

## Checks and Balances Potential Areas for Congressional Oversight of Immigration Administration in the 112th Congress

By James R. Edwards, Jr.

*An elective despotism was not the government we fought for; but one in which the powers of government should be so divided and balanced among several bodies of magistracy so that no one could transcend their legal limits, without being effectually checked and restrained by the others. — Thomas Jefferson, 1784<sup>1</sup>*

The Obama administration enjoyed two years in which both houses of Congress were under the control of its own political party. One-party rule in Washington may ease a president's getting his wishes. It also can result in a lack of scrutiny — congressional oversight, the exertion of constitutional checks and balances toward the executive branch — from Congress. This dynamic arose in 2009 and 2010 where immigration policies are concerned.

However, with a Republican majority taking charge of the House of Representatives and gaining to within three seats in the Senate, one can expect to see more vigorous oversight of a previously unconstrained administration. As James Madison noted in Federalist 51, "In republican government, the legislative authority necessarily predominates."<sup>2</sup> The Constitution charges the president to "take care that the laws [Congress enacts] be faithfully executed."<sup>3</sup> The current "imperial presidency" is about to get a check-up by way of Congress exercising its constitutional prerogatives to rein in what it views as executive overreach, abuse of power, or failure to act. These congressional activities may include oversight hearings, demands for documents and records, and other investigations.<sup>4</sup>

In several regards, Congress may view the Obama administration's implementation of the immigration laws to have been less than faithfully executed. Where immigration is concerned, Congress holds plenary power to set immigration policy. The administrative and judicial branches have very little prerogative concerning immigration. Yet this jurisdictional border has been breached. It is in Congress's institutional interest to safeguard its plenary powers against the encroachment of the other federal branches.

This *Memorandum* offers several areas of immigration policy in which the current administration has acted in ways that seem inconsistent with congressional intent, the plain language of the law, or that otherwise raise questions. These subjects are ripe for congressional oversight attention in the 112th Congress. They are as follows:

- The Department of Homeland Security has taken several steps to weaken immigration enforcement. These include restrictions on the 287(g) program, dismissing or refusing to prosecute whole categories of illegal aliens for removal, turning back to "catch and release," and easing off of worksite enforcement.
- The administration has potentially misused or abused its powers. This action includes misuse of administrative means to effect de facto amnesty, as well as employing the resources of the federal government to sue the state of Arizona and Maricopa County Sheriff Joe Arpaio in what some argue are politically motivated cases.
- The administration has acted in ways that merit inquiry from the legislative branch. Included are misreported statistics concerning deportations and terrorist convictions, leadership crises, inadequate screening out of foreign extremists, implementation of eligibility verification in health exchanges, and bureaucratic conflicts that inhibit border security activity.

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*James R. Edwards, Jr., Ph.D., is a Fellow with the Center for Immigration Studies and coauthor of The Congressional Politics of Immigration Reform.*



By no means does this exhaust the oversight agenda. But it should provide a start as the new Congress assesses the administration's performance of the past two years.

## Rolling Back Enforcement

An instance of the administration's diminution of enforcing immigration laws is its changes to the 287(g) program. Congress created this program in 1996 to enable state, local, and tribal police to initiate assistance in the enforcement of federal immigration laws. Congress intended to give local authorities latitude in designing participation to meet their — not federal — priorities and needs.<sup>5</sup> By 2009 the 287(g) program had more than 70 agencies in 25 states enrolled, with more signing up every month. It played a vital role in identifying removable aliens and speeding their departure from the country, while saving taxpayer dollars at all levels.

In the fall of 2009, the Immigration and Customs Enforcement bureau revamped the terms of agreement demanded of all participating state and local law enforcement agencies. ICE unilaterally restricted these police departments' latitude, restrained the program's mission, shifted the focus solely to criminal aliens, and put up several barriers such as first having to arrest or convict an alien of a violent offense to pare back ICE's workload.<sup>6</sup> ICE virtually eliminated the task force/investigative 287(g) model. These restrictions run opposite congressional intent. Oversight of these unwarranted changes would help restore the 287(g) program to the vigorous tool it was just over a year ago.

In line with ICE's relief of illegal and criminal aliens who have not been convicted of other crimes, in August 2010 the agency ordered the large-scale dismissal of removal cases.<sup>7</sup> Government lawyers now must drop deportation proceedings against illegal or criminal aliens who otherwise face removal if the aliens have been in the United States more than two years, do not have a felony criminal record, and have filed "credible" immigration applications. The new policy systematizes giving thousands of illegal and criminal aliens relief from facing deportation, with the U.S. Citizenship and Immigration Services bureau taking the lead over the enforcement bureau's handling of these cases.

