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Practical Thoughts on Immigration

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The following is adapted from a speech delivered on February 18, 2015, at a Hillsdale College National Leadership Seminar in Naples, Florida.

The lesson from the last 20 years of immigration policy is that lawlessness breeds more lawlessness. Once a people or a government decides to normalize one form of lawbreaking, other forms of lawlessness will follow until finally the rule of law itself is in profound jeopardy. Today, we have a constitutional crisis on our hands. President Obama has decided that because Congress has not granted amnesty to millions of illegal aliens living in the U.S., he will do so himself. Let us ponder for a moment just how shameless this assertion of power is.

Article 2, Section 3, of the Constitution mandates that the president “shall take Care that the Laws be faithfully executed.” This provision assumes that there *is* a law for the president to execute. But in this case, the “problem” that Obama is purporting to fix is the *absence* of a law granting amnesty to millions of illegal aliens. Rather than executing a law, Obama is making one up—arrogating to himself a function that the Constitution explicitly allocates to Congress. Should this unconstitutional power grab stand, we will have moved very far in the direction of rule by dictator. *Pace* Obama, the absence of a congressional law granting amnesty is not evidence of political failure that must somehow be corrected by unilateral executive action; it is evidence of the lack of popular consensus regarding

amnesty. There has been no amnesty statute to date because the political will for such an amnesty is lacking.

On February 16, U.S. District Judge Andrew Hanen halted President Obama’s illegal amnesty with a temporary injunction. The proposed amnesty program, Judge Hanen found, went far beyond mere prosecutorial discretion *not* to enforce the law against individuals. Instead, the Department of Homeland Security proposed to confer on illegal aliens a new legal status known as “legal presence.” But Congress has not granted DHS the power to create and bestow legal status. The amnesty program represented a “complete abdication” of DHS’s responsibility to enforce the law, Judge Hanen declared. Indeed, DHS was actively thwarting the express will of Congress.

Pursuant to traditional canons of judicial interpretation, Judge Hanen ruled against the Obama administration on the narrowest possible grounds in order to avoid reaching the constitutional question. He based his decision on the law governing agency rulemaking, rather than on separation of powers grounds. But his rebuke was just as scathing.

The administration will likely fight the ruling through the Fifth Circuit Court of Appeals and, if necessary, all the way to the Supreme Court. Democrats should hope that the administration loses. They are assiduously pretending that Obama’s executive amnesty is merely an innocuous exercise of prosecutorial discretion. But if Obama’s power grab is upheld, they will rue the day that they

acceded to this travesty when a Republican president decides, say, to privatize Social Security because Congress has failed to do so.

Obama’s executive amnesty is the most public and egregious example of immigration lawlessness to date. But beneath the radar screen has been an equally telling saga of cascading lawlessness that is arguably as consequential: an ongoing attack on the Secure Communities program and on deportation more generally. Because of this attack, the rallying cry of so many conservatives that we must “secure the borders” is a naïve and meaningless delusion.

* * *

The Secure Communities program is a commonsensical response to illegal alien criminality. Whenever an illegal alien is booked into a local jail on suspicion of a crime, an alert is automatically sent to federal authorities in the Immigration and

Customs Enforcement (ICE) agency. ICE agents can then ask that the jail or prison briefly hold the illegal alien after he has served his time rather than releasing him, so that ICE can pick him up and start deportation proceedings. This is known as a detainer.

You would think that such a program would be wholly uncontroversial. An alien who crosses into our country illegally already has no claim to undisturbed presence here. He has voluntarily assumed the risk of deportation. But an illegal alien who goes on to break other laws has even less claim to protection from deportation. Yet Secure

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[Latin]: in the first place

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Communities has been the target of incessant protest from illegal alien advocates since its inception. Those advocates make the astonishing claim that it is unfair to remove an illegal alien who commits other crimes.

Even more astonishing, nearly 300 jurisdictions agree, including New York State, California, New York City, Chicago, and Los Angeles. They have openly refused to honor ICE's requests for detainers, but instead have released tens of thousands of criminals back on to the streets where they easily evade detection. Not that ICE would be likely to try to pick them up! Indeed, the irony regarding the agitation against Secure Communities is that ICE rarely uses its power under the program. In 2012—the last year for which we have complete figures—the agency was notified of over 400,000 illegal jail detainees, but removed only 19 percent of them. And about 50 percent of the criminal illegal aliens whom ICE chooses not to deport reoffend upon release.

