

FIVE QUESTIONS DEBATE
IMMIGRATION REFORM
UPDATED APRIL 6, 2006

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 two sets of questions. **CHECK BACK SOON TO VIEW THE THIRD ROUND OF Q & A.**

FIRST ROUND OF QUESTIONS AND ANSWERS

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.

SECOND ROUND OF QUESTIONS AND ANSWERS, UPDATED 4/6/06

Q2. EASTMAN: *Unless we restore the original understanding of the Citizenship Clause and remove the incentive to illegal immigration that comes from false claims of birthright citizenship, aren't the current guest-worker proposals only going to exacerbate*

the problem? Won't the claim against forcing guest workers back to their home countries after another 6 years, separating them from even more "anchor baby" family members, be even stronger than it is today?

STOCK: The United States would not be experiencing the current levels of illegal or unauthorized immigration if supply and demand took their natural course, unimpeded by bureaucracy and irrational laws. The US economy demands workers; American family members want to be united with their foreign-born family members; and yet the legal immigration system imposes unreasonably low quotas on workers, bars much family member immigration altogether, and has created a myriad of inefficient and nonsensical rules that virtually ensure that illegal migration continues. If Congress were to increase the unreasonably low quotas for legal workers (about 5,000 unskilled workers per year are currently allowed to immigrate) to a level commensurate with the demand of the modern American economy, and if Congress were to likewise increase the quotas for family members so that they do not have to wait a decade or more in most cases to immigrate legally, we would have little illegal immigration. This is simple economics. The President and many members of Congress are for this reason trying to change the law. The erroneous rhetoric comes from those who argue that the existing law can be enforced, when it cannot. Blood is thicker than borders.

Enforcement of existing law, particularly in the workplace, is much more difficult than restrictionists admit. It would take a great deal of effort to verify the legality of every worker in the current workforce; the current system is essentially an "honor system" where employers take people's word that they are American citizens or nationals (although some verification of aliens occurs). Proving eligibility to work is not a simple matter of matching names and Social Security numbers—recent experience with the Social Security matching programs makes this clear. To understand why this is so, however, requires a fairly sophisticated understanding of the Social Security number system. One must understand that for most of the workforce, having a name match a number does not mean that the person is authorized to work. Professor Eastman, for example, is old enough to have been issued a Social Security number when the Social Security Administration issued numbers to anyone who asked, regardless of his or her immigration status or eligibility to work. No one at the Social Security Administration verified Professor Eastman's citizenship or eligibility to work; they simply issued him a number, and as long as he gives his name and number, the system will tell his employer that he is a "match"—but it will not tell his employer that he is a U.S. citizen, and the employer will just have to take Professor Eastman's word for that. Furthermore, a name not matching a number does not necessarily mean that a person is unauthorized, as any married, female US citizen who has taken her spouse's name can tell you—thousands of such women are pegged as "possible unauthorized aliens" each year. The Social Security Administration will tell you, in its reports, that its name/number matching system does not verify a person's eligibility to work or citizenship, nor does it verify a person's identity—the system merely verifies whether the name offered matches, in SSA records, the number offered. "Enforcing" this system nationwide as a proxy for employment eligibility would not only be ineffectual, it would result in economic chaos, as the technology to do so is not in place and would require funding for a national database of

all authorized workers, something the United States does not yet have. If we are going to enforce this system, we should at least have a national debate on the costs and benefits of doing so, rather than just assuming that it is an easy matter. For a good article discussing some of the problems with the current system, see June Kronholz, "Business Groups Fault U.S. Plan To Identify Illegal Workers," Wall Street Journal, March 16, 2006; Page B1.

U.S. unemployment right now is 4.8%, which is considered "full employment." Unauthorized workers are thought to make up more than 5% of the workforce, and are more than a third of the workers in some key industries (agriculture, construction). "Enforcement" against all these workers is simply not feasible without massive expenditure of money, abandonment of most other federal programs, and economic chaos. Drying up this job market, as Professor Eastman suggests, is a recipe for undermining the economy.

