Written by **Joe Wolverton, II, J.D.** on November 1, 2011

Obama Administration Challenges South Carolina Immigration Law

The measure (S.B. 20) was signed into law in June by Governor Nikki Haley, the daughter of Indian immigrants, and was set to go into effect on January 1, 2012.

According to the complaint filed by the Justice Department, if enforced, the South Carolina law would unlawfully conflict with federal immigration statutes and would contribute to a patchwork of state and local laws many of which would contradict currently operative federal immigration policies and principles.

Specifically, the filing claims:

> In our constitutional system, the federal government has preeminent authority to regulate immigration matters and to conduct foreign relations. This authority derives from the Constitution and numerous acts of Congress.

Governor Haley's office doesn't expressly disagree with the DOJ's version of the grant of constitutional authority over immigration, rather it is the federal government's lack of effective exercise of that power that prompted passage of the strict immigration law.

A spokesman for South Carolina governor Nikki Haley told the Associated Press, "If the feds were doing their job, we wouldn't have had to address illegal immigration reform at the state level. But until they do, we're going to keep fighting in South Carolina to be able to enforce our laws."

For its part, the Obama administration insists that by forcing businesses to participate in the E-Verify system and permitting law enforcement "to seek to punish unlawful entry and presence of aliens such as by requiring, whenever practicable, a determination of immigration status during any lawful stop, detention, investigation, or arrest" the state of South Carolina is violating the Equal Protection and Due Process Clauses of the 14th Amendment to the Constitution.

The 14th Amendment reads in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The complaint filed this week argues that while South Carolina has a legitimate concern about the influx of illegal aliens, it has no constitutional authority whatsoever to regulate immigration.

> The United States understands the State of South Carolina's legitimate concerns about illegal immigration, and has undertaken significant efforts both to secure our nation's borders and to address the problems created by unlawfully present aliens. The federal government, moreover, welcomes cooperative efforts by States and localities to aid in the enforcement of the nation's immigration laws. But the United States Constitution forbids South Carolina from supplanting the federal government's immigration regime with its own State-specific immigration policy – a policy

> that, in purpose and effect, interferes with the numerous interests the federal government must balance when enforcing and administering the immigration laws and disrupts the balance actually established by the federal government.

Following Arizona's passage of the highly publicized and federally challenged S.B. 1070, several states have proposed or passed similar measures aimed at stanching the flow of illegal aliens into their sovereign territory.

The Obama administration currently has legal challenges pending against the enforcement of at least a portion of the immigration laws enacted in Arizona and Alabama. Additionally, Assistant Attorney General Tony West told reporters that the Justice Department continues to review mounting legal challenges to similar laws being considered in Utah, Indiana, and Georgia.

In a press release accompanying the filing of the lawsuit, Department of Homeland Security Secretary Janet Napolitano said the law set to be enforced in South Carolina:

> diverts critical law enforcement resources from the most serious threats to public safety and undermines the vital trust between local jurisdictions and the communities they serve, while failing to address the underlying problem: the need for comprehensive immigration reform at the federal level.

In its challenge of the statutes of South Carolina, Arizona, and Alabama, as well as those being contemplated against similar laws in Utah, Indiana, and Georgia, the Obama administration continues to perpetuate the myth of federal exclusivity in the area of immigration law.

However, no matter the accumulation of judicial decisions or federal lawsuits filed by the executive branch claiming exclusivity, the fact is that the Constitution of the United States nowhere grants the national government the exclusive authority to regulate matters of immigration.

The entire universe of powers delegated to the Congress of the United States is contained with Article I, Section 8 of the Constitution. Therein are enumerated the powers ceded by the states and the people to the national legislature. Not one of the roughly 20 powers listed authorizes Congress AT ALL, much less exclusively, to establish immigration policy.

The closest the Constitution comes to placing anything even incidentally related to immigration within the bailiwick of Congress is found in the clause of Article I, Section 8 that empowers Congress to "establish an uniform Rule of Naturalization." That's it. There is no other mention of immigration in the text of the Constitution. Somehow, though, the enemies of the right of states to govern themselves have extrapolated from that scant reference to "naturalization" the exclusive and unimpeachable right to legislate in the arena of immigration.

The difference between immigration and naturalization is one of definition.

Immigration is the act of coming to a country of which one is not a native. Naturalization, however, is defined as the conference upon an alien of the rights and privileges of a citizen. It is difficult to understand how so many lawyers, judges, and legislators (most of whom are/were lawyers) can innocently confuse these two terms.

Before the states sent delegates to a convention in Philadelphia in 1787 to amend the Articles of Confederation (the result of which was the Constitution), they were already defending their sovereign borders by setting rules governing the means by which one could lawfully enter the state. That is to say, they were policing the immigration of aliens, an act undeniably within their right as a sovereign

government.

On not one single occasion during that summer of 1787 did any one of the 55 (on and off) representatives of the 13 states suggest the endowment of the new national government with the authority to set immigration policy for the entire nation. That is significant. Not even the most strident advocate of a powerful national government ever proposed granting the power in question to the central authority.

In fact, the sole reference to the federal government's power to regulate immigration is Article I, Section 9 wherein Constitution forbids Congress from interfering in the "migration or importation" of persons into the several states until 1808. That this limitation touched and concerned the slave trade and only the slave trade is patently obvious to anyone reading the debates of the delegates as recorded by James Madison and others who were present at the time. In fact, the wording of Article I, Section 9 is precisely worded so as not to be confused with any other article of the Constitution.

With all this in mind, it is a curious thing to consider how so many men and women trained in the law generally and in the interpretation of the Constitution specifically could collectively misread the plain language of that document. Do they not know that not a single pen stroke was made on that revered parchment ceding to Congress the power to control immigration?

Not only does the federal government NOT have exclusive authority over immigration law, but the silence of the document itself on the matter, as well as the legislative history of the laws enacted to carry out the Constitution's endowment of power, reveals that our Founding Fathers intended for the states to retain the plenary power to police their own borders, including deciding who may or may not pass through them or reside within them.

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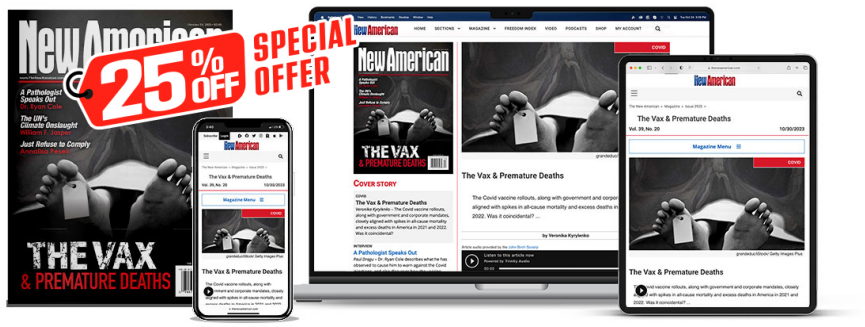

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