* * *

There are two aspects of the campaign against Secure Communities that bear particular notice: the hypocrisy of the Obama administration and the campaign's advocates, and the hypocrisy of big city police chiefs.

In 2012, Arizona became the target of universal contempt among the country's elites for passing a law that encouraged local law enforcement officers to assist ICE with immigration enforcement. According to illegal alien advocates and the Obama administration, this law, known as SB 1070, was an unconstitutional state usurpation of the federal government's plenary power over immigration matters. The Obama administration sued Arizona for allegedly interfering with federal authority over immigration and won an injunction against SB 1070. Yet now these same advocates are urging states and localities to defy the federal government's requests for immigration assistance, resulting in the creation of local sanctuary zones where federal

immigration authority cannot reach.

If ever there were a lawless usurpation of the federal government's power over immigration, the open revolt against Secure Communities is it. Yet the Obama administration, rather than hauling these recalcitrant jurisdictions to court, has lain supine and chastely looked the other way. And late last year, it threw in the towel completely. It dismantled the Secure Communities program except in a few narrow instances, agreeing with the activists that it was unfair to worry illegal alien criminals about deportation.

There is another aspect of the campaign against Secure Communities that shows the corrosiveness of our tolerance of lawlessness. Major police chiefs in high immigration jurisdictions are under enormous political pressure to protect illegal aliens. And that has meant tossing aside everything that they know about public safety and policing. One of the great insights of policing in the last two decades was the realization that low level misdemeanor offenses like graffiti, turnstile jumping, drunk driving, and drug sales have an outsized impact on a community's perceptions of public safety and on the actual reality of crime. Enforcing misdemeanor offenses is an effective way of incapacitating more serious criminals. And even when an offender does not go on to commit more violent felonies, such allegedly minor offenses as shoplifting and illegal street vending create a sense of lawlessness and disorder that breaks down the fabric of a community. Police chiefs like New York's William Bratton and Los Angeles's Charlie Beck know this. Yet they have fiercely opposed cooperating with the federal government on Secure Communities, on the ground that misdemeanor offenses are too trivial to worry about and should not subject illegal aliens to deportation. This is pure hypocrisy—the result of the enormous pressure of demographic change on our principles.

The ultimate goal of the campaign against Secure Communities is to delegitimize deportation entirely as a response to

illegal immigration. If it is morally unacceptable to repatriate even a convicted illegal alien criminal, then it is all the more unacceptable to repatriate someone who has “merely” crossed the border illegally. This undermining of alien-removals is behind the constant protests demanding to “stop deportations now.” It is behind the claim that it is Americans who are to blame for separating families, rather than the alien who knowingly came into the country in violation of our laws and assumed the risk of being sent home.

The campaign against deportation does not name itself as such, but it has been highly successful. Despite the false rhetoric of the Obama administration, deportation has basically disappeared from the interior of the country. The removal rate in 2014 for illegal aliens who were not explicit ICE priorities was one-half of one percent. If aliens cannot be removed for illegal entry, then there is no more immigration law. Deportation is the only remedy for illegal entry that corrects and deters the original lawbreaking. That is why Mexico, along with virtually every other country, practices it unapologetically. Lose deportation, as we are doing, and the U.S. will have formally ceded control of its immigration policy to people living outside its borders. National sovereignty will have become meaningless.

The delegitimizing of deportation makes the conservative rallying cry to secure the borders sadly naïve. An utterly secure border is impossible; people will always find a way to cross. But if, once they cross, nothing can be done to them, then we may as well not have borders. That’s why the advocates have spent all their energy fighting deportation rather than fighting increased border security—because they know that eradicating the former is far more important.

* * *

The erosion of the rule of law is bad enough. But the social consequences of mass illegal immigration are equally troubling. We are importing poverty and educational failure. If you want to

see America’s future, look no further than my home state of California, which is a generation ahead of the rest of the country in experiencing the effects of unchecked low-skilled immigration.

