IMMIGRATION: Executive Orders, Federal Statutes & State and Local Regulations

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Executive Orders: Intent and Design

On February 16, a Texas Federal District Judge Hanen blocked President Obama’s executive actions on immigration as a result of a suit filed by 26 GOP run states. He did not rule on the legality or illegality of the President’s actions; this will be determined by a 3-judge panel or en banc court. But the judge said that the challengers’ pleadings were of sufficient merit and clarity to warrant suspending the executive orders on immigration awaiting further findings.

The Washington Post, on the 17th, noted some of the Court’s language: No law gave the administration the power “to give 4.3 million removable aliens what the Department of Homeland Security itself labels as ‘legal presence,’...In fact the law mandates that these illegally-present individuals be removed.” The Department of Homeland Security “has adopted a new rule that substantially changes both the status and employability of millions.”

Defenders of the President’s action say that the executive order would offer a safe harbor for the undocumented parents of U.S. citizens and permanent residents who
have resided in the country for at least five years. There are other aspects of the orders, but this is the most significant because, with the best statistics the Census Bureau has on undocumented aliens, it could affect up to 5 million individuals. Obama’s Department of Justice is appealing the decision of the Texas judge.

The immediate impact appeared likely to at least delay the application process, which was to begin the day following the Judge’s order, for some undocumented immigrants wishing to take advantage of the new policies. Also in the mix is the US House’s attempt to deny funding to the Department of Homeland Security unless Obama backs down from his executive orders. At this writing it is unclear how this faceoff will end.

**History of the Faceoff**

This faceoff is but another in a series that has been percolating between the US Congress, the administration and state and local governments since 2011. Immigration is one of the issues on which many state and local governments feel free to take independent action -- for several reasons:

(1) the belief that the federal government has not crafted a workable immigration policy;
(2) the hard economic facts that undocumented immigrants cost states severely in provision of benefits; and
(3) the belief that the local community is in the best position to determine how to best address the problems caused by the undocumented population.

Arizona is probably best known for its “take no prisoners” stance on illegal immigration. Other states have followed Arizona’s lead, though perhaps not quite so vociferously. Governor Bryant, who as State Auditor provided an in depth study of illegal immigrants in Mississippi, supported a bill that was moving through the state house in 2011 -- quite similar to Arizona’s -- that died in the Mississippi Senate.

But not every jurisdiction feels so negatively about undocumented aliens. We are, in fact, a nation of immigrants. It’s just that some of us came earlier than others, brought customs and values similar to the “Pilgrim Fathers,” and assimilated in the manner deemed appropriate in an earlier time. But immigration has always been a flashpoint, even before the US Congress passed the first piece of legislation regulating immigrants, the Manifest of Immigrants Act. [Passed in 1819, this legislation required immigration statistics be kept on individuals coming into the
country as well as a type of “bill of rights” for immigrating travelers. In 1818, the US had seen a dramatic increase in immigration but also significant mortality rates on transatlantic voyages, so the country tried to remedy this with action. The Act was ultimately modified, and finally repealed by the Carriage of Passengers Act of 1855.]

We’ve known for a long time that we like people who are similar to ourselves. It’s a documented social fact. Recently handled in the journal Group Processes and Intergroup Relations, Dr. Chris Crandall, psychology professor at the University of Kansas and co-author of the study “Social Ecology of Similarity,” tells us that we gravitate to those individuals who are like us, have the same or similar social class, ethnic background, and even common (although unknown to us) genetic traits.

Even Benjamin Franklin had these issues. “Doctor” Franklin came from a family of Brits who lived in and around the Dorset area and moved to the Boston area in the 1600s. And he, it seemed, didn’t like the influx of Germans in the Boston area. German immigrants, he said, “swarm into our settlements” and “will never adopt our language or customs.” But Germans did assimilate -- perhaps not as quickly as Franklin wanted.

Today Germans are the largest single ethnic group in America, according to the February 7, 2015 issue of The Economist, with approximately 46 million Americans who claim German ancestry. Yet they have so thoroughly assimilated that “we” non-Germans barely notice them.

