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IMMIGRATION EDITORIALS

ILLEGAL IMMIGRATION IN THE VIRGINIA GENERAL ASSEMBLY—FROM THE PERSPECTIVE OF AN ADVOCATE OF PASSING LAWS TO STOP ILLEGAL IMMIGRATION:

WHY DO IT AND WHAT CAN BE DONE?

*David B. Albo**

I. WHY LEGISLATORS WANT TO PASS LAWS TO DISCOURAGE ILLEGAL ALIENS: THE PROBLEM WITH ILLEGAL IMMIGRATION ISN'T THE PEOPLE—IT'S THE COST!

According to the Pew Hispanic Center, approximately 300,000 illegal aliens were located in Virginia in 2005.¹ This number reflects individuals who arrived legally with a passport or visa and overstayed their allowed time, as well as individuals who came across the borders of the United States without documentation.²

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1. PEW HISPANIC CTR., ESTIMATES OF THE UNAUTHORIZED MIGRANT POPULATION FOR STATES BASED ON THE MARCH 2005 CPS (2006), *available at* <http://pewhispanic.org/files/factsheets/17.pdf>. A more recent approximation of Virginia's undocumented immigrant population estimates this number at 205,000. Federation for American Immigration Reform: Virginia: Illegal Aliens, http://www.fairus.org/site/PageServer?pagename=research_research2b7b (last visited Apr. 24, 2008).

2. More than half of the unauthorized migrant population in the United States entered the country illegally. PEW HISPANIC CTR., MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION (2006), *available at* <http://pewhispanic.org/files/factsheets/19.pdf>. Approximately forty-five percent of unauthorized immigrants entered the country legally, but have overstayed their visas. *Id.*

It is impossible to calculate an exact figure of what illegal aliens cost the taxpayers and what undocumented immigrants contribute in taxes.³ Using common sense—something not often utilized in the legislative process—a couple of facts can be deduced. First, the odds that undocumented immigrants pay income taxes are low because they do not have social security numbers.⁴ Second, while illegal aliens cannot purchase goods in our country without paying consumer taxes such as the car tax, sales tax, and gas tax⁵, they do not spend all of their disposable income in Virginia. Instead, they send much of it back to their families.⁶ While undocumented immigrants may pay taxes, they do not pay the same level of taxes that citizens and legal immigrants do.

It is just as difficult to calculate the costs associated with illegal immigrants.⁷ A few costs that come to mind are the prison impact for the small percentage of illegal aliens that are convicted of crimes, acquire social services, and accumulate emergency room bills that build up due to a lack of insurance.⁸ However, the biggest cost is education, which can be calculated fairly accurately. Due to a Supreme Court of the United States decision that commands state and local governments to give children of illegal aliens a free public school education,⁹ Virginia's schools are saddled with a huge bill. For example, Fairfax County contains about thirteen percent of Virginia's population.¹⁰ Although Fairfax may have a higher percentage of illegal aliens than the state on average, a conservative estimate is that fifteen percent, or 45,000 of 300,000, undocumented immigrants live in Fairfax. Assuming that twenty-five percent of the illegal alien population is composed of school aged children¹¹ and knowing that

3. See Federation for American Immigration Reform: Estimated Costs of Illegal Immigration, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecentersf134 (last visited Apr. 24, 2008).

4. Federal regulations prohibit illegal aliens from obtaining social security numbers. See 20 C.F.R. § 422.104 (2007).

5. See VA. CODE ANN. §§ 58.1-603 to -604 (Repl.Vol. 2004).

6. INTER-AMERICAN DIALOGUE, MAKING THE MOST OF FAMILY REMITTANCES: SECOND REPORT OF THE INTER-AMERICAN DIALOGUE TASK FORCE ON REMITTANCES 3 (2007), available at http://www.thedialogue.org/PublicationFiles/family_remittances.pdf.

7. Bill Turque, *Illegal Immigration's Cost is Hard to Count*, WASH. POST, Nov. 27, 2007, at B1.

8. See CONGRESS OF THE UNITED STATES CONGRESSIONAL BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 1-2 (2003), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>.