While there is a place for "prosecutorial discretion" on a case-by-case basis, this dismissal policy raises it to the wholesale level. The policy also seems to run counter to congressional intent to remove more, not fewer, illegal and criminal aliens. The 1996 immigration law added a number of criminal offenses making one removable to the list. Congress did this in order to rid

the country of more aliens who pose a threat to public safety, even as a lesser threat than that of a murderer, rapist, or robber. Oversight here would help reverse such an overextension of "prosecutorial discretion" that so plainly runs opposite to congressional intent.

Similarly, ICE has relaxed the deportation of another broad class of illegal aliens: those who would gain legalization under the DREAM Act.<sup>8</sup> The administration's decision to drop removal proceedings against most illegal alien students effectively grants amnesty to hundreds of thousands of illegal immigrants. Again, to exercise prosecutorial discretion on a case-by-case basis is one thing; to choose not to carry out the law toward a type of illegal alien numbering at least 726,000 is another matter. Such a practice would seem out of keeping with congressional intent.

On another front, the Obama administration has begun a return to a "catch-and-release" policy. The policy met severe criticism during the Bush administration, which ultimately curbed the practice.<sup>9</sup> The number of illegal aliens placed in detention pending their immigration proceedings rose to nearly 400,000 by 2009. However, in 2009 the new administration began moving back toward the release of illegal aliens it considers nonthreatening.<sup>10</sup> Such laxity ignores both congressional intent and experience. The 1996 immigration law mandated detention for many illegal aliens. Congress did so because illegal aliens largely flee rather than appear for their scheduled immigration hearings. Inquiry into the latest version of "catch and release" could help reorient ICE toward the prudence of detention and removal.

The administration has also de-emphasized workplace enforcement.<sup>11</sup> From 2005 to 2008, ICE steadily increased enforcement actions at companies with sizable illegal alien workforces. In FY 2008, ICE made some 5,184 administrative arrests and 1,103 criminal arrests at worksites. However, the Obama administration has significantly reduced the arrests of illegal workers at job sites.<sup>12</sup> While holding employers accountable for hiring illegal aliens (this administration's stated priority) is important, it is harder to garner sufficient evidence to prove an employer "knowingly" hired ineligible workers. And holding the alien workers to account is equally important, at a minimum to send a signal to would-be illegal entrants. Congress might ask ICE to justify its shift in priorities and lack of productivity in employer sanctions enforcement.

## Misuse/Abuse of Power

In 2010, USCIS planned ways to use administrative relief measures in the law as alternatives to “comprehensive immigration reform.”<sup>13</sup> A leaked memorandum explained how the agency could create an amnesty outcome for millions of the 10-12 million illegal immigrant population in the face of legislative deadlock over broad immigration legislation that would include widespread legalization of illegal aliens.

The agency spelled out its options for what critics call “de facto amnesty.”<sup>14</sup> These options included a more liberal application of Temporary Protected Status and “parole-in-place, deferred action, and the issuance of Notices to Appear.” Such administrative proposals and practices may constitute misuse, if not abuse, of power. Congress delegated limited means for granting exceptional relief in extraordinary cases. Oversight of this deliberate, widespread application of limited powers may help re-establish the appropriate boundaries of what are supposed to be rare exceptions to the rule. Further, it would protect congressional plenary powers over immigration matters.

Another subject ripe for congressional oversight is the federal lawsuit against Arizona’s S.B. 1070, the state law enacted in 2010 that created complementary state offenses in line with federal immigration crimes.<sup>15</sup> Congress could inquire as to the motivation for the lawsuit, who and which outside organizations were party to this move, and explore and correct the several misstatements and errors the administration based its complaint on as legal and policy facts. Here, too, the administration advocated its encroachment upon Congress’s plenary power over immigration.

The U.S. Department of Justice filed suit against Sheriff Joe Arpaio of Maricopa County, Ariz., in 2010.<sup>16</sup> Sheriff Arpaio is a no-nonsense law enforcement officer whose reputation has won him national prominence and respect, particularly for his eager participation in the 287(g) program and firm stand against illegal immigration as that problem manifests itself at the local level. The Justice Department’s lawsuit has been criticized as intended to intimidate one of the most prominent local lawmen taking on illegal aliens. The timing of the legal action also has raised questions, as it followed on the heels of Arizona’s enactment of a state law aimed at engaging local and state police in going after illegal aliens. Though there may be valid grounds for Justice’s unprecedented action, congressional inquiry would shed light on the administration’s motives, who was behind the lawsuit, and whether this situation warranted such a serious course.