Writing about German assimilation, The Economist commented: “Agreeable Teutonic customs, such as drinking beer with pretzels and watching sports on Sunday, have spread throughout [America]. Tedious ones, such as reading Nietzsche, have not. The success of people who arrived poor and now prosper mightily is evidence that the melting pot works. It is a rebuke to those who demand ever-higher fences to keep foreigners out.” (p. 15)

The fact is that, no matter how much is written about “diversity” or touted about “diversity,” a majority of Americans are a bit xenophobic. We prefer the melting pot to the collection of single silos or pockets of “diversity” among us. And thus we want to do “something” about immigration policy -- although our suggestions are as varied as our diversity.
Shaken, not Stirred

One thing is for sure: the US immigration system is flawed, if not simply broken. A Gallup Poll issued earlier this year indicated that 60% of Americans are dissatisfied with the level of immigration into the country today. [This is an increase of 6 points from the 2014 polls.] When Gallup issued its annual Mood of the Nation poll, many high profile issues dropped off the burner. But there are increasing levels of dissatisfaction with current immigration levels. Two (2) in five (5) Americans want to see the level of immigration decrease. Only seven (7) percent of Americans want more immigration, unchanged from 2014. Republicans are most dissatisfied with immigration levels -- 84% say they are dissatisfied -- while only 54% of Independents and 44% of Democrats feel similarly.

Estimates are that about 11 million people live in America illegally, most of whom will never be deported, and 5 million of whom certainly will not be deported if the President’s executive orders succeed. Congress needs to act, and it knows it. An executive order -- or series of them -- is not the way to handle the immigration crisis. Yet, Congress seems unwilling or unable to do so.

So, here come the states, leaping into the breach, in a clear violation of federal policy.

There are the states that make it difficult for undocumented aliens, following the Arizona plan. And then there are other locales which try to assist immigration so that America can reap the benefit of intelligent and industrious immigrants seeking a home here. For example, California now issues illegals drivers’ licenses. Massachusetts allows enterprising illegals to shelter their businesses under the aegis of state universities which are exempt from visa caps on skilled migrants. Interestingly enough, it is not just states that are taking stands on the immigration issue.

Michigan’s GOP governor, Rick Snyder, has called for 50,000 new visas for people who are willing to live in Detroit and is attempting to make it easier for skilled migrants to get professional licenses. His pet project: he wants immigrants to revitalize Motown! Baltimore, Dayton, Philadelphia (Doctor Franklin’s town) and Cleveland are attempting to make it easier for immigrants to come to their cities, to repopulate blighted neighborhoods, work hard, and help fill public coffers. Baltimore’s mayor, Stephanie Rawlings-Blake, intends to make Baltimore the most immigrant friendly city in the world. She has instituted Spanish language exercise
classes in libraries. She has introduced micro-loans which are publically supported and have no credit checks. The Baltimore police no longer routinely check the immigration status of citizens. Nor do they enforce any federal immigration laws unless they are explicitly required to do so. Following in Rawlings-Blake’s pathway, in 2012 then Governor Martin O’Malley (D) instituted the policy of allowing illegal immigrants to get drivers’ licenses.

Each inroad into local legislating of aspects of immigration is a step toward focus on the 10th amendment. Federalism be damned! Local actions taken in this vein are usually driven by over-riding economic or social philosophy, including the issues identified earlier from which states are seeking to wrest control from the federal government. However, there is a progressive tradition in the US which demands that federal authority must respect state authority and to restrict preemption of state laws by the federal government. Many localities argue that federal law and regulations should be the floor – the bottom for protection of rights that states may desire to regulate, giving the states the ability to create and/or enforce more expansive protections, and the ability to resist government overblown.