9. See Plyler v. Doe, 457 U.S. 202, 230 (1982).

10. See U.S. Census Bureau, State and County Quick Facts, <http://quickfacts.census.gov/qfd/states/51/51059.html> (last visited Apr. 2, 2008). The Census Bureau estimates that in 2006, Virginia had a population of 7,642,884 people. *Id.* The population of Fairfax County in that year was 1,010,443. *Id.* By these numbers, Fairfax has 13.2% of the population of Virginia.

11. Twenty-five percent of the estimated 45,000 undocumented immigrants equals 11,250 children.

the average per pupil cost of educating a child in Fairfax County is \$13,407,¹² simple math shows an *annual* education cost of \$150 million.¹³ In this example, Fairfax County homeowners pay the equivalent of eight cents of their real estate tax to educate the children of illegal immigrants.¹⁴ For an average home costing \$450,000, the Fairfax County homeowner is paying \$320.40 per year in taxes to educate children of illegal immigrants.¹⁵ These numbers generated my interest in passing laws to discourage illegal aliens from coming to Virginia. Because politicians respond to citizen complaints, and because my constituents often complain about their real estate taxes, I determined that an appropriate response would involve passing laws to reduce illegal immigration in Virginia.¹⁶

II. HOW LEGISLATORS CAN PASS LAWS TO DISCOURAGE ILLEGAL ALIENS FROM COMING TO VIRGINIA

In the 2007 Session, most of the bills affecting illegal immigration were carried over for study. We could not determine the scope of Virginia's authority because we are part-time legislators and not immigration law experts.¹⁷ Thus, the Virginia State Crime Commission was created to examine criminal laws addressing illegal immigration, and a newly formed study commission on immigration was assigned to look at the civil laws.¹⁸

The Crime Commission heard testimony and read reports on this issue and wrote a comprehensive treatise of its findings. The full report is summarized in the next section of this editorial.

12. Fairfax County Public Schools, Statistics, <http://www.fcps.edu/about/stats.htm> (last visited Apr. 8, 2008).

13. 11,250 undocumented students multiplied by \$13,407 equals \$150,828,750.

14. See Fairfax County, General Fund Statement, http://www.fairfaxcounty.gov/dmb/advertised/fy2009/general_fund_statement.xls (last visited Apr. 8, 2008). The revenue gained from real estate taxes was \$1,896,010,205 for 2007. *Id.* Thus, the \$150,828,750 divided by 1,896,010,205 equals 0.796. The percentage shows that approximately \$0.08 per \$1 of real estate tax paid is used for educating undocumented students.

15. See Fairfax County, Taxes and Revenue, http://www.fairfaxcounty.gov/dta/tax_rates.htm (last visited Apr. 8, 2008). The real estate tax in Fairfax is \$0.89 per \$100 assessed value. *Id.* A home assessed for \$450,000 would lead to \$4005 in real estate tax, as \$0.89 multiplied by \$450,000 equals \$400,500, which is divided by \$100. Of the total amount paid by the homeowner, \$320.40 goes to educating undocumented students because \$0.08 multiplied by \$4005 equals \$320.40.

16. Eight cents due to education costs of illegal aliens divided by the current eighty-nine cents per \$100 of value rate equals nine percent.

17. See VA. STATE CRIME COMM'N, FINAL REPORT OF THE ILLEGAL IMMIGRATION TASK FORCE: STUDYING THE IMPACT OF ILLEGAL IMMIGRATION ON VIRGINIA'S JUSTICE SYSTEM 3 (2008), available at <http://vscc.virginia.gov/reports/Illegal%20Immigration%20FINAL%20report.pdf> [hereinafter ILLEGAL IMMIGRATION TASK FORCE REPORT].

18. See *id.* at i.

A. Preemption Doctrine of the United States Constitution Regarding the Civil Status of Legal Presence in the United States

The Preemption Doctrine of the United States Constitution controls what the Virginia legislature can and cannot do.¹⁹ In simple terms, this doctrine states that states cannot preempt federal law.²⁰ In other words, the states cannot pass their own laws on federally mandated topics. The federal government has concluded that a person's legal status is entirely within their jurisdiction.²¹ Thus, the Virginia legislature is very limited in what laws it can pass when dealing with the civil offense of being in the United States illegally.²²

19. *Id.* at 7.