## Other Areas for Inquiry

The administration has misreported deportation statistics, using questionable methods that inflate the figures.<sup>17</sup> Similarly, the administration has publicized wrong numbers for terrorist convictions.<sup>18</sup> Whether from incompetence, fraudulent intent, or honest error, such erroneous figures are unacceptable. Congress may wish to inquire in depth into the nature, cause, and intent of reporting these wrong figures.

A serious failing of the administration has been its engendering of a lack of confidence in their leaders by rank-and-file immigration enforcement personnel.<sup>19</sup> The National Border Patrol Council in the past two years has voted “no confidence” in ICE Assistant Secretary John Morton and Border Patrol chief David Aguilar. When the officers on the ground do not trust their leadership and publicly express their belief that the leaders are undermining their immigration enforcement mission, a significant problem has developed and needs to be addressed. This may be one of the areas to which Congress directs its attention.

An area badly in need of oversight is DHS’s failure to implement measures Congress has plainly directed. For example, the exit portion of the US VISIT entry-exit system remains partial at best and well short of the mandate in Section 110 of the 1996 immigration law. The border fence has yet to be completed in accordance with the Secure Fence Act of 2006.

Another ICE practice in need of congressional scrutiny might include its handling of repeat offenders who are illegal aliens. Specifically, cases such as an illegal alien charged as a drunk driver with killing a nun in an automobile crash in Virginia warrants congressional investigation. The alien in question had repeatedly been cited for driving under the influence. ICE has withheld information about the illegal alien, even though two years before he was taken into custody, put into removal proceedings, and released by the immigration agency. After publicly announcing an inquiry, DHS has refused to make public its findings. The public interest legal watchdog group Judicial Watch is seeking release of ICE’s findings.<sup>20</sup> However, Congress could apply even stronger pressure on an agency that has lost much credibility on account of just such behavior.

Also, the administration has performed poorly at stopping foreign-born terrorists from entering the United States. The PATRIOT Act (Title IV, Subtitle B) partially revived ideological exclusion as grounds for turning away foreigners out to destroy the United States.<sup>21</sup> With more careful scrutiny, jihadist sympathizers such as Faisal Shahzad, the Times Square

bomber, and radical imams could be denied entry in the first place. DHS Secretary Janet Napolitano expressed openness to ideological exclusion on National Public Radio in 2010.<sup>22</sup> Congress could learn how DHS uses the tools at hand and identify where legislation is needed to strengthen ideological exclusion policies.

As the new Congress considers how to deal with the Obama health reform law, one part relating to immigration demands oversight during implementation. This involves eligibility verification through the “exchanges” called for in each state that will manage health insurance options and the premium subsidy individuals and households will apply for. Loopholes exist, as the law is written, in regard to screening out illegal aliens from receiving this tax credit. Section 1411 of the Patient Protection and Affordable Care Act sets up a verification system vastly inferior to the existing, robust SAVE system widely in use for other means-tested programs.<sup>23</sup> And the law gives the administration wide latitude to weaken further the modest verification program established for health exchanges. Only Congress’s constant vigilance might lead to meaningful eligibility verification based on citizenship or immigration status.

Congress might alleviate the bureaucratic morass identified by a recent Government Accountability Office report of how Interior Department rules require the Border Patrol to ask permission before carrying out various enforcement duties on public lands.<sup>24</sup> Such interagency disagreement has resulted in delays in border security and potentially advantages illegal alien smuggling activity. This is the kind of situation that congressional intervention through oversight activities can referee and settle.

## Conclusion

The Founders provided Congress the tools to restrain the administration’s excesses. Immigration agencies in the executive branch have relaxed enforcement, from the local police role to deportation to worksite actions. The administration has potentially misused its powers concerning administrative relief and by filing a federal lawsuit. And several other problems, from statistical error to mismanagement, require congressional oversight. A strength of the American system of government is its checks and balances. Such oversight is now overdue where immigration is concerned.

