

## 19. IMMIGRATION AND THE CONSTITUTION #1

Harrison H. Schmitt

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### **Former Senator Schmitt Joins in Alert About the Invasion Across America's Southern Border**

The United States of America's nearly five-century foundation of liberty and prosperity includes remarkable benefits arising from the motivation and skills of immigrants. Most who have come to our shores sought new lives and carried with them the unique characteristics of both the desire to live and raise their children in "the land of the free" and the willingness to risk all to do this. The genetic and cultural amalgamation of these naturalized immigrants has reinforced that special character that uniquely distinguishes "Americans," that is, hard working, productive, inventive, generous, and quick to fight to protect freedom anywhere it is threatened, including from within.

America, however, has been under a steadily accelerating invasion since the 1970s. Predominately crossing our southern border, this invasion has been propelled by three dominate factors: (1) normal human desires by highly motivated Mexicans to improve their lives, (2) illegal drug demand in the United States, and (3) intolerance for human liberty by Islamic radicals.

Since 1850, many sectors of our economy have employed temporary or "guest" workers from Mexico. For over a century, these migrant workers simply attempted to both support their families in Mexico as well

as learn new skills. Indeed, the truck farms, mines, oil fields, and tourism industry of Mexico owe their successes to the training migrants received as guest workers in the United States. In general, individual Americans and the economies of Mexico and the United States benefited from the labor of migrant workers, particularly during World War II. Until the 1980s, fluctuations in America's demand for relatively unskilled labor more or less managed this migration so that permanent immigration stayed at a minimum. At the same time, however, strained relationships have existed between many Americans and Mexicans, as well as between the two nations, because of the disparities in overall economic wellbeing, differences in cultural heritage, and repeated historical conflict.

In the early 1980s, a number of Senators and Congressmen proposed, based on economic realities and the past benefits of migrant worker availability, that the concept of "guest workers" be formalized by federal management of the national migrant worker supply so that it matched the available jobs not sought by American workers. Also, these sponsors felt that a well-managed system gradually could overcome the problems between workers and employers. At no time did this legislative effort consider amnesty

for illegal aliens a helpful or constitutional option.

Unfortunately, by 1986, organized labor in the United States had persuaded the Congress and President Reagan to reject this managed approach and, instead, imposed a fully restrictive system, the Simpson-Mizzoli Act. With its formalization of the illegal status of migrants while in the United States and the placement of the onus of immigration law enforcement on employers, this change caused former and future migrants to stay north of the border rather than face the dangers and hardships of coming back each year for work. In addition, those who stayed here found ways to bring their extended families across the border, rather than maintaining direct ties to their hometowns and extended families in Mexico.

The disastrous result of restrictive federal policy, as well as the growth of available welfare and educational benefits, has been an increase from the steady, cross-border circulation of about 2 million migrants in the 1970s to 15-20 million illegal immigrants 30 years later. The amnesty provisions included in the 1986 Simpson-Mizzoli Act only increased the flow of illegal immigrants, giving hope of another future grant of amnesty.

Clause 4 in Article I, Section 8, of the Constitution makes amnesty of any specific group of non-citizens unconstitutional as it give Congress only the power “To establish an *uniform* Rule of Naturalization.” A one time amnesty for illegal aliens hardly qualifies as a “uniform Rule” if other immigrants must follow a different process to become citizens. Amnesty for being in the United States illegally also created great resentment among naturalized Americans and legal residents following the normal course toward naturalization. Clearly, constitutional equal

protection of the law does not apply if federal amnesty targets a specific group.

The politically motivated lawsuit just filed by the Federal Government against the immigration enforcement law of the State of Arizona assumes that Article VI, Clause 2, the so-called Supremacy Clause of the Constitution, provides that federal law always trumps state law. Basically, this position maintains that the Congress, with the agreement of the President, can override any State law. The Founders would not have agreed. The relevant portion of Clause 2 actually reads, “**This Constitution**, and the Laws of the United States **which shall be made in Pursuance thereof**...shall be the supreme Law of the Land...” The underlined phrases clearly indicate that only the Constitution and federal law made by virtue of Congress’ enumerated powers are supreme; however, those laws enacted by the States under their 10<sup>th</sup> Amendment powers lie beyond the reach of federal law so long as State laws honor other constitutional rights of the people.

Again, the only power relative to immigration granted to the Congress is “To establish an uniform Rule of Naturalization.” Enactment of immigration law beyond this power must rest on Congress’ power to either (1) “provide for the common defence,” that is, to provide for border security or (2) make regular, that is, regulate the use legal migrant labor in interstate commerce. As border security is not being provided by the Federal Government nor is it intercepting illegal workers moving across State lines, a long list of precedents allow the States to enforce federal law. Those precedents include use of State law personnel to enforce speed limits on federally funded highways, drug laws, and crimes against financial institutions.

Current Congressional leadership and the President now appear intent on dealing with illegal immigration with national worker identification cards. Rather than handling worker immigration constitutionally, with full border control and a managed guest worker program, they will argue that Congress' power to "provide for the...general Welfare" found in Article I, Section 8, Clause 1, permits any form of federal legislation. The full Article I phrase, in fact, reads, "provide for the common Defence and general Welfare." Following Clauses in Section 8 are intended to limit the powers of the Congress to specific details related to these two primary functions, and none give Congress power to do anything politically or ideologically expedient for re-election. Of particular note in this regard is the lack of any Section 8 enumeration, directly or indirectly, of "immigration" or "national identification" among other stated areas that permit Congressional action. Again, Congress only is given the power "To establish an uniform Rule of Naturalization."

