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Controlling Illegal Immigration: What Ohio and Every Other State Can Do

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Chair Sandra Harwood, Vice Chair Mark Schneider, Ranking Member Matthew Dolan, and committee members—thank you for this opportunity to share my thoughts and answer your questions to the best of my ability. The topic of this hearing is House Bill 184, the Ohio Job Integrity Protection Act.

Let me take a moment to provide you with my background. I practiced labor and employment law for five years in Ohio and Colorado. Since leaving the practice of law, I have served as the deputy regulator for then-Governor Bill Owens in Colorado. I left that position to join the fledgling U.S. Department of Homeland Security (DHS), where I was the chief of staff in what was then called the Office for Domestic Preparedness. When my supervisor resigned, DHS Secretary Tom Ridge named me as acting executive director of that office, which had been renamed the Office of State and Local Government Coordination and Preparedness. I led that office for 11 months.

Shortly after Michael Chertoff became Secretary of DHS, he and the Deputy Secretary asked me to serve as the policy and operational counselor to the Deputy Secretary. I performed that function concurrently with my other two positions at DHS (acting executive director and chief of staff). In that role, I participated in the development of today's federal border and interior policies. These policy developments included a shift from the capture-and-release policy to the detention-and-remove policy, the

Talking Points

- For state and local governments, the economic costs of illegal immigrants can be crushing.
- In order to truly tackle their illegal immigration problems, state and local governments must take a more aggressive approach than simply relying on the federal government.
- States need the authority to enforce their own laws dealing with illegal immigrants and those who employ, house, or otherwise aid them.
- The E-Verify system is inexpensive, efficient, and the best way to determine whether a foreign applicant is legally able to work.
- Federal appellate courts have found the use of the E-Verify system to be constitutional.
- Many other states have adopted the E-Verify system to ensure the jobs in their jurisdictions are filled by citizens and those lawfully present.

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much-needed transformation of the Citizenship and Immigration Services, and the increased focus on securing the border.

Today, I am a Visiting Fellow at The Heritage Foundation, a prominent public policy research organization in Washington, D.C., where I research and write on homeland security issues. In addition, I serve as an adjunct professor at The Ohio State University, where I teach a course called "Homeland Security and Terrorism: A Comparative Analysis of Responses within the Transatlantic Alliance," which includes an analysis of immigration and integration in the U.S. and Europe. In my new book, *Homeland Security and Federalism: Protecting America from Outside the Beltway*, I argue for a return to the American federalist system where state and local governments play a stronger role on the critical issues impacting the lives of Americans, including enforcement of immigration law.

Currently, I am heading a project for Heritage that seeks to develop solutions for state and local governments in four homeland security areas: (1) preparedness and resiliency, (2) disaster management, (3) enforcement of interior illegal-immigration laws, and (4) counterterrorism. It is The Heritage Foundation's fundamental belief that the U.S. Constitution created a federalist system in which the federal government possesses expressed, but limited powers, and in which the states and the people retain all remaining powers.

Specifically, the Ninth and Tenth Amendments firmly established the federalist system of government by first stating that the rights contained in the Bill of Rights should "not be construed to deny or disparage others retained by the people" and then adding the corollary limiting provision that "powers not delegated to the United States by the Constitution…are reserved to the States respectively, or to the people."[1] As James Madison noted in *The Federalist Papers*, "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the States."[2]

Immigration law is mostly covered in the Immigration and Nationality Act (INA) of 1952, the Immigration Reform and Control Act of 1986, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which amended the INA.[3] States need the authority to enforce their own laws dealing with illegal immigrants and those who employ, house, or otherwise aid them and, thereby, create greater pressure on the federal government to allocate the resources necessary to deal with America's illegal-immigration dilemma.

The highest hurdle for state and local governments to overcome in dealing with illegal-immigration issues within their jurisdictions is the Supremacy Clause of the U.S. Constitution. The Supremacy Clause states that, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[4] The Supremacy Clause gives the Congress the authority to preempt state and local laws "where concurrent jurisdiction exists."[5] Congressional preemption can occur explicitly through statutory language stating as much, or implicitly through intent to regulate an entire field or when state or local law conflicts with federal law.[6]

Specifically, in order for the federal law to preempt state law, the federal law must contain explicit language that such preemption was "the clear and manifest purpose of Congress."[7] On immigration

1. U.S. Constitution, Ninth and Tenth Amendments (1791).
2. *The Federalist Papers* 289, ed. by Clinton Rossiter (New York: Signet Classics 1999).
3. The McCarran-Walter Bill of 1952, Public Law No. 82-414 (1952).
4. U.S. Constitution, Article VI, Clause 2 (1787).
5. Blas Nuñez-Neto *et al.*, "Enforcing Immigration Law: The Role of State and Local Law Enforcement," Congressional Research Service *Report for Congress* RL32270 No. 5, August 30, 2007.
6. *Ibid.*

issues, because the Congress provided exceptions for state and local laws dealing with "licensing or similar laws" concerning the employment of illegal immigrants, the Congress failed to occupy the entire field of immigration law.[8]

