

2008

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

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Recommended Citation

Neuman, Gerald L. (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 10.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol36/iss4/10>

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This Remark will begin with some historical observations before turning to the contemporary situation. As a scholar, I prefer to provide greater complexity, but I will focus on the highlights for the purposes of this Remark.

First, a general observation about the history of United States immigration policy. Our borders have never been legally open, and should not be. The federal government took over the regulation of immigration from the states after the Civil War.¹ Initially, federal law only identified categories of aliens that Congress considered undesirable as immigrants to the United States, and did not try to limit the numbers of desirable immigrants. The great watershed in immigration policy occurred in the 1920s, when Congress placed annual limitations on the number of otherwise desirable immigrants.² Restricting the volume of immigration required the government to define priorities among immigrants, and from 1924 until 1965, the leading principle of the United States immigrant selection process was the ethnic national origins quota. That system was finally abolished in 1965, and replaced by a tripartite policy that gave preferences to family members of citizens and resident aliens, to employees with needed skills, and to refugees.³ In modified form, this policy still operates today.⁴

Second, since the 1920s the United States has repeatedly found it appropriate to regularize the status of otherwise desirable immigrants who had entered or remained in violation of the legislation. You can call that a legalization or an amnesty; in rational discourse nothing turns on the label. For example, amnesties for long-term residents were enacted

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1. See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 19-43 (1996); ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 185-93 (2006).

2. See ZOLBERG, *supra* note 1, at 243-44.

3. See *id.* at 333.

4. See *id.* at 380-81.

in 1929, 1940, 1958, 1965, and 1986.⁵ The 1986 amnesty gave lawful resident status to over two-and-a-half million people.⁶

Today it is estimated that there are more than twelve million unlawful residents.⁷ I do not mind using the phrase “illegal alien” to describe them, but we should understand that it is not a well-defined legal term, and it describes a wide variety of people and situations. Some simply entered without permission; some were temporarily admitted but overstayed; some are entitled to legal status but are waiting for the government to act; some have applied for asylum as the law permits and are awaiting a decision; some came involuntarily—for example, having been brought as children by their parents.⁸ One unforeseen consequence of stricter border enforcement since the 1980s has been that people who would otherwise have been seasonal migrant workers traveling alone have been pressured to settle down as permanent illegal immigrants with families.⁹

By the government’s own estimates as of January 2006, roughly one million illegal aliens had lived here for over twenty-one years; another one-and-a-quarter million for over sixteen years; almost two million for over eleven years; three-and-a-quarter million more for over six years; and roughly four million for less than six years.¹⁰

The government report does not break these figures down by ages, but private demographers estimated in 2004 that there were more than one-and-a-half million unlawfully resident children, and almost two million families with at least one unauthorized parent and at least one citizen child.¹¹

Having twelve million residents without legal status raises serious and complex rule of law issues, from a number of perspectives. One is

5. Act of Mar. 2, 1929, ch. 536, 45 Stat. 1512; Nationality Act of 1940, ch. 876, § 328, 54 Stat. 1151; Act of Aug. 8, 1958, Pub. L. No. 85-616, 72 Stat. 545; Act of Oct. 3, 1965, Pub. L. No. 89-236, § 19, 79 Stat. 920; Pub. L. No. 99-603, §§ 201, 203, 302, 100 Stat. 3394, 3405, 3417 (1986).

6. ZOLBERG, *supra* note 1, at 372.

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

8. See JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 9 (2005), available at <http://pewhispanic.org/files/reports/46.pdf>.

9. See DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 128-33 (2002).

10. MICHAEL HOFER, NANCY RYTINA & CHRISTOPHER CAMPBELL, DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006 2 (2007), available at www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf.

11. PASSEL, *supra* note 8, at 18-19.

the illegal conduct that brought them here, though in some cases it occurred many years ago. Many children came here by no fault of their own and have grown up in our society and face a serious dilemma because they were lawfully educated here but cannot lawfully be employed. Another rule of law issue is the vulnerability of the unauthorized population to crime or other violations of their legal rights; their status can inhibit them from seeking protection or redress.

The continuing presence of these children and adults raises a number of questions. For example: How many years of productive, taxpaying, otherwise law-abiding life here make up for an illegal start and the acquisition of false documents? How can we efficiently and accurately administer a system that does not leave us guessing about our actual population, and that enables us to identify significant threats to safety, health, and national security? Our political process needs to address these questions, not avoid them with simplistic slogans and myths.

If we are concerned about illegality, we should also be concerned about the illegal conduct of employers as well as employees. Many employers knowingly employ unauthorized aliens (that *is* a legal term¹²), but the political power of employers has been exercised to push the burden of illegality onto employees and to make employer sanctions difficult to enforce against employers.¹³ If we are concerned with illegal conduct, we should also focus on other forms of employer illegality, such as occupational safety violations and the breaking of unions.

Rule of law problems in immigration enforcement should also attract our attention, such as the failure of the Department of Homeland Security to adjudicate meritorious applications,¹⁴ and the Attorney General's crippling of the appellate function of the Board of Immigration Appeals in 2002.¹⁵

We should also focus on the illegal conduct of municipal officials, such as the adoption of unlawful local employer sanctions ordinances, which clearly violate an express prohibition in the 1986 Immigration

12. 8 U.S.C. § 1324a(h)(3) (2006) (defining an "unauthorized alien" in relation to employment as one who is neither a lawful permanent resident nor otherwise authorized to accept the employment).

13. See MASSEY ET AL., *supra* note 9, at 119-21.

14. See CITIZENSHIP & IMMIGRATION SERVICES OMBUDSMAN, DEP'T OF HOMELAND SEC., ANNUAL REPORT 2007 11-16 (2007), available at www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf (discussing delays and current backlog).

15. See Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 632-33 (2006).

Act.¹⁶ That prohibition was the product of employers' political power, and I would not try to defend it on *a priori* moral grounds, but it is the law of the land, and its violation raises rule of law issues like any other positive law.

Compliance with law by government officials is, after all, the primary meaning of the rule of law.

16. 8 U.S.C. § 1324a(h)(2).