In spite of the lack of any clear constitutional power to do so, the Congress created the "e-Verify" program in 1997 as a federally coordinated system to assist employers in determining the legal status of new hires. Now under the management of the Department of Homeland Security in cooperation with the Social Security Administration, this program gradually has grown and become mandatory for federal contractors, although still voluntary for others. Political pressure has increased, however, to make e-Verify mandatory for all employers. In fact, the Federal Government has sued the State of Illinois to overturn a State law that prevents use of e-Verify in hiring.

As a national data bank exists to assist states in their efforts to control illegal immigration, an argument based on the regulation

of interstate commerce (Article I, Section 8, Clause 3) can be made for federal assistance to the States in this arena. Hiring of migratory workers clearly relates to commerce that encompasses many States and could be constitutionally regulated along that narrow line. A federal program that mandates use of e-Verify, however, unconstitutionally transfers immigration law enforcement responsibilities to the private sector and the States. Then the Justice Department sues Arizona, but not other states with similar laws, for enforcing federal immigration law. Where is the legal consistency in this Alice in Wonderland approach to providing for our common defense?

If, in addition to e-Verify, Congress attempts to impose national identification cards on all Americans, much less just on "workers," this would look very much like the identification papers that came with Germany's disastrous adoption of national socialism, adding to other trends in that direction now prevalent in the United States. Clearly, such cards, particularly if they contain personal information such as identifying DNA, runs afoul of the right to privacy guaranteed by the 9<sup>th</sup> Amendment. That Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The "certain rights" referenced by this Amendment, clearly include those specified in the 1<sup>st</sup> through 8<sup>th</sup> Amendments. Those "others retained by the people" logically would embrace all naturally encompassing, or intensive, human rights of a free people, for example, the "unalienable rights of life, liberty, and the pursuit of happiness," specified in the Declaration of Independence. Other such intensive rights include privacy as well as free association, education, travel, communication, and thought, in other words, natural rights that inherently belong to humans as a species.

The requirements for national security, the often dysfunctional nature of government in Mexico, and the explosion of unfunded welfare liabilities, unfortunately, have made it necessary to take entirely new approaches to illegal immigration. Not surprisingly, the Constitution, directly or indirectly, includes everything necessary for Americans to address the realities of modern immigration.

- **First**, under Article I, Section 8, Clauses 15 and 16, both the Federal Government and the States, together or separately, have the power to seal and enforce their international borders against illegal entry and one or the other, or both together, should do so. Also, Article I, Section 10, Clause 3 specifically gives the States the power "...to engage in War" when "actually invaded or in such imminent Danger as will not admit delay." Clearly, Arizona and other Border States are being "invaded" by both non-citizens who would rob their taxpayers and criminals who would conduct illegal drug and terrorism-related activities within their jurisdictions. As recent deaths and crimes show, delay in enforcement demonstrably constitutes "imminent danger" to all their citizens.
- **Second**, Border-States should petition for the consent of Congress under Article I, Section 10, Clause 3, to individually contract with Mexico for temporary workers as required for unfilled jobs in labor intensive industries within their respective borders. To avoid the scam Cuba perpetrated on the Carter Administration in 1980, these contracts should provide for joint vetting of workers relative to past criminal ac-

tivity and outstanding warrants. The 10<sup>th</sup> Amendment allows the States to work together to set up such a temporary worker program that serves their combined interests so long as Congress consents. In addition, under Article I, Section 8, Clause 3, the Federal Government has the power to "regulate Commerce" associated with the movement of temporary workers between States.

- **Third**, the States and the Federal Government should respectively legislate to stop the provision of State and federal privileges and benefits to non-citizens. Nothing in the Constitution requires that they receive equal protection of American laws. We also should revisit and reverse past legislative and Federal Court determinations that rights and privileges under the Constitution apply to anyone illegally within the jurisdiction of the United States or born within that jurisdiction under false pretenses. Those rights should only become available after naturalization based on a uniform, consistent procedure. On the other hand, under the 10<sup>th</sup> Amendment, State law could require various benefits be included in employment contracts between temporary workers and employers within State jurisdiction.
- **Fourth**, Congress should provide an efficient and uniform method of gaining legal residency, particularly for needed high-skilled workers, and restrict the issuance of green cards to the immediate, nuclear family of a legal resident.
- **Fifth**, the current system of using State-issued driver's licenses, or a

comparable document for non-drivers, to identify American citizens should be continued. It is constitutional under the 10<sup>th</sup> Amendment, but the various States must accept the critical nature of this responsibility and issue such identification only to citizens and legal residents. The driver's license system's resistance to counterfeiting should be improved continuously through the application of federal technological research necessary to prevent and detect counterfeiting, applicable to Congress' Article I, Section 8, Clause 6, power "To provide for the Punishment of Counterfeiting the Securities...of the United States."

These five actions, taken in total, particularly will benefit many Americans of Hispanic heritage by reducing employment competition from illegal immigrants and by reducing involuntary discrimination in hir

ing by employers now under federal regulatory intimidation.

There exists a *de facto* invasion of America by illegal immigrants and drug cartels from Mexico and parts of the southern hemisphere. The new Congress that convenes in 2011 and the new President taking office in 2013 must work to stop this invasion at the borders while resisting both amnesty for illegal immigrants and increased enforcement placed on the backs of individual Americans. Both approaches are unconstitutional and both encourage discrimination against American citizens of Hispanic heritage.

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*Harrison H. Schmitt is a former United States Senator from New Mexico as well as a geologist and Apollo 17 Astronaut. He currently is an aerospace and private enterprise consultant and a member of the new Committee of Correspondence.*