

A RESPONSE TO MARGARET STOCK†

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I would like to offer several points in response to Margaret Stock's presentation. First, she described how the Declaration of Independence criticized King George for limiting immigration.¹ On one hand, that is correct, but on the other hand, the Founders were not open-borders advocates.² Their chief objection to King George was that he was not allowing immigration to proceed in accordance with the Laws for Naturalization of Foreigners, not that he refused to embrace unlimited immigration.³ The Founders may not have yet agreed on a detailed immigration policy, but they at least agreed that immigration to the United States should be limited according to the laws adopted by the newly-formed republic.⁴

Second, Ms. Stock states that the current system is broken and dysfunctional and that the real solution to this problem is for Congress to reform the current laws. She posits that the only good that will result from the Arizona statute is the possibility of comprehensive immigration reform, presumably including an amnesty for illegal aliens. This is unfortunately a familiar Washington tune: if a problem exists, what we need is for Congress to pass a law, and the problem will be solved. Unfortunately, that is not reality. In so many areas, Congress passes a law, and that law only compounds the problem.

Federal immigration laws are not at all dysfunctional, and even if there were problems in the structure of the laws, we would have no way of knowing the scope of the problems because federal immigration laws

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¹ THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

² THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 149 (2001).

³ THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

⁴ WEST, *supra* note 2, at 159.

have never been fully executed as intended.⁵ Before embarking on widespread legal reforms, the government should simply enforce the current laws thoroughly and systematically across the country.⁶ If the laws were actually enforced as intended, the system would likely work, and work well. Any dysfunction in the system stems chiefly from a failure to enforce the law as written, rather than an inherent failure in the law itself. Having Congress weigh in with a so-called comprehensive reform act (including an amnesty) will not improve the situation; indeed, depending on the content of such an act, it may make things much worse.

Third, Ms. Stock argues that some areas of the country do not have enough Immigration and Customs Enforcement (“ICE”) agents to pick up the illegal aliens that may be arrested by Arizona police officers. Again, while this may be correct,⁷ the Arizona law does not demand or require that the ICE agents come running to take custody of every illegal alien arrested.⁸ It merely provides the federal government the opportunity to do so—if the phone call is made and the federal government is unable to respond, then so be it. S.B. 1070 simply requires Arizona law enforcement officers not to turn a blind eye when they encounter illegal aliens in the course of enforcing other laws.⁹

Fourth, Ms. Stock asserts that Arizona’s law conflicts with Congress’ strategy. She does not, however, cite any statute that embodies—or even hints at—a strategy of not enforcing certain laws or tempering enforcement in certain parts of the country. Her argument boils down to this: because Congress has not allocated enough resources to federal enforcement agents to enforce all of our laws vigorously, Congress has therefore implied that the states should enforce only some laws, or only enforce immigration laws against illegal aliens who have committed certain crimes. While no statute supports this assumption, we are asked to discover it in the penumbras and emanations of other congressional actions. Such attenuated arguments do not amount to a valid preemption claim.

Finally, Ms. Stock argues that the federal government would prefer that Arizona use the existing statutory procedure of Section 287(g)¹⁰

⁵ See Mark Krikorian, *Obama Won't Enforce Existing Immigration Laws*, HUMANEVENTS.COM (May 6, 2010), <http://www.humanevents.com/article.php?print=yes&id=36853>.

⁶ See *id.*

⁷ See Alia Beard Rau & JJ Hensley, *Police Weighing Bill's Impact*, ARIZ. REPUBLIC, Apr. 22, 2010, at A1.

⁸ See generally, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

⁹ See Ariz. S.B. 1070 § 2.B.

¹⁰ Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006).

rather than implement its own system. Section 287(g) defines a process by which a state can enter into a formal agreement with the federal government to deputize state law enforcement officers as ICE agents with federal law enforcement powers.¹¹ Seventy-one law enforcement agencies around the country participated in this program as of October 2010.¹² The problem with this argument is that the Obama administration is actually scaling back the 287(g) program.¹³ States will not be able to utilize 287(g) if the executive branch does not permit them to do so. Notably, Sheriff Joe Arpaio's Maricopa County is the jurisdiction that has most aggressively and effectively used its 287(g) authority, making more than three times the number of 287(g) arrests in 2008 than any other jurisdiction.¹⁴ The Obama administration has been taking steps to prevent this from continuing.¹⁵

Ms. Stock also neglected to mention sub-section 10 of 287(g).¹⁶ Sub-section 10 affirms that the 287(g) mechanism is not an exclusive method for cooperating with the federal government on immigration enforcement.¹⁷ Thus, Congress contemplated immigration arrests by state and local jurisdictions, outside of 287(g) agreements. Furthermore, at the same time that Congress enacted 287(g), it enacted 8 U.S.C. § 1373,¹⁸ which requires the federal government to respond to any inquiry coming from any state or local law enforcement officer about a person's immigration status.¹⁹ Through these statutes, Congress unambiguously evinced intent for state and local officers to assist in illegal immigration detection and enforcement.

