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Is There an Enumerated Power Over Immigration?

In Judge Susan Bolton's ruling granting the federal government partial preliminary injunction of several key provisions of Arizona's S.B. 1070, she made specific reference to the exclusivity of federal power to regulate immigration. Arizona, she held, should be prohibited from legislating in an arena that the Constitution meant to be within the zone of federal power.

Where is the constitutional basis for Judge Bolton's ruling? Is there a clause of that document endowing Congress with power to promulgate laws drawing the circumference of immigration policy and procedure? If such a clause exists, discussion of S.B. 1070 would be moot as that law would fail constitutional muster as an exercise of a power delegated to the federal government. What follows is an inquiry into the existence or absence of federal authority over immigration.

In all the clauses of Article I, Section 8 of the Constitution there is found no enumeration of power over immigration given to Congress. Notwithstanding this void, in the dicta of her opinion Judge Bolton wrote: "The Supreme Court has consistently ruled that the federal government has broad and exclusive authority to regulate immigration, supported by both enumerated and implied constitutional powers."

Where, exactly, is congressional authority to regulate immigration found in the Constitution? The enumeration in the Constitution of specific powers delegated to the federal government is the cornerstone of American political theory and of the Constitutional Republic established in 1787. The basic definition of enumerated powers is that the best limitation on power is to not give it in the first place. Powers, as understood by Madison, Jefferson, et al., were only legitimate if they had been granted to the government by the people and written specifically in the document through which the governed gave life to the government — the Constitution.

"We the People" says the Preamble to the Constitution, established this government. All powers assigned to the government in the document were originally (and ultimately) held by the people. No original, organic, or self-possessed powers existed in the government. The government is an artificial creation of the people and is powerless but for their endowment of a specific roster of powers to it.

Does the requisite enumeration exist in Article I, Section 8 wherein is found the universe of legislative powers ceded to the federal government by the states that gave it life? Given the attention accompanying the passage, enforcement, and injunction of Arizona's S.B. 1070, it is instructive and imperative to the perpetuation of our Republic to investigate the constitutional vitality of the law and the legal wrangling over its future and its fairness.

It is well known that one of the primary purposes of the Constitutional Convention of 1787 was the establishment of a government sufficient to redress the weaknesses of the Articles of Confederation. Under the Articles, states retained a near total amount of self-determination and autonomy, leaving the union impotent in matters that required an "energetic" federal authority. This seemingly insuperable situation spurred the Founders to long for "a more perfect union," one that would be at once a safeguard of liberty and a unifying force endowed with power sufficient to hold 13 sovereignties together into one equally sovereign whole.

During the ratifying convention held in Virginia in 1788, a question was raised regarding the scope of the surrender of sovereignty that would be required of states whose representatives were rightfully jealous of maintaining the rights of their home states. Would the proposed charter protect the rights of states to continue governing themselves? George Mason, a delegate to the Constitutional Convention in 1787 who refused to sign the Constitution saying that he would rather "chop off his right hand than put it to the Constitution," said:

> But I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the states. Otherwise, the power of providing for the general welfare may be perverted to its destruction. Many gentlemen, whom I respect, take different sides of this question. We wish this Amendment to be introduced to remove our apprehensions. There was a clause in the Confederation reserving to the states respectively every power, jurisdiction, and right, not expressly delegated to the United States.

A pair of amendments similar to those recommended by Mason was eventually appended to the Constitution, known as the Ninth and Tenth Amendments. Read together, these amendments work to restrict the powers of the national government to those enumerated in the Constitution, as well as to protect the sovereignty of the states against alienation by the government of the United States.

The application of the dual principles of a national government limited by enumerated powers and the retention by states of their right to govern within their boundaries to the issue of immigration is a timely one. Historically, Thomas Jefferson spoke on the matter:

> Alien friends are under the jurisdiction and protection of the laws of the state wherein they are; that no power over them has been delegated to the United States, nor prohibited to the individual states, distinct from their power over citizens; and it being true, as a general principle, and one of the amendments to the Constitution having also declared, that "the powers not delegated to the United States by the Constitution, nor prohibited to the states, are reserved, to the states, respectively, or to the people," the act of the Congress of the United States, passed the 22d day of June, 1798, entitled "An Act concerning Aliens," which assumes power over alien friends not delegated by the Constitution, is not law, but is altogether void and of no force.

Is the same true of the entire panoply of federal immigration laws and regulations? Has the government of the United States enacted a slate of laws for which there is no constitutional authority? In the absence of explicit, enumerated authority to legislate, the power remains with the states and the people. The responsibility for deciding who may or may not enter a state is upon the government of that state, and not the national government.

Arizona's expression of its legislative will setting criteria for whether an immigrant may remain within

its borders is, therefore, absolutely legal and without vulnerability to claims of federal exclusivity. Moreover, not only is there no federal supremacy over state laws with regard to immigration policy, but there is no constitutional accession of federal jurisdiction over immigration whatsoever. As President Ulysses S. Grant wrote in a memo to the House of Representatives: "Responsibility over immigration can only belong with the States since this is where the Constitution kept the power."

In light of the foregoing constitutional exegesis, it appears that in order for Attorney General Holder and his boss, President Barack Obama, to preserve legal standing for the central claim of their action against Arizona, namely that "the power to regulate immigration is vested exclusively in the federal government," they must point to the precise point in American jurisprudential history that the states relinquished their right to enact and enforce immigration statutes they deem necessary to their particular condition.

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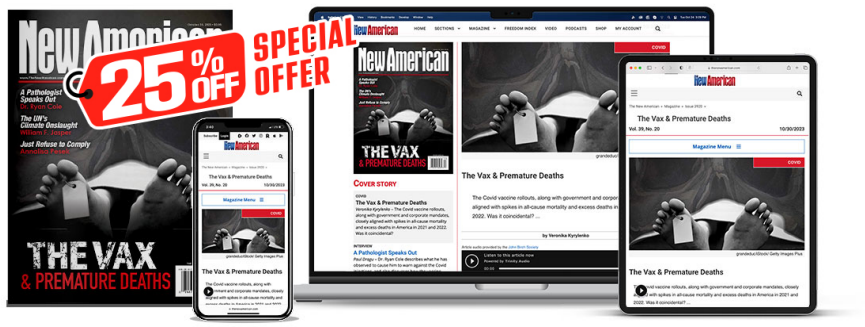

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