**Who can truly institute immigration policy?**

So who is truly responsible for the nation’s immigration policy? Jennifer Chacon, a professor of law at the University of California, Irvine School of Law, has posited some considerations in an article published in the ABA Journal. Ms. Chacon contends that the answer to the question is not so clear cut as it seems. According to her, while the text of the US Constitution and various US Supreme Court cases which have interpreted the Constitution indicate that the federal government has exclusive authority to enact and enforce immigration, but state and local authorities may (and do) regulate immigration by shaping the life of immigrants in their jurisdictions, paying for benefits, and making the atmosphere welcoming or unwelcoming. Article I, Section 8, clause 4 of the US Constitution gives the federal legislative branch the power to “establish a uniform Rule of Naturalization.” However, naturalization is distinct from immigration, and historically has been treated so in America. As Professor Chacon tells us, for the first century of the republic most states had laws that regulated immigration into their own respective borders. Immigrants often excluded by this type of state legislation were known criminals, individuals who were reliant on public assistance, slaves and free blacks.

In the late 1870s, the US Supreme Court made an entrée into the field of limiting states’ exercise of immigration regulation. Notable are the *Passenger Cases* and the
Head Money Cases. The Passenger Cases (1874) struck down the activities of New York and Massachusetts to put a “tax” on immigrants before they could cross state borders with the intention of establishing residency. In those cases, a majority of justices concluded that the taxes usurped the federal power to regulate commerce under Article I, Section 8, clause 3. In the Head Money Cases (1884), the US Supreme Court upheld a federal regulation on immigration for the very first time, basing federal authority on the Commerce Clause.

When the US Congress did begin to consistently regulate immigration in the late 19th century, the regulation was focused on Chinese immigration. In the Chinese Exclusion Case (1889), the Court began to look to congressional regulation over immigration as a “virtually unreviewable, plenary power.” The Court has continually cited plenary power to justify its action in immigration regulations, even though the language of the Constitution deals with “naturalization”, not immigration. In fact, in the 2012 decision in Arizona v. United States, Justice Kennedy wrote:

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. ... This authority rests, in part, on the National Government’s constitutional power to “establish a uniform Rule of Naturalization,” U. S. Const., Art. I, §8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations....

Naturalization vs. Immigration

Justice Kennedy’s language leads to the inevitable question: is there a difference between immigration and naturalization? Of course there is. Naturalization is the process by which a resident becomes a citizen entitled to the benefits of participation in the body politic. Immigration is simply the movement of people from one place to another -- one country to another, one state to another, one city or county to another. While Congress is granted the power to write the rules to govern naturalization in the US Constitution, the document does not grant power for the federal government to police states’ borders. That power was not granted to Congress, but left to the people (the states).
It is, admittedly, difficult for a nation as large as ours, with 50 states as “diverse” as ours, to institute different laws about immigration. Yet, a strict constructionist would say that such legislation is the inherent right of the state and should be shaped by the attitudes, needs and abilities of the state’s constituency. The problem arises with the consideration of liberal democratic (small “d”) principles of the rights of government and the natural rights of man. The Declaration of Independence speaks to the natural rights of man (“...that among these are Life, Liberty and the pursuit of Happiness.”) which, theoretically, cannot be denied by a government. So when a state such as Arizona “criminalizes” a person’s right to live in a particular place, it seems strangely odd and at odds with the concept of liberty. On the other hand, a state’s right to exclude someone who has not been “naturalized” does not criminalize; it merely regulates. Is this a distinction without a difference? The answer to that question depends on your political “stripe.”

Not So Simple...

The fact is that by the mid years of the 20th century, the Court had established that the right to deal with non-citizens goes to the “heart” of the federal power over foreign affairs of this country. This is true even if a state has a non-conflicting, co-existing scheme for non-citizens in its midst. See Hines v. Davodowitz (1941).

Painting with a broad brush, the Court said:

[W]here the federal government, in the exercise of its superior authority in this field [of immigration], has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulation.

In the 1970s the Court backed down from that position -- indicating that there may be room for state and local involvement in the regulation of the lives of immigrants, though not necessarily in regulating and enforcing the flow of immigration. One of the earliest examples of this is the case of DeCanas v. Bica (1976). This case established that states and localities could take up issues that would fall within basic state authority like health, safety and welfare. After the DeCanas case, the Supreme Court did not consider the question of the overlay of federal and state/local regulations of immigration again until the 21st century.
So after the Court’s reasoning in *DeCanas*, states got busy.