I will conclude with one final point. Contrary to what some people may think, ICE does not regularly patrol for illegal aliens. In many

¹¹ *Id.*

¹² *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa> (last visited May 21, 2011).

¹³ See Jon Feere, *DHS Task Force Seeks Weaker 287(g)*, CTR. FOR IMMIGRATION STUDIES (Oct. 2, 2009), <http://www.cis.org/feere/weaker287g>; Krikorian, *supra* note 5; Memorandum of Recommendations from the Homeland Sec. Advisory Council Sw. Border Task Force to Sec'y of the Dep't of Homeland Sec. Janet Napolitano 6 (Sept. 30, 2009), available at http://www.dhs.gov/xlibrary/assets/hsac_southwest_border_task_force_recommendations_september_2009.pdf.

¹⁴ JESSICA M. VAUGHAN & JAMES R. EDWARDS, JR., CTR. FOR IMMIGRATION STUDIES, *THE 287(G) PROGRAM: PROTECTING HOME TOWNS AND HOMELAND 7* (2009), available at <http://www.cis.org/articles/2009/287g.pdf>; Dan Nowicki, *Feds' New Tone Puts Arpaio in Hot Seat*, ARIZ. REPUBLIC, Mar. 15, 2009, at 1.

¹⁵ See Nowicki, *supra* note 14.

¹⁶ 8 U.S.C. § 1357(g)(10) (2006).

¹⁷ See *id.*

¹⁸ Act of Sept. 30, 1996, Pub. L. No. 104-208, § 133, 642, 110 Stat. 3009-563, -564, -707.

¹⁹ 8 U.S.C. § 1373 (2006).

instances, ICE is dependent on other agencies for initial detection and detention of illegal aliens. ICE officers spend a lot of their time preparing for specific raids and developing cases for alien removal. In many parts of the country, state and local law enforcement officers are ICE's primary eyes and ears on the field who initially detect and detain illegal immigrants. This requires a cooperative relationship between ICE and local law enforcement.²⁰ For example, in Maricopa County, which covers sixty percent of the population of Arizona,²¹ ICE gets a large percentage of its leads from the Maricopa County Sheriff's Office. Because the Sheriff's Office detects so many illegal aliens and alien smugglers, they can give leads to ICE, which can then concentrate its efforts on big raids—safe houses, drop houses, and the smuggling operations themselves.²² Again, this results in a very efficient and mutually beneficial relationship, but its foundation rests upon state and local law enforcement utilizing their authority to make arrests and assist ICE. By attacking states that are using this authority, the Obama administration is shooting itself in the foot.

It is really quite simple: state and local officers, who are on the ground permanently and know the area, focus their efforts on small-scale, local matters, such as particular illegal aliens who may be involved in committing additional crimes beyond their immigration violations; and the federal government, using the states as a force multiplier, can focus on larger-scale operations such as alien smuggling networks, alien street gangs, and large employers of illegal aliens. In addition, the federal government can take custody of the individual illegal aliens arrested by state and local officers and initiate removal proceedings against such aliens. Federalism, the system upon which this republic was built, works when it is permitted to function as constitutionally intended.

²⁰ See *Combating Border Violence: The Role of Interagency Coordination in Investigations: Hearing Before the Subcomm. on Border, Mar., & Global Counterterrorism of the H. Comm. on Homeland Sec.*, 111th Cong. 12 (2009) (statement of Kumar C. Kibble, Deputy Director, Office of Investigations, U.S. Immigration and Customs Enforcement, Department of Homeland Security).

²¹ *State and County QuickFacts: Maricopa Country, Arizona*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/04/04013.html> (last visited May 21, 2011).

²² See Press Release, U.S. Immigration & Customs Enforcement, ICE Teams up with County Sheriff, Adult Probation To Target Deportable Criminals in Phoenix Area (Feb. 14, 2008), available at <http://www.ice.gov/news/releases/0802/080214phoenix.htm>.