In implied preemption cases, the U.S. Supreme Court noted three situations where implied preemption negates state or local laws: first, if the state or local law attempts to regulate immigration; second, if the federal law "occupies the field"; and third, if the state or local law conflicts with federal law.[9] When evaluating a preemption claim, the courts are required to "start…with the assumption that the historic police powers of the States [are] not to be superseded by…Federal Act unless that [is] the clear and manifest purpose of Congress."[10]

As the U.S. Supreme Court has found, state and local police power is "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people."[11] Those sovereign powers "proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before."[12] As the Fifth Circuit Court of Appeals concluded, "No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws."[13]

Moreover, as the U.S. Supreme Court noted: "States possess broad authority under their police powers to regulate the employment relationship and protect workers within the State."[14] As such, state and local actions "to prohibit the knowing employment by...employers of persons not entitled to lawful residence in the United States, let alone to work here, [are] certainly within the mainstream of such police power regulation."[15] In what is the strongest statement on this issue, the U.S. Supreme Court noted:

> Although the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service. Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.[16]

State and local governments have wide latitude to enact laws concerning traditional issues within their jurisdictions.

The issue under consideration today is the use of the E-Verify system in Ohio. Although the E-Verify system is not a panacea, it is a relatively inexpensive ($100 or less per employer), efficient (an inquiry takes 15 seconds or less), and reliable (96 percent) online method of ensuring that Ohio jobs are filled only by Ohioans and those who are lawfully present. With Ohio's unemployment rate at 10.8 percent and increasing, such a law would provide much-needed job opportunities for those out-of-work Ohioans at both the unskilled and skilled levels. Specifically, many entry-level jobs currently filled by illegal border crossers (who make up 60 percent of all illegals) and some technical-level jobs currently filled by individuals who have overstayed

7. *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 325 (1997).
8. 8 U.S. Code Sections 1324a(h)(2).
9. *De Canas v. Bica*, 424 U.S. 351, 357 (1976).
10. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).
11. *Manigault v. Springs*, 199 U.S. 473, 480 (1905).
12. *Sturges v. Crowninshield*, 17 U.S. 122, 193 (1819).
13. *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987).
14. *De Canas*, p. 356.
15. *Ibid.*, pp. 356–357.
16. *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982).

their work or education visas (40 percent of all illegals) would become open as those holding the jobs illegally were let go.

Two examples from other states illustrate these opportunities. First, 28 illegal workers were arrested in an employer raid in Bellingham, Washington, in 2009.[17] The unemployment rate in Whatcome County, where the raid occurred was 8.1 percent. More than 150 Americans applied for the jobs that became available after the employer raid.

The second example is from Vernon, California, where Overhill Farms employed 260 illegal immigrants who had used invalid or fraudulent Social Security Numbers (SSN) to get their jobs.[18] The issue came to light in 2009 after an Internal Revenue Service desk audit uncovered that the 260 employees had provided bad SSNs. Despite the findings, the federal government did "not mandate that those employees be fired." Overhill Farms made the decision to fire the employees only after talking with three different law firms (apparently forum shopping for a law firm that would give them the advice they wanted). Although the union representing the illegal immigrants cried foul, Overhill Farms "gave the workers 30 days to correct the problem with the IRS and provide the company with verification, but none did so." Not one of the 260 employees came forward with any proof that he was in fact a citizen or lawfully present in the United States. Once again illustrating both the fallacy that "Americans won't do this kind of work" and the importance of reserving U.S. jobs for legal workers, Overhill Farms filled all of the $10-an-hour jobs with citizens or legal immigrants at a time when California's unemployment rate was 10.9 percent.

Thirteen other states require the use of the E-Verify system for government employees, government contractors, and private-sector employers. Based on recent court decisions, state and local governments have wide latitude to enact laws concerning the use of E-Verify.

In February 2007, the City of Valley Park, Missouri, enacted an ordinance that prohibited the employment of illegal immigrants.[19] A business found violating the ordinance will have its license suspended.[20] In January 2008, the United States District Court for the Eastern District of Missouri (Eastern Division) found that "the Ordinance is a regulation on business licenses, an area historically occupied by the states."[21]

In May, the United States Court of Appeals for the Eighth Circuit issued a decision affirming the district court and noting that just because "Appellants do not have a business license does not exempt them from this ordinance. Appellants fall within the ordinance provisions and must, as law-abiding citizens, comply and conform their conduct according to its directive."[22] The Eighth Circuit went on to conclude that "as a business entity covered by the ordinance, Appellants may not knowingly recruit, hire for employment, or continue to employ, an unlawful worker to perform work within the City."[23]

Likewise, in Arizona, the legislature passed a law in 2007 aimed at employers who hire illegal immigrants. The Legal Arizona Workers Act (LAWA) gave "the Superior Court of Arizona…the power to suspend or revoke the business licenses of employers who intentionally or knowingly employ unauthorized aliens."[24] In February 2008, the United