The families of which I speak are not all "relatives of children who were born on U.S. soil to parents who were in this country illegally." This is a overstatement perpetrated by restrictionists. Having practiced in the area of immigration law for many years, I know who the "unauthorized" are—they are most often the spouses of American citizens and lawful permanent residents, the brothers and sisters of American citizens and permanent residents, the children of American citizens and permanent residents; visa overstayers; and persons who have fallen out of status in a myriad of other ways, often through some government mistake or failure to process their paperwork in a timely fashion. Many of them are victims of abuse whose spouses refuse to file papers for them. The unauthorized are not living apart from the rest of America, but live among us. Thousands of federal government employees, for example, have "illegal" spouses—mostly because restrictive immigration laws make it difficult or impossible for the foreign spouses to get papers. It's popular to claim that the huge numbers of illegals are all the parents of so-called "anchor babies," but this is inaccurate. It's especially inaccurate because the US government regularly deports the illegal parents of U.S. citizen children—under current law, the parents of minor U.S. citizen children are not permitted to stay in the US unless they can qualify for one of a very limited number of exceptional hardship waivers (5,000 per year). Under current policy, these parents of so-called "anchor babies" are regularly deported, and they take their children with them. As a result, we now have whole colonies of U.S. citizen children growing up outside our borders.

Professor Eastman claims that the Supreme Court of the United States has erroneously interpreted the Citizenship Clause of the U.S. Constitution, and has testified on this topic (see <http://judiciary.house.gov/media/pdfs/eastman092905.pdf>). In fact, Professor Eastman's interpretation would bring back the discredited views of Chief Justice Taney, who in the infamous Dred Scott decision held that African-Americans were not citizens of the United States. (Taney relied on a theory—rooted in European continental tradition—that citizenship required the consent of the polity in which the person was born; this theory contrasts starkly with the Anglo-American tradition of citizenship by ascription.) Professor Eastman's "original interpretation" argument is disputed by many scholars, and others have more convincingly argued that the "original intent" of the

Citizenship Clause was to confer American citizenship on all those born inside the borders of the United States, excluding only those who entered under the auspices of another sovereign and with immunity from US law (such as diplomats). I invite readers of this debate to explore the arguments presented in Chapter 9 of Gerald L. Neuman's book, *Strangers to the Constitution*, for more details.

Professor Eastman's interpretation of the Citizenship Clause is also extremely problematical from a practical perspective, as it threatens the citizenship of many more Americans than just the children of illegal aliens. To provide just one example, Professor Eastman would call into question the birthright citizenship of the US-born children of the millions of Americans who hold dual citizenship—including, interestingly, the children of every British subject who has naturalized as a U.S. citizen (the British government continues to recognize naturalized British-Americans as British subjects, even if they renounce British citizenship upon naturalizing in the United States).

Eliminating birthright citizenship is not practical nor feasible, and doing so will not reduce illegal migration. What will reduce illegal migration is sensible and yet comprehensive immigration reform. Our immigration laws are currently a mockery of our history and heritage as a "nation of immigrants." They must be reformed, because in their current form it makes no sense to try to enforce them. We have been enforcing them for the past ten years, and we have only created ever-larger numbers of illegal or unauthorized people within our borders.

Q2. STOCK: *The US economy will not continue to thrive if we cannot successfully compete with European and Asian nations whose own workforce needs are increasingly driving them to open up new paths for immigrants. The United States needs immigrant workers to offset a shrinking labor force—shrinking because of pending baby boomer retirement and low birth rates. The Bureau of Labor Statistics projects that the US will create 21 million new jobs by 2012, and will have 56 million new job openings, due primarily to an aging workforce. The current low quotas for legal workers—coupled with the current serious restrictions on qualifying for these visas—will not meet these demands. Additionally, our national security is increasingly threatened because our restrictive immigration policies mean that the United States no longer attracts the world's top scientific and technical talent. What is your solution to this very real need for workers, given that you favor deporting the estimated 8-20 million unauthorized aliens who are currently living inside the United States? Which of the current House and Senate immigration proposals do you favor, and why?*

EASTMAN: There you go again with that word "restrictionist." As I've made very clear, I support an increase in legal immigration, capped only by the policy judgment of Congress on the level of immigration that can be absorbed at any given time. As we've seen from the riots in France, and even the mass protests in recent days here in the U.S., the introduction into any society of millions of immigrants who still feel an allegiance to their native country can pose real problems for the very existence of a body politic.

But your second piece of false rhetoric, contending that my interpretation of the Citizenship Clause “would bring back the discredited views of Chief Justice Taney” in *Dred Scott*, is really beyond the pale. African-Americans, whether slave or free, were born in the United States and subject to its complete and exclusive jurisdiction, and are therefore entitled to full citizenship under my interpretation of the 14th Amendment. Indeed, the whole point of the Citizenship Clause was to mandate that African-Americans be deemed citizens, and nothing I have stated even remotely suggests otherwise.