20. *Id.*

21. *See id.*

22. The legal analysis outlined by the Crime Commission's report is as follows:

In general, Article 7 of the U.S. Constitution makes the "Constitution and the laws of the United States" the "supreme law of the land." Also known as the Supremacy Clause, it prevents the creation of, or "pre-empts," existing state or local law that conflicts with existing federal law. The power to regulate immigration is considered an exclusive federal power.

Although the federal power to regulate immigration is considered "exclusive," the [United States] Supreme Court has never held "that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power . . ." *DeCanas v. Bica*, 424 U.S. 351, 355 (1976). Specifically, the Court has held that the regulation of immigration is "essentially a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain." *Id.* The Court, in *DeCanas v. Bica*, outlined a three-part test for determining whether a state measure is preempted: whether (1) the state law regulates immigration, (2) it was Congress's "clear and manifest purpose" to ouster state power, or (3) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 355-63.

. . . Within the first prong of the *DeCanas* test, one factor courts have used when applying the test is whether the state law utilizes federal standards. *Id.* at 361. In *Equal Access Education v. Merten*, the United States District Court for the Eastern District of Virginia considered a preemption challenge to the Virginia policy of denying illegal immigrants admission to post secondary schools. 305 F. Supp. 2d 585, 591 (E.D. Va. 2004). The District Court held that a policy utilizing federal standards, and not state standards, is not a regulation of immigration under the first prong of *DeCanas*, since it does not determine "who should or should not be admitted into the country." *Id.* at 601. On the other hand, portions of California's Proposition 187 were held to be impermissible regulations of immigration because the law in question allowed California agents to make independent determinations of immigration status, instead of federal standards. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 769 (C.D. Cal. 1995).

One of the principal factors for the second prong of the test is the presence of "congressional action" in the subject area. *DeCanas*, 424 U.S. at 356. . . . [I]n *DeCanas*, the U.S. Supreme Court noted that the Immigration and Naturalization Service . . . did not penalize the employment of illegal immigrants. [Thus,] "California's law barring employment of illegal immigrants was not preempted." *Id.* . . . Courts will . . . consider whether the federal regulation represents Congress'[s] intent to "occupy the field." *Id.* at 357 n.5. For example, in *Merten*, the District Court stated that Congress had enacted

B. Law Enforcement Authority

While passing laws regarding the civil offense of lawful presence in the United States is very limited due to the Preemption Doctrine, enforcing criminal laws is an entirely different matter.²³ To illustrate this, let's look at what a state or local police officer can do when confronted with an illegal alien. State and local police have the authority to arrest individuals for federal crimes committed in their presence.²⁴ However, state and local police officers do not have the authority to detain people for a violation of federal civil laws—unless they are given specific permission by the federal government.²⁵ Thus, if a county police officer sees a person passing counterfeit currency in violation of federal law, he can arrest that individual. In contrast, if a police officer sees a person he knows to be in the country illegally, he can do nothing because being in the United States illegally is not a crime. It is a status—a product of civil law.²⁶ If this person who is in the country illegally walks up to a police officer and states, “I am not lawfully present in the U.S.,” there is nothing that the officer can do. However, the act of crossing the border illegally is a federal crime.²⁷ So if an illegal immigrant instead stated, “I am not lawfully present in the U.S. because I snuck across the border,” an officer can arrest him for breach of federal criminal law. But, this example changes if the county police officer has been given specific permission by the federal government to

regulations defining the requirements for student visas, which specifically excluded any mention of illegal immigrants. 305 F. Supp. 2d at 606-07. Based on the exclusion of illegal immigrants, the District Court determined that it was “clear that Congress has left the states to decide for themselves whether or not to admit illegal aliens into their public post-secondary institutions.” *Id.* at 607. . . .

The last prong of the *DeCanas* test, which addresses apparent conflicts between state and federal laws, looks to reconcile both statutory schemes in order to protect the purpose of the federal law. *DeCanas*, 424 U.S. at 358. While not addressing a conflict between state and federal law, the U.S. Supreme Court held that awarding back pay to an illegal alien would “unduly trench upon explicit statutory prohibitions critical to federal immigration policy,” such as illegal aliens obtaining a job with false documents.” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002). In *League of United Latin American Citizens v. Wilson*, the District Court invalidated sections of Proposition 187 that defined the requirements to receive benefits that were narrower than federal guidelines. 908 F. Supp. 755, 777-78 (1997). Specifically, in *Wilson*, the Court stated that some of the aliens excluded from Proposition 187 are entitled to certain benefits under federal immigration law, creating a direct conflict. *Id.* ILLEGAL IMMIGRATION TASK FORCE REPORT, *supra* note 16, at 7-9.