## End Notes

- <sup>1</sup> From Jefferson's *Notes on the State of Virginia*, as quoted in Benjamin F. Wright, ed., *The Federalist* (New York: Barnes & Noble, 2004), 62.
- <sup>2</sup> Wright, 356.
- <sup>3</sup> U.S. Constitution, Article II, Section 3.
- <sup>4</sup> For more on Congress's oversight function, see Walter J. Oleszek, "Congressional Oversight: An Overview," Congressional Research Service *Report for Congress*, February 22, 2010 (R41079), <http://www.fas.org/sgp/crs/misc/R41079.pdf>.
- <sup>5</sup> Jessica Vaughan and James R. Edwards, Jr., "The 287(g) Program: Protecting Home Towns and Homeland," Center for Immigration Studies *Background*, October 2009, <http://cis.org/287greport>.
- <sup>6</sup> Jon Feere, "The Obama Administration's 287(g): An Analysis of the New MOA," Center for Immigration Studies *Memorandum*, October 2009, <http://cis.org/ObamasNew287g>.
- <sup>7</sup> John Morton, "Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions," ICE Memorandum, August 20, 2010, [http://graphics8.nytimes.com/packages/pdf/us/27immig\\_memo.pdf](http://graphics8.nytimes.com/packages/pdf/us/27immig_memo.pdf).
- <sup>8</sup> "Students Spared Amid an Increase in Deportations," *The New York Times*, August 8, 2010, <http://www.nytimes.com/2010/08/09/us/09students.html>.
- <sup>9</sup> Associated Press, "Chertoff: End 'Catch and Release' at Borders," October 18, 2005, <http://www.foxnews.com/story/0,2933,172570,00.html>.
- <sup>10</sup> Spencer S. Hsu, "Agency Plans to Improve Oversight of Immigrant Detention," *The Washington Post*, August 7, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/06/AR2009080601543.html>.
- <sup>11</sup> Department of Homeland Security Fact Sheet, "Worksite Enforcement Strategy," April 30, 2009, <http://www.ice.gov/doclib/news/library/factsheets/pdf/worksite-strategy.pdf>.
- <sup>12</sup> Stephen Dinan, "Work Site Arrests of Illegals Fall Dramatically," *Washington Times*, November 19, 2009, <http://www.washingtontimes.com/news/2009/nov/19/work-site-arrests-of-illegals-fall-dramatically/>.
- <sup>13</sup> Alejandro N. Mayorkas, "Administrative Alternatives to Comprehensive Immigration Reform," USCIS Memorandum, undated, <http://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-immigration-reform.pdf>.
- <sup>14</sup> Sen. Charles Grassley, "Senators Again Ask Administration if Plans Are Underway for Large-Scale de Facto Amnesty," news release, July 26, 2010, [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=27796](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=27796).
- <sup>15</sup> *United States v. Arizona* (U.S. Dist. of Ariz.), July 6, 2010, [http://www.foxnews.com/projects/pdf/070610\\_AZlawsuit.pdf](http://www.foxnews.com/projects/pdf/070610_AZlawsuit.pdf).
- <sup>16</sup> Yvonne Wingett, J.J. Hensley, and Michael Kiefer, "Sheriff Joe Arpaio Sued by Justice Department in Civil-Rights Probe," *Arizona Republic*, September 3, 2010, <http://www.azcentral.com/news/election/azelections/articles/2010/09/02/20100902joe-arpaio-sued-by-justice-department-brk-02-ON.html>.
- <sup>17</sup> Andrew Becker, "Unusual Methods Helped ICE Break Deportation Record, E-Mails and Interviews Show," *The Washington Post*, December 6, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/05/AR2010120503230.html>. Also, see Spencer S. Hsu and N.C. Aizenman, "DHS Corrects Report That Overstated ICE Deportations Under Obama," *Washington Post* blog, March 8, 2010, <http://voices.washingtonpost.com/44/2010/03/dhs-corrects-report-that-overs.html>.
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- <sup>19</sup> Kimberly Dvorak, "'No Confidence Votes' Become a Pattern at ICE and Border Patrol," *San Diego Examiner*, August 13, 2010, <http://www.examiner.com/county-political-buzz-in-san-diego/no-confidence-votes-become-a-pattern-at-ice-and-border-patrol>.
- <sup>20</sup> See <http://www.judicialwatch.org/news/2010/dec/jw-sues-dhs-documents-illegal-alien-who-killed-virginia-nun-drunk-driving-accident-aug>.
- <sup>21</sup> See James R. Edwards, Jr., "Keeping Extremists Out: The History of Ideological Exclusion and the Need for Its Revival," Center for Immigration Studies *Background*, September 2005, <http://www.cis.org/HistoryIdeologicalExclusion>. Also, see Rosemary Jenks, "The USA PATRIOT Act of 2001," Center for Immigration Studies *Background*, December 2001, <http://www.cis.org/articles/2001/back1501.html>.
- <sup>22</sup> See <http://www.npr.org/templates/transcript/transcript.php?storyId=126536469>.
- <sup>23</sup> See James R. Edwards, Jr., "Latest Senate Health Bill's Immigration Smoke and Mirrors," Center for Immigration Studies blog, November 22, 2009, <http://www.cis.org/edwards/reidbill>.
- <sup>24</sup> See Judson Berger, "Border Patrol Projects Caught Up for Months in Red Tape, Government Study Shows," Fox News, October 5, 2010, <http://www.foxnews.com/politics/2010/10/05/border-patrol-projects-caught-months-red-tape-study-shows/>.