Society, 36 HOFSTRA L. REV. 1335, 1336 (2008); see also HANSON, *supra* note 1, at 34.

3. See Neuman, *supra* note 2, at 1336.

4. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1182(a) (1996)).

5. Adam Nossiter, *Hundreds of Factory Workers Are Held in Immigration Raid*, N.Y. TIMES, Aug. 26, 2008, at A12.

6. *Id.*

7. See Kris W. Kobach, Remark, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 2007 National Lawyers Convention of the Federalist Society, 36 HOFSTRA L. REV. 1323, 1328 (2008).

or even the Attorney General as to which cases that they should prosecute.<sup>8</sup> We thus have a problem of establishing a consistent approach to enforcement internally within this Administration.

As for the states, Professor Kobach has written about the power of states to enforce immigration laws, or to do so at least under certain circumstances.<sup>9</sup> This is a complex problem. I would like to point out two things. First, the federal government, under the *Printz* case, cannot force the states to enforce federal laws.<sup>10</sup> That is to say, Congress and the Executive lack the constitutional power to co-opt states into carrying out federal policy.<sup>11</sup> That is a separate question from the clear principle that states are bound by the Constitution, federal laws pursuant to the Constitution, and Supreme Court interpretations of both. But in terms of co-opting state agencies and executive agencies, *Printz* pretty much rules out making the states enforce federal immigration laws.<sup>12</sup> Second, there are also limits on what states can do with respect to immigration when they are not authorized by the federal government to act.

We can relate this back to the “Passenger Cases” in 1849.<sup>13</sup> While there are certain areas that bump up against immigration where the states are able to act under the police power, there are limits to what states can do in terms of discouraging immigration.<sup>14</sup> Indeed, New York and Massachusetts attempted in the nineteenth century to keep out Irish immigrants.<sup>15</sup> They ultimately failed because immigration is a matter involving our national borders and, therefore, committed to the federal government, not the state government.<sup>16</sup> The problem of immigration ultimately is the responsibility of Congress. That, however, does not mean that the Executive branch should fail to enforce existing law.

---

8. See Dan Eggen & Paul Kane, *Senators Chastise Gonzales at Hearing*, WASH. POST, Apr. 20, 2007, at A4. Some Senators argued that United States attorneys were fired for not following instructions from GOP officials that they should concentrate their efforts on certain crimes such as voter fraud. *Id.*

9. See generally Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (discussing that there is inherent authority for states to enforce federal immigration laws and Congress has not preempted such state enforcement).

10. See generally *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the federal government does not have the authority to direct state officials to carry out federal programs).

11. *Id.* at 933.

12. *Id.* at 935.

13. See generally *The Passenger Cases*, 48 U.S. 283 (1849) (holding that states do not have the constitutional power to tax aliens entering at the ports of those respective states).

14. *Id.* at 425-26.

15. See *id.* at 284-85.

16. *Id.* at 442-43.

Indeed, the solution, it seems to me, is enforcement first, but not for the reasons usually given.

What do I mean by this? First of all, the President's primary job, under separation of powers, is to execute the laws.<sup>17</sup> While he can certainly seek to change the law, he is supposed to enforce the law as it exists until it is changed. But there is another reason why the President ought to enforce the immigration laws, and to do so vigorously. Enforcing any law will expose unanticipated problems. Many of the opposing opinions about immigration are based on conjecture about what will happen if the existing laws are well enforced. The effects of enforcement will differ in various areas of the country. Moreover, there are likely to be different opinions around this country about whether those effects are desirable or not. Attitudes toward legal, as well as illegal, immigration are certainly affected by who bears the costs and who benefits from immigration. In many communities, it may be that citizens want to get rid of all workers from outside of the country. Doing so may or may not result in increased employment for Americans. We cannot really know except by enforcing the law. As an aside, we who lived through Katrina do know that not a single roof in Louisiana or Mississippi would have been replaced after the hurricane if the federal government had not suspended immigration enforcement in the affected area.

We live in a federal system. As per Federalist 10, people have many different views on most matters of policy.<sup>18</sup> The place to resolve conflicts among those views is in Congress. As a result, most matters of policy require compromise in order to enact legislation. Of course, Congress does not want to tackle immigration issues in this spirit. If, however, the President enforces existing law and it proves to be economically damaging enough, his action would force Congress to meet its obligation by reaching an agreement to make some changes in the law.

While I support vigorous enforcement against illegal immigration, I am also concerned about the creeping jurisdiction of Homeland Security away from the borders. Thanks to Congress and, largely, the Republicans, the country has, since the 1970s, taken a tough "law and order" approach at the federal level on matters that properly belong to

---

17. U.S. CONST. art. II, § 3.

18. THE FEDERALIST NO. 10 (James Madison) (discussing the problems and dangers that faction poses to a republican government).

the states.<sup>19</sup> Thirty years later, people have realized how federalized much of the crime in this country has become. If you consider the creeping jurisdiction of Homeland Security—not only into critical infrastructure, but into places such as meatpacking plants—you realize that we are stretching the “war on terrorism” internally to the point of militarizing law enforcement.<sup>20</sup>

Now, just as I think that the Left is wrong to judicialize war,<sup>21</sup> it is wrong to centralize and militarize law enforcement. Why? Under our Constitution, we are not a unitary state like France.<sup>22</sup> Not everything can or should be solved by the federal government. Apart from the fundamental constitutional objection, the federal government simply cannot take over all law enforcement unless the number of federal law enforcement agents and the number of federal judges increase to a size equal to the total of police officers and judges in the fifty states. As it is, the federal government cannot handle its responsibilities to United States. The federal failure to enforce immigration law effectively ought not to be the basis for creating a completely monolithic state. That is not the view of liberty given to us by our founders.

---

19. See AMERICAN BAR ASSOCIATION, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998), available at [www.nacdl.org/public.nsf/legislation/overcriminalization/\\$file/fedcrimlaw2.pdf](http://www.nacdl.org/public.nsf/legislation/overcriminalization/$file/fedcrimlaw2.pdf) (last visited Sept. 24, 2008).

20. HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR HOMELAND SECURITY 27-29 (2007), available at [http://www.dhs.gov/xlibrary/assets/nat\\_strat\\_homelandsecurity\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/nat_strat_homelandsecurity_2007.pdf).

21. See generally John S. Baker, Jr., *Competing Paradigms of Constitutional Power in 'The War on Terrorism'*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5 (2005).

22. See 1958 CONST. 20.

\*\*\*