23. ILLEGAL IMMIGRATION TASK FORCE REPORT, *supra* note 16, at 9.

24. *See, e.g., Weeks v. Alabama*, 274 So. 2d 646, 648 (Ala. Crim. App. 1973).

25. *See* 8 U.S.C. § 1357(g) (2007).

26. *See supra* text accompanying note 20.

27. *See* 8 U.S.C. § 1324(c) (2007).

arrest;²⁸ this specific permission is known as “287(g)” authority.²⁹ Section 287(g) is a federal law that allows state and local government police, who have received certain training, to arrest and detain individuals determined to be not lawfully present in the United States in violation of federal civil immigration laws.³⁰ In that case, when the person merely admits to being in the country illegally, he can be arrested by the county officer.

III. 2008 LEGISLATION ON IMMIGRATION

Armed with the knowledge gained from the 2007 Session and the Crime Commission Report, the General Assembly was in a position to debate numerous immigration bills on their merits, which could be enacted at the state level. Some bills were never considered due to their unconstitutionality.³¹ For example, many of the anti-illegal immigration bills in the Virginia legislature dealt with punishments for knowing

28. See *supra* text accompanying note 24.

29. ILLEGAL IMMIGRATION TASK FORCE REPORT, *supra* note 16, at 9 n.75 (citing 8 U.S.C. § 1357(g) (2007)).

30. As outlined by the Crime Commission:

Currently, three statutes in the U.S. Code grant specific authority for state law enforcement officers to effect arrests for violations of immigration law. Section 1252c allows state and local law enforcement officers to arrest and detain an illegal immigrant who was previously convicted of a felony and removed from the U.S. Section 1324 allows state and local officers to effect arrests under the federal anti-harboring statute. Section 1357(g) provides the ability for state and local law enforcement agencies to enter into a memorandum of understanding with ICE for the purpose of authorizing its officers to enforce immigration law. Despite the explicit authorization found in these three statutes, there is a belief that state and local law enforcement have “inherent authority” to enforce criminal violations of immigration law.

The concept of “inherent authority” to enforce criminal immigration law began with a 1983 decision by the Ninth Circuit Court of Appeals, in the case of *Gonzales v. City of Peoria*, involving city police officers who made a series of warrantless arrests of illegal immigrants. The police made these arrests by relying on a memo which stated that “state law enforcement officers have the authority to make arrests for federal violations.” The memo based the legal authority for state law enforcement arrests of federal violations on the U.S. Supreme Court’s decision in *United States v. DiRe*. The Tenth Circuit Court of Appeals has followed the general rationale articulated by the *Gonzales* Court in a series of cases, stating “this court has held that state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws.” *Id.* at 9-10 (citations omitted).

31. See H.B. 1047, Va. Gen. Assembly (Reg. Sess. 2008) (establishing a civil offense with a \$100 civil penalty for the unlawful employment of an undocumented person, the inability to provide documents demonstrating legal eligibility for employment, or the false representation of documents demonstrating legal eligibility for employment); H.B. 1249, Va. Gen. Assembly (Reg. Sess. 2008) (establishing an unfair employment practice where an employer knowingly employs an individual unauthorized to work in the United States and allowing a cause of action for any employee discharged where an undocumented individual is the replacement). These bills are unconstitutional because they are preempted by federal law.

violations of civil immigration law. And most of these bills sought to punish employers who knowingly hired illegal aliens.³² As previously stated, enforcing federal criminal laws is not a problem.³³ However, most of the legislation regarding punishments for knowing violations of civil immigration laws is preempted by the United States Constitution.³⁴ These bills were filed in response to critics of bills that were directed at just the illegal aliens. These critics argued that these bills attacked illegal aliens instead of the employers who benefited from hiring them.³⁵ Thus, to be fair, many legislators filed bills to attack knowing violations of immigration laws by employers. But, in politics no good deed goes unpunished. In the end, most of these were killed due to constitutional concerns.