Your position boils down to this. We would have less *illegal* immigration if we made all immigration legal. Well, we would have less of an illegal drug trade if we decriminalized drugs, too, but that really begs the question of whether we should have restrictions on immigration or on drugs. Those are hard policy judgments, but one thing is clear to me. They should not be driven exclusively by the economics of the matter. Economics was the argument put forward to retain slavery after the invention of the cotton gin, and it is being put forward now by those who wish to have a ready supply of cheap labor, despite the drain on social resources or the creation of communities set apart from the rest of us and relegated to a second-class status that would result. The latter concern is particularly acute with respect to the various guest worker proposals being offered.

I am heartened, though, that you fully embrace my concern about birthright citizenship. “Blood is thicker than borders” proves the point that conferring automatic citizenship on the children of people who are in this country illegally only serves as a draw for future illegal immigration. The tens of thousands of protestors in Los Angeles this past week confirm the point as well. These “birthright” children of the soil are demanding that their parents, aunts and uncles now be afforded citizenship in a country they entered illegally. Your claim that the U.S. “regularly” deports the parents of these “birthright” children, and that the parents take their children with them, is grossly misleading, as it does not adequately convey how relatively few those deportations are in comparison to the number of illegal immigrants still residing here with their children. And it is utterly disproved by this week’s news.

Your argument about the Social Security administration is a straw man. I never said that having a valid social security number proves eligibility to work, only that having an invalid number is a pretty good indication of ineligibility. That mistakes are made by any bureaucracy as big as the Social Security administration does not alter that fact, and I am fully confident that even the Social Security administration can distinguish between its error regarding my wife’s efforts to change her name when we married, and the completely fraudulent use of social security numbers that come as part of a coyote’s illegal immigration package of phony documents.

You are right that my position on birthright citizenship would call into question the citizenship of those who claim to hold dual citizenship. Our naturalization oath actually requires that citizens renounce all other allegiances, so where did we get this notion of dual citizenship in the first place? It is not to be found in our statute books, which do not recognize it. It is not to be found in logic, for it is self-contradictory. It is, rather, found only in the eye-wink of state department bureaucrats who seem bent on denying the very

basic premises of sovereignty. “We are the world” may be a nice song for Hollywood, but it has no place in our existing law.

Now to your question. One of the reasons there is such a demand for illegal immigrant labor in this country is the draconian regulations imposed on employers who try to hire legal labor. Minimum wage laws render unemployable a good portion of the unskilled labor pool of legal U.S. citizens—just look at the unemployment rates among inner city black youth for confirmation. Do you favor a reduction of the minimum wage laws (or blatant disregard of them, as you do of the immigration laws) in order to help meet the labor demands of the U.S. economy? Mandated benefits, such as those recently imposed by the State of Maryland on Wal-Mart, knock out a good slice of unskilled or low-skilled labor as well. Shall we repeal all those mandates, or just ignore them? How about the numerous laws that make it almost impossible to fire anyone (at least anyone legal) in the workplace? Shall we repeal those laws? Workers compensation laws and the broken tort system also add significantly to the cost of hiring *legal* workers, providing a strong incentive for hiring *illegals*. Why don't we focus our attention on these massive barriers to the competitiveness of American business before toying with permitting such a massive influx of illegal immigrants as is likely to overwhelm our institutions, our security, and our very way of life? I favor Representative Deal's bill to extend the offer of citizenship to children of legal, permanent residents. I favor a significant increase in the number of visas for permanent residence that we will offer. But I do not favor perpetuating any of the incentives to massive *illegal* immigration, which at the moment is threatening our very sovereignty. As for the specifics of the other particular bills pending, I think the bill offered by Senators Cornyn & Kyl in the Senate, and the bills offered by Representatives Sensenbrenner and Hunter in the House, have much more to commend them than the McCain/Kennedy bill, the Frist bill, or the Specter bill, including more stringent employment verification requirements, enhanced workplace enforcement and penalties, provision for expedited removals of persons entering the country illegally, and enhanced border patrol and security. I am particularly troubled by the guest-worker provisions in the Specter and McCain-Kennedy bills, though, and even in the Cornyn-Kyl bill, for the reasons I stated in my first question. I think those proposals, like the 1986 Amnesty bill, will only encourage future flouting of whatever immigration laws we adopt, by people confident that we'll have another round of amnesty in another 10-20 years to deal with the new illegal influx. The Cornyn-Kyl bill at least has the benefit of requiring that the guest worker maintain a residence in the country of origin, though I doubt that the requirement is enforceable.

**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.*