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The Search for Federal Immigration Authority

On September 9, the United States Court of Appeals for the Third Circuit upheld the injunction against Hazleton, Pennsylvania's Illegal Immigration Relief Act that was handed down by District Court Judge James Munley on July 26, 2007.

The Court of Appeals (and Judge Munley in his earlier decision) held that the Hazleton law was an unconstitutional encroachment into the area of immigration law that is exclusively within the purview of the government of the United States. That is to say, states have no authority to legislate with regard to the status of illegal immigrants living inside their sovereign borders.

The short-term effect of the decision is the temporary overturning of the Hazleton ordinance. The long-term effect, however, is much more deleterious to the continuation of the Republic established by the Constitution of the United States of America.

As reported in *The New American*, the Obama administration has perpetuated the myth of federal exclusivity in immigration law by filing suit against the sovereign state of Arizona seeking to enjoin enforcement of so-called S.B. 1070, the measure lawfully passed by the Arizona legislature and signed into law by Governor Jan Brewer.

No matter the accumulation of judicial decisions or federal lawsuits, 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 fifty-five (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.

During the process of promulgating specific laws that were necessary and proper to carrying out the enumerated power of setting the rules of naturalization, several Congressmen descanted on the proper constitutional boundaries meant to encompass congressional action in this regard. Much of this relevant and valuable historical record was recounted in an article written by Vincent Gioia:

> The exclusive authority to establish rules for naturalization was meant to guard against an improper mode of naturalization, rather than foreigners should be received upon easier terms than those adopted by the several States. [See CONGRESSIONAL DEBATES, Rule of Naturalization, Feb. 3rd, 1790, page 1148.]
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> During the debate about the Rules of Naturalization another representative, Representative White, noted the narrow limits of what "Naturalization" [the power granted to Congress] means, and he "doubted whether the constitution authorized Congress to say on what terms aliens or citizens should hold lands in the respective States; the power vested by the Constitution in Congress, respecting the subject now before the House, extend to nothing more than making a uniform rule of naturalization. After a person has once become a citizen, the power of congress ceases to operate upon him; the rights and privileges of citizens in the several States belong to those States; but a citizen of one State is entitled to all the privileges and immunities of the citizens in the several States.… All, therefore, that the House have to do on this subject, is to confine themselves to an uniform rule of naturalization and not to a general definition of what constitutes the rights of citizenship in the several States." [see: Rule of Naturalization, Feb. 3rd, 1790, page 1152.]
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> In the same debate still another representative, Representative Stone, concluded that the "laws and constitutions of the States, and the constitution of the United States; would trace out the steps by which they should acquire certain degrees of citizenship" [page 1156]. "Congress may point out a uniform rule of naturalization; but cannot say what shall be the effect of that naturalization, as it respects the particular States. Congress cannot say that foreigners,

> naturalized, under a general law, shall be entitled to privileges which the States withhold from native citizens." [See: Rule of Naturalization, Feb. 3rd, 1790, pages 1156 and 1157.]

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 charter. Surely they 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 to a man 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.

See the following related articles:

Is There an Enumerated Power Over Immigration?

Mexico Joins Suit Against Arizona; Illegals Sue Rancher for Civil Rights Violations

Federal Failure Sparks State Responses

First Hispanic Group Set to Join AZ Against DOJ Lawsuit

Federal Judge Blocks Enforcement of Key Provisions of S.B. 1070

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