

Illegal Immigrants and the Bill of Rights Joshua Griisser

Public concern with illegal immigration has reached new heights in recent years. A recent poll showed that an overwhelming 91 percent of Americans believe that illegal immigration is either a “very serious” or “somewhat serious” problem (Blanton, 2005). Although terrorism was a primary concern for many respondents, a large number also expressed concerns about jobs and wages. This is largely a factor of the anemic performance of the economy for working Americans, since “the current expansion has a chance to become the first sustained period of economic growth since World War II that fails to offer a prolonged increase in real wages for most workers” (Greenhouse and Leonhardt, 2006). In an attempt to capitalize on the public frenzy, many politicians have proposed crackdowns on illegal immigration – and on illegal immigrants. Some of the proposals raise Constitutional questions. In particular, one area of contention is whether the Bill of Rights should apply to illegal immigrants, and, if so, to what extent.

Some provisions of the Bill of Rights clearly and uncontrovertibly do apply to illegal immigrants. For instance, the Eighth Amendment forbids “cruel and unusual punishment”, including the use of torture. As far as I know, no one in mainstream politics has ever suggested that beating or torturing illegal immigrants should be acceptable behavior. (However, some political figures, including President Bush, have suggested the use of torture against suspected terrorists.) Illegal immigrants also enjoy a basic right to due process, and it is impossible to effectively suspend this right; at a bare minimum, a determination must be made in the first place that the individual in question has, in fact, entered the United States illegally (and, if so, to which nation they should be deported). If this were not the case, it would open up the horrific prospect

of individuals being shanghaied off the streets on the basis of their appearance and/or language use and deported. Such a prospect should be utterly unacceptable to anyone who is concerned with traditional American freedoms. Under current Constitutional law, immigrants have the right to a deportation hearing before an immigration judge, and may utilize a lawyer at such a hearing. They also have the right to an interpreter, if necessary, and the right to examine the evidence against them just as they would at a criminal trial (American Civil Liberties Union, 2000). It is difficult to argue that any of this is excessive or frivolous. Such provisions are necessary in order to ensure that basic standards of civilized fairness are met.

In other cases, the applicability of the Bill of Rights is more questionable. In particular, I know of no good arguments in favor of illegal aliens having a right to bear arms under the Second Amendment. The Constitution clearly connects this right to the obligations of citizenship (“a well-regulated militia”), and thus it would be inappropriate to extend it to illegal immigrants who owe no duty of loyalty to the United States. Likewise, even though all individuals have the right to freedom of expression as set forth in the First Amendment, illegal aliens who do so may end up being deported if their exercise of that right brings their illegal status to the attention of the authorities. This is a tricky issue, since it balances legitimate human rights against the government’s legitimate interest in controlling who is permitted to enter the country. I would argue that an illegal alien who speaks out in public and thereby reveals his unlawful status may be deported, but such deportation should not be permitted to take place selectively – it must be applied fairly and consistently in all cases, regardless of the content of the underlying speech. There should also be penalties applied to businesses that deliberately hire illegal aliens so that they can intimidate them and violate their rights to speak out against unsafe conditions with threats of deportation.

Under the Constitution, the Fourth Amendment freedom from unreasonable search and seizure applies to everyone, regardless of their legal status. I see no effective way to change this without opening a can of worms. If police were permitted to search illegal aliens without probable cause, what criteria would be used to make that determination? What if it was incorrect? Couldn't police wanting to conduct a search on a citizen absent probable cause simply claim that they suspected that individual was in the country illegally? It is far easier, more workable, and more just to apply the Fourth Amendment across the board.

With regard to illegal immigrants, perhaps the most controversial section of the Constitution is not the Bill of Rights per se, but the Fourteenth Amendment's guarantee of birthright citizenship. That Amendment begins by stating that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This has been interpreted by the courts as a statement that anyone born in the United States, regardless of the legal status of his or her parents, is entitled to United States citizenship. Some politicians, including Rep. Tom Tancredo (R-CO), have recommended that this provision be altered to prevent so-called "anchor babies" – that is, the American-born children of illegal immigrants – from gaining citizenship. It is unclear whether this would require a Constitutional amendment. H.R. 3938, the "Enforcement First Immigration Reform Act of 2005", would have attempted to work around this provision by claiming that the children of illegal aliens were not "subject to the jurisdiction" of the United States, and therefore not eligible for citizenship (House of Representatives, 2005). However, since that bill failed to pass, it is unclear whether the courts would accept such an argument. I am ambivalent on the subject. On one hand, it seems unreasonable for individuals illegally present here to convey citizenship, which they themselves do not possess, to their children. On the other hand, some European

countries have refused to grant citizenship to the children of immigrants and have, as a result, ended up with a large mass of alienated individuals who feel that they have no stake in society. If the “anchor baby” loophole could be cleanly closed, I would be in favor of doing so. However, I fear the potential ramifications and unintended consequences of such a law, and therefore, ultimately, am against it.

Illegal immigration is recognized by the American people as a serious problem that must be addressed. However, the most optimal way to resolve it is not to deny basic human rights to the immigrants themselves. Rather, it is to enhance border security, promote economic development in Mexico and other sources of low-wage immigration, and crack down on unscrupulous employers who, deliberately or with willful blindness, choose to hire illegal aliens. These measures will be more effective than depriving immigrants of their human rights – and far more in keeping with the basic traditions of American liberty.

References

- American Civil Liberties Union (2000). The rights of immigrants: ACLU position paper. Retrieved 9/18/2006 from <http://www.aclu.org/immigrants/gen/11713pub20000908.html>
- Blanton, D. (2005). 5/03/05 Fox poll: Illegal immigration seen as serious problem for U.S. Fox News, 5/3/05. Retrieved 9/17/2006 from <http://www.foxnews.com/story/0,2933,155413,00.html>
- Greenhouse, S. and Leonhardt, D. (2006). Real wages fail to match a rise in productivity. *The New York Times*, 9/28/2006. Retrieved 9/17/2006 from <http://www.nytimes.com/2006/08/28/business/28wages.html?ex=1158638400&en=b939d28a48ac3928&ei=5070>
- House of Representatives (2005). H.R. 3938: Enforcement First Immigration Reform Act of 2005. Retrieved 9/18/2006 from <http://thomas.loc.gov/cgi-bin/query/F?c109:1:./temp/~c109xt9o93:e132076:>