- California passed Proposition 187 in 1994. The proposition was enjoined in *LULAC v. Wilson*, the following year, determining that a state could not prevent noncitizens from assessing a variety of benefits. The court held that regulation of benefits to noncitizens is an exclusively federal prerogative.

- Undeterred, the Immigration Policy Project of the National Conference of State Legislators reported that in 2005 state legislatures considered about 300 immigration and immigration-related bills and passed around 50 of them.

- The following year, 2006, 500 bills were considered, and legislators passed 84 of them.

- In 2007 state legislators considered 1,562 immigration and immigration-related bills and passed 240 of them.

- In 2009 state legislators considered 1,500 such bills and passed 353 of them.

The ramifications of these bills impact the questions of immigration in all its aspects -- far and wide. Some intend to bar unauthorized citizens from housing and employment. Others increase immigrant eligibility for state benefits and enhance available English language education.

Because of the rapid movement of state and local governments to attempt to handle the immigration issues that the US Congress had failed to, the Court again addressed the primacy of the federal government in regulation of immigration, while delineating methods in which state and local authorities can regulate immigration in the signal cases, *Chamber of Commerce v. Whiting* (2011) and *Arizona v. US* (2012), the case challenging the constitutionality of SB 1070 which is Arizona’s 2010 statute.

In *Whiting*, the Court held that the provision of the Immigration Reform and Control Act of 1986 [IRCA] expressly approved state regulation of unauthorized workers through “licensing and similar laws.” The Court said that the Legal Arizona Workers’ Act [LAWA] -- which could result in the suspension or revocation of business licenses for those who knowingly employed unauthorized labor in the state -- was expressly permitted by the language of the IRCA. This ruling sanctions, in some measure, the dual exercise of power, shared by the federal government and local authorities.
Arizona’s legislature intended to share power and to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the US.” This legislation became the herald of discussions around local interventions into immigration regulation. In Arizona v. US, the Court struck down three (3) provisions of the law, including a provision that would have required non-citizens to be penalized by the state for failure to carry proof of their lawful status. (To support this decision, the Court cited Hines v. Davidowitz, and noted that Congress had already enacted comprehensive regulations in the area of noncitizens’ registration requirements.) The other two provisions that the Court struck down were found to be in conflict with existing federal law and in excess of authority given to federal agents with respect to “probable cause” detentions.

While this decision resulted in a number of federal courts declaring local statutes and ordinances unconstitutional, there remain various methods that locales can legally involve themselves in immigrant regulation. For example, states may legally deny non-citizens present in their state without authority numerous state benefits -- including all but the most basic emergency services. And locales with strong feelings can (and do) ignore many federal directives on the handling of immigrants.

Conclusion

While there is a uniform federal immigration law, and although the Supreme Court has declared unequivocally for over a century that the federal government has the exclusive power to make and enforce that law, the policies and practices of state and local governments throughout the country continue to shape the lived experience of the immigrants within their jurisdictions. Notwithstanding the letter of the law, federal immigration law is always mediated by powerful intervening forces at the state and local level. As the federal immigration policy continues to fail, and Congress continues to abdicate, the states and localities will slowly reclaim their abilities to shape immigration policy to adhere to the wishes of their constituents.

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Quarles was honored in 2006 by the American Bar Association’s Administrative Law and Regulatory Practice Section, receiving the Mary C. Lawton Award for lasting contributions to the Mississippi Workers' Compensation Commission in the areas of alternative dispute resolution and access for Hispanic workers. She is also a recipient of the American Society of Public Administrators’ Joan Fiss Bishop Award, honoring a woman who has promoted increased participation of women in public administration, exhibited a defined contribution to increase women's involvement in the public sector, and demonstrated innovative leadership and accomplished professionalism in her own public sector career.

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