17. Dan Springer, "Homeland Security Frees 27 Illegal Immigrants, Sends Them Back to Work," Fox News, April 1, 2009, at *http://www.foxnews.com/story/0,2933,512098,00.html* (August 16, 2009).
18. Patrick J. McDonnell, "Computer 'Raid' in Vernon Leaves Factory Workers Devastated," *Los Angeles Times*, June 12, 2009.
19. *Gray v. City of Valley Park, Missouri,* United States District Court for the Eastern District of Missouri, Eastern Division, Case No. 4:07CV00881 ERW, Memorandum and Order by Judge E. Richard Webber 9, January 31, 2008.
20. *Ibid.*, pp. 16–17.
21. *Ibid.*, p. 15.
22. *Gray v. City of Valley Park, Missouri*, Case No. 08-1681, Memorandum and Order (8th Cir. 2009).
23. *Ibid.*
24. *Arizona Contractors Association, Inc. et al. v. Napolitano et al.*, United States District Court for the District of Arizona, Case No. CV07-02496-PHX-NVW, Findings of Fact, Conclusions of Law and Order by Judge Neil V. Wake 2–3, February 7, 2008.

States District Court for the District of Arizona concluded that the initiative and the requirement to use the E-Verify system were constitutional.[25]

On September 17, 2008, the Ninth Circuit Court of Appeals—America's most liberal appellate court—issued its decision on the constitutionality of LAWA, which had been appealed by the plaintiffs after the District Court had found LAWA constitutional.[26] The Ninth Circuit concluded that LAWA was constitutional, that Arizona could require the use of the E-Verify system, and that the Supreme Court's holdings in the 1976 *De Canas v. Bica* were not superseded by the Immigration Reform and Control Act of 1986.[27]

Finally, on April 3, 2009, a Rhode Island Superior Court judge upheld Governor Donald Carcieri's executive order requiring government use of the E-Verify system by concluding that "[t]he executive order and the final regulation are a proper exercise of executive authority and do not violate any constitutional authority of the General Assembly."[28]

Critically, it is not for the courts to decide whether a particular state or local law is good public policy or not; rather, as the U.S. Supreme Court found, "debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision."[29]

For state and local governments to truly tackle their illegal immigration problems, they must take a more aggressive approach than simply relying on the federal government to do its duty and federalize a handful of state or local officers each year. There are many additional actions that state and local governments can take. Critically, state and local government action should "remove or reduce the economic incentives for unlawful presence."[30]

The costs of both legal and illegal immigrants can be difficult to determine. The Heritage Foundation estimated that low-skill legal immigrants without a high school degree receive "three dollars in government benefits and services for each dollar of taxes they pay."[31] Roughly "61 percent of illegal immigrant adults lack a high school diploma [while another] 25 percent have only a high school diploma."[32] The poverty rate for illegal immigrants is double the rate of Americans.[33] "Over a lifetime, the typical low-skill immigrant household will cost taxpayers $1.2 million dollars."[34]

For state and local governments, the economic costs of illegal immigrants can be crushing. For example, "up to 3 million people who illegally crossed the border" are living in Texas.[35] Depending on the education levels and familial status of those three million illegal immigrants, Texans could be paying more than $6 million per year in non-reimbursed government benefits and services.

Although the number of illegal immigrants is smaller in Ohio, the cost is still too much. Once again, thank you for the opportunity to appear

25. *Ibid.*, pp. 26–29.
26. *Chicanos Por La Causa, Inc. v. Napolitano*, No. 07-17272, 13081 (9th Cir. 2008).
27. *Ibid.*
28. *Rhode Island Coalition Against Domestic Violence et al. v. Carcieri et al.*, Case No. PC 08-5696, Memorandum and Order (Prov. Sup. Ct. Apr. 3, 2009).
29. *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, 190–191 (1938).
30. Immigration Reform Law Institute, "Planning for State Immigration Enforcement Legislation," 2006, p. 1, at *http://www.irli.org/Planning4StateImmEnfLeg.pdf* (August 16, 2009).
31. Robert Rector, "White House Report Hides the Real Costs of Amnesty and Low Skill Immigration," Heritage Foundation *WebMemo* No. 1523, June 26, 2007, at *http://www.heritage.org/research/immigration/wm1523.cfm*.
32. Robert Rector, "Amnesty Will Cost U.S. Taxpayers at Least $2.6 Trillion," Heritage Foundation *WebMemo* No. 1490, June 6, 2007, at *http://www.heritage.org/research/immigration/wm1490.cfm*.
33. *Ibid.*, p. 2.
34. Rector, "White House Report Hides the Real Costs of Amnesty," p. 1.
35. James Jay Carafano, "Heritage at the Border: Ideas that Make a Difference," Heritage Foundation *WebMemo* No. 1395, March 14, 2007, at *https://www.policyarchive.org/bitstream/handle/10207/12197/wm_1395.pdf?sequence=1* (August 25, 2009).

before you and answer any questions you might have on this important topic.

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