Nearly 50 percent of all California births are now Hispanic, and the state’s Hispanic population is now almost equal to the white population. The consequences of this demographic shift have been profound. In the 1950s and ’60s, California led in educational achievement. Today, with a majority Hispanic K-12 population and the largest concentration of English language learners in the country, California is at the bottom of the educational heap. Over a third of California eighth graders lack even the most rudimentary math skills; 28 percent are equally deficient in reading. The mathematics performance gap between Hispanic and white eighth-graders has not budged since 1990; the reading gap has narrowed only slightly since 1998.

California is at the epicenter of the disturbing phenomenon of “long-term English learners.” You would think that an English learner would be someone who grew up in a foreign country speaking a foreign language, and who came to the U.S. only later in life. In fact, the vast majority of English learners are born here, but their cognitive and language skills are so low that they are deemed non-native English speakers. Nationally, 30 percent of all English learner students are third-generation Americans.

In 2013, California Governor Jerry Brown pushed through a controversial law to try to close the achievement gap between California’s growing Hispanic population and its Anglo and Asian populations. That law redistributes tax dollars from successful schools to those with high proportions of English learners and low-income students. It remains to be seen whether this latest effort to raise the education outcomes of the children of low-skilled immigrants will prove more effective than its predecessors. Working against that possibility is Hispanics’ high dropout rate—the highest in the state and

the nation—and their equally unmatched teen pregnancy rate.

To be sure, many illegal Hispanic aliens possess an admirable work ethic and have stabilized some moribund inner-city areas like South Central Los Angeles. But thanks to their lack of social capital, many of their children and grandchildren are getting sucked into underclass culture. The Hispanic out-of-wedlock birth rate in California and the U.S. is 53 percent—twice what it was in the black population in 1965 when Daniel Patrick Moynihan wrote his prescient warning about the catastrophe of black family breakdown. The incarceration rate of Mexican-Americans in California shoots up eight-fold between the first and second generations, to equal the black incarceration rate. Gang involvement is endemic in barrio schools, giving rise to a vast taxpayer-supported army of anti-gang counselors serving the children of single mothers.

This social service bureaucracy in barrio schools is just the tip of the iceberg. Welfare use among immigrants and their progeny is stubbornly high, because their poverty rates are stubbornly high. Hispanics are the biggest users of government health care and the biggest supporters of Obamacare. They favor big government and the higher taxes necessary to pay for it. The claim that low-skilled immigration is an economic boon to the country as a whole is false. It fails to take into account the government services consumed by low-skilled immigrants and their children, such as schools, hospitals, and prisons.

* * *

So what should be done? First of all, we must reassert the primacy of the rule of law. At the very least, that means rehabilitating deportation and ceasing

to normalize illegal immigration with our huge array of sanctuary policies. Liberals appear indifferent to the erosion of law, and even too many conservatives are willing to excuse immigration law-breaking in order to placate what they imagine to be a conservative voting bloc in waiting. But let us hope the rule of law is not lost.

I would not at present offer an amnesty to those who have voluntarily chosen to violate the law, since every amnesty, both in the U.S. and Europe, has had one effect and one effect only: more illegal immigration. People who come into the country illegally or overstay their visas do so knowingly. They assume the risk of illegal status; it is not our moral responsibility to wipe it away. Their children, if they are born here, are already American citizens, thanks to the misguided policy of birthright citizenship. The illegal status of their parents is a problem that will eventually fade away as that first generation dies out. The Obama amnesty, however, actually incentivizes the use of birthright citizenship, since it rewards with legal status illegal aliens who have American citizen children.

I would also radically reorient our legal immigration system towards high skilled immigrants like the parents of Google's founder, Sergey Brin. Canada, Australia, and other countries are already benefiting from placing a priority on skilled immigrants.

Immigration policy should be forged with one consideration in mind: America's economic self-interest. Immigration is not a service we provide to the rest of the world. Yes, we are a nation of immigrants and will continue to be one. No other country welcomes

as many newcomers. But rewarding illegal immigration does an injustice to the many legal immigrants who played by the rules to get here. We owe it to them and to ourselves to adhere to the law. ■



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