Other bills passed the General Assembly.³⁶ The criminal law bills deal

32. ILLEGAL IMMIGRATION TASK FORCE REPORT, *supra* note 16, at 11-12.

33. *See id.* at 9-10.

34. *See id.* at 11-15.

35. The Crime Commission opined:

Bills have been introduced over the last few General Assembly sessions that seek to penalize employers for hiring illegal immigrants. For example, in 2007, [House Bill] 1067 and [House Bill] 2605 proposed to amend [Virginia] Code [section] 40.1-11.1 to make the penalty for employing an illegal alien \$100, per day employed. [House Bill] 2328, also introduced in 2007, proposed to amend [Virginia] Code [section] 40.1-11.1 to make it a Class [one] misdemeanor to fail to confirm the legality of an employee through the electronic verification-of-work authorization program operated by the Department of Homeland Security. Both proposed measures are expressly preempted by [United States] Code [section] 1324a because they penalize employers for hiring illegal immigrants. Congress has clearly indicated with the passage of 8 U.S.C.[] [section] 1324a that its “manifest purpose” is to ouster state power in the area of employment of illegal immigrants. Consequently, any state measure which attempts to criminalize or sanction the employment, recruitment[,] or referral for a fee of illegal immigrants is expressly preempted and, thus, unconstitutional.

Attempts have been made to hold employers accountable by forcing them to include immigrant employees in the Virginia workers’ compensation system. [House Bill] 2688 was introduced during the 2007 session to create criminal and civil penalties for employers who fail to pay workers’ compensation benefits to illegal immigrants. This type of bill is likely preempted by the U.S. Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, in which the U.S. Supreme Court held that the National Labor Relations Board could not award an illegal immigrant back pay because such payment would run contrary to the federal immigration policy of prohibiting the employment of illegal aliens. Consistent with *Hoffman*, forcing employers to comply with workers compensation payments to illegal immigrants would also seem to encourage, rather than prevent, illegal immigrants from obtaining work. . . .

While states are preempted from penalizing employers who hire illegal aliens, Congress has allowed the states some room to place restrictions on employers.

Id. at 11-12 (citations omitted).

36. *See* H.B. 440, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 8, ch. 469, 2008 Va. Acts ___) (establishing a presumption of no bail for undocumented persons charged with specific offenses); H.B. 820, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 3, 2008, ch. 180, 2008 Va. Acts. ___) (requiring officers in jails and correctional facilities to inquire as to an individual’s citizenship status and make a query to the Law Enforcement Support Center of the United States Immigration and Customs Enforcement); H.B. 926, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as

with crime, which is not preempted by federal law. The business-related bills require an actual federal conviction to go into effect. Thus, the state is not determining federal immigration status, rather the bill becomes effective after the federal courts make a decision on civil immigration law violations. Also, while federal law preempts the states from enacting immigration laws, it does not bar a state from setting criteria for licensing its businesses. Thus, laws establishing criteria that will not violate federal immigration law in order to *acquire* a state license as opposed to punishing an already licensed business is not unconstitutional. This is a nuance and perhaps will be the subject of future litigation.

Act of Mar. 12, 2008, ch. 588, 2008 Va. Acts. ____ (terminating or revoking authorization of business entities including corporations and partnerships to operate in the Commonwealth due to the hiring or continuing employment of undocumented persons); H.B. 1298, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 12, 2008, ch. 598, 2008 Va. Acts. ____ (requiring all public bodies to include a provision in written contracts that the contractor does not and will not knowingly employ undocumented persons during the contract's performance); S.B. 609, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 5, 2008, ch. 415, 2008 Va. Acts ____ (mandating that officers in jails and correctional facilities ask about an individual's citizenship status and make an immigration query for all individuals born in another country or a citizen of another country); S.B. 517, Va. Gen. Assembly (Reg. Sess. 2008) (providing that all public bodies shall include a provision in all written contracts whereby the contractor agrees to not employ knowingly any undocumented individual); S.B. 623, Va. Gen. Assembly (Reg. Sess. 2008) (providing a presumption of no bail to undocumented individuals charged with certain crimes).