

FIVE QUESTIONS DEBATE IMMIGRATION REFORM

Below, two Federalist Society members pose and then answer questions about the Immigration Reform measures being debated in Congress.

We begin with Professor Eastman and Professor Stock posing and answering one question. **CHECK BACK SOON TO VIEW THE NEXT ROUND OF Q & A.**

Q1. EASTMAN: *During debate over immigration reform in 1986, many argued that an amnesty would simply encourage further illegal immigration, with the full expectation that subsequent amnesties would also be offered. The intervening years seem to have proved that contention correct beyond measure, with more than 10 million people currently living in the United States illegally. Our current non-enforcement policy has fostered “outlaw” communities of non-citizens amongst our midst, who not only work illegally, but who are bankrupting our social services systems and who, tragically, are preyed upon by trans-border thugs well aware that their victims will not report crimes for fear of deportation. This is no way to treat fellow human beings. Why should we expect that the new spate of amnesty proposals, whether denominated “guest worker” plans or something else, will not also continue the incentive for illegal immigration that the 1986 Act provided?*

STOCK: First, I would disagree with several statements contained within the question, but I'll try to address them in my answer.

While it is true that somewhere between 8 and 20 million people are currently living in the United States illegally, these illegals are not a result of the 1986 so-called "amnesty" laws. Most of the illegals here today are illegal as a direct result of the harsh "enforcement only" approach that the U.S. government has taken since 1996. Along with unrealistically low legal immigration quotas, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigrant Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 in particular--along with the numerous acts passed subsequently—have created an extraordinarily complex and harsh regime in which employers and family members find it nearly impossible to immigrate legally to the United States. Hundreds of thousands of parents, spouses, siblings, and children of U.S. citizens and lawful residents today cannot immigrate legally as a result of the 1996 and subsequent "reforms," and because blood is much thicker than the Byzantine rules of the more than five different federal agencies charged with enforcing the immigration laws, it is not surprising that the illegal population grows. It is also not surprising that immigration law is an increasingly profitable field for lawyers--few non-lawyers can navigate the system—and also a thriving field for criminals who profit from the complexity of the system and the lack of simple, legal avenues for immigration.

The current system is not one that is worthy of "a nation of immigrants"—it more resembles a concoction of Kafka's imagination. Today, federal agencies administer a system that has been called by DHS "a mystery and a mastery of obfuscation" and by federal judges "more complex than the Internal Revenue Code." While restrictionists call for more enforcement of this arbitrary and irrational system, even the agency charged with carrying out this enforcement admits that "enforcement only" will not work. To give just one example, one can look at how the numbers of border enforcement agents have gone up tremendously over the past ten years, and yet illegal immigration has soared even faster. Those who call for more "enforcement" would ignore the fact that "enforcement only" is what the government has been attempting—and utterly failing to do—for the past ten years.

What Congress should be doing is comprehensively overhauling the entire system—but in the face of the simplistic anti-immigrant rhetoric of the restrictionist forces, many in Congress are afraid to do the right thing. The best of the new spate of guestworker and regularization proposals are designed to create a rational, market-driven system, unlike the very irrational amnesty program of the 1980s, which had cut-off dates and applied only to limited numbers of people in particular industries. President Bush is right to call for a system that will be simple, responsive to market forces, and will at the same time meet the demands of our economy for labor—and for families to be reunited. Those who liken the current proposals to the 1980s "amnesty" program are simply not familiar with the details.

Q1. STOCK: *What makes you think that an "enforcement" approach will work now, when it's been failing spectacularly for the past ten years? What is the benefit to the country of deporting hundreds of thousands of families of American citizens and lawful permanent residents, even when most of these people are no threat to our nation's security? And finally, whether you favor border enforcement or interior enforcement, how do you propose to pay for it, given ballooning federal budget deficits, the increasing cost of the Global War on Terrorism, and the desire to shrink the federal budget and cut taxes?*

EASTMAN: I have never argued for an "enforcement only" plan of immigration reform, and describing my position as "restrictionist," as you imply in your answer to my first question, is erroneous rhetoric that only serves to inflame rather than enlighten. I have in fact been quite consistent in arguing for an *increase* in legal immigration, not as second-class guest workers but as full future citizens, committed to the principles of government by consent and the rule of law, and willing to take their place alongside the existing citizenry in allegiance to the United States. Of course, how much of an increase we can absorb at any given time is a policy judgment for Congress to make. If we think the existing policy judgment is wrong, we should work to change the law, not encourage massive violations of it.

The simple fact is that enforcement of existing law has been a farce. We occasionally step up border enforcement, but without any real seriousness. True enforcement would occur at the point of greatest incentive for illegal immigration—the workforce. And it would not take much of an effort. Although there is a portion of the illegal immigrant employment market that operates under the table, the bulk of it is in the open. Employers file withholding tax returns on these illegal employees, and dutifully receive back notices from the Social Security administration that the name and social security numbers do not match. At that point, any argument that the employer was unaware of the illegal status of his employee is gone (if it was ever credible at all), so imposition of significant fines on the employer would actually produce a significant decline in employers willing to use illegal immigrant labor. Dry up the job market, and you dry up the lion’s share of the incentive to illegal immigration. Moreover, this would be a relatively straight-forward and cost-effective means of enforcement, so I seriously doubt budget concerns should stand in the way of enforcing the law. Indeed, given the huge and well-documented drain on social services caused by illegal immigration, our government budgets would probably be much better off once enforcement efforts were actually tried.

My final point in response is to highlight your implicit acceptance of the “anchor baby” argument, which others who are opposed to enforcement of our immigration laws have assured me does not exist. You asked, “What is the benefit to the country of deporting hundreds of thousands of families of American citizens and lawful permanent residents, even when most of these people are no threat to our nation's security?” The families of which you speak are, to a significant extent, relatives of children who were born on U.S. soil to parents who were in this country illegally. To claim now that we should not deport the parents because their own illegal conduct allowed them to give birth to U.S. citizens would make a mockery of our immigration laws. Moreover, the claim is based on an erroneous interpretation of the Citizenship Clause of the U.S. Constitution (albeit one that has simply been assumed for about a century). The Citizenship Clause of the 14th Amendment actually has two components: 1) “All persons born or naturalized in the United States,” and 2) “and subject to the jurisdiction thereof,” . . . “are citizens of the United States and of the State wherein they reside.” The claim of birthright citizenship is particularly troubling in the context of illegal immigrants, for it permits those who have not followed our law, who have not adopted the United States as their own country and sworn their allegiance to it, to nevertheless demand that the United States confer the privilege of citizenship upon their children (and derivatively upon them as well). The original intent of the 14th Amendment was to mandate that those born on U.S. soil *and* who were subject to the full and complete, allegiance-owing, can-be-prosecuted-for-treason jurisdiction of the United States, would be citizens.

**Professor John Eastman is a professor at Chapman University School of Law.*

**Professor Margaret Stock is a professor at the United States Military Academy at West Point.*