

PANEL DISCUSSION AND COMMENTARY†

Mr. Ho: We are going to open up the discussion for questions from the floor.

Audience Question 1: What I want to know from Ms. Stock and Professor Kobach is what other types of state laws would be constitutional, in either of your views, in this area either to encourage entrepreneurs or highly skilled immigrants to jumpstart the economy? Are there other types of enforcement measures available? What can states do, setting aside SB 1070?

Ms. Stock: Well, states do many things already. States do in fact cooperate with federal immigration law enforcement under the provisions of Section 287(g)¹ and under the Secure Communities Program, in which the federal government obtains fingerprints from the state jails of participating states.² Some localities have tried to opt out of that program,³ but the federal government says that the program is not optional: a locality must participate if its state is participating.⁴

† This commentary session was presented as part of the panel discussion of the Federalist Society's National Lawyers Convention on Civil Rights: Immigration, the Arizona Statute, and *E Pluribus Unum* in Washington, D.C. on November 18, 2010. The panelists discussed issues involving Arizona's controversial immigration law. Panelists included the following: Roger Clegg, President and General Counsel, Center for Equal Opportunity; Kris W. Kobach, Kansas Secretary of State, and Daniel L. Brenner/UMKC Scholar and Professor of Law, University of Missouri-Kansas City School of Law; and Margaret D. Stock, Adjunct Instructor of the Department of Political Science, University of Alaska Anchorage. The panel was moderated by former Solicitor General of Texas James C. Ho, who is partner in the Dallas office of Gibson, Dunn & Crutcher LLP.

¹ 8 U.S.C. § 1357(g)(1) (2006). Under this section, the states may enter into a written agreement with the Attorney General in which state officers function as a federal immigration officer regarding the "investigation, apprehension, or detention of aliens in the United States" consistent with that state's law. *Id.*

² See *Secure Communities*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited May 21, 2011). The Secure Communities program is a partnership between the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ"). In this program, state localities submit fingerprints of their criminals to the DOJ and checked against the criminal history records of the Federal Bureau Investigation ("FBI"). The DOJ would turn the fingerprints over to be checked against the DHS immigration records. If the DHS finds a match between their records and the fingerprints, Immigration and Customs Enforcement ("ICE") evaluates whether any action is required based on the immigration status of the alien, the severity of the crime, and the criminal history of the alien. *Id.*

³ *E.g.*, Arlington Cnty. Bd., Arlington, Va., *Resolution Promoting Community Safety in Accordance with Constitutional Principles* (Sept. 28, 2010), <http://www.arlingtonva.us/departments/CountyBoard/proclamations/page78364.aspx>; S.F. Bd. of Supervisors, S.F., Cal., *Resolution Urging the San Francisco Sheriff's Department, the Juvenile Probation Department and the San Francisco Police Department To Opt-Out of*

There is also cooperation between the federal government and the states on a wide variety of issues. Mr. Kobach accuses me of not citing a statute. I would have to cite the whole Immigration and Nationality Act (“INA”).⁵ In the INA, Congress has laid out a complicated scheme. It has provided different visa categories for unauthorized immigrants to get status if they’re crime victims.⁶ It has provided for a temporary protected status which the President may grant to whole countries of unauthorized immigrants, along with work permits, allowing them to stay in the United States lawfully because of foreign-policy considerations in their home countries.⁷ There are battered spouse provisions where undocumented men and women, who cannot get their U.S. citizen spouses to file paperwork for them, are permitted to get immigrant status here in the United States.⁸ Arizona’s law would disrupt those provisions.

States are permitted to cooperate heavily with the federal government in the prosecution of cases involving alien smuggling,⁹ in certifying people for various crime-victim visas like the S (“Snitch”) Visa,¹⁰ the T (“Trafficking”) Visa,¹¹ the U (“Abuse”) Visa.¹² The states also

Participating in the Police Immigration and Customs Enforcement Collaboration Program Known as “Secure Communities,” 294 (May 20, 2010) available at http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/bosagendas/materials/bag060810_100650.pdf; Cnty. of Santa Clara Bd. of Supervisors, Santa Clara Cnty., Cal., *Public Safety & Justice Committee-September 1, 2010*, 1–2 (Sept. 28, 2010), available at <http://uncoverthetruth.org/wp-content/uploads/Santa-Clara-S-Comm.pdf>.

⁴ *E.g.*, Shankar Vedantam, *No Opt-out for Immigration Enforcement*, WASH. TIMES, Oct. 1, 2010, at B1 (“Participation in the program, called Secure Communities, was widely believed to be voluntary . . . [b]ut the Immigration and Customs Enforcement agency now says that opting out of the program is not a realistic possibility—and never was.”). The National Day Laborer Organizing Network (NDLON), as well as several other organizations, filed suit in New York to compel several government organizations to release documents regarding whether localities may opt-out of participating in the Secure Communities Program, after which a judge ordered the government to release the documents. *Judge Demands Release of Secure Communities Documents, Government Faces Possible Sanctions*, NAT’L DAY LABORER ORGANIZING NETWORK (Dec. 10, 2010), <http://www.pitchengine.com/nationaldaylaborerorganizingnetwork/judge-demands-release-of-secure-communities-documents-government-faces-possible-sanctions/108635/>.

⁵ *See* Immigration and Nationality Act, 8 U.S.C. §§ 1101–1527 (2006).

⁶ *Id.* § 1101(a)(15)(T)(i)(I), (U)(i)(I). Criminal activity includes violent crimes, inchoate offenses, and crimes that interfere with a fair trial. *See id.* § 1101(a)(15)(U)(iii).

⁷ *Id.* § 1254a(a)(1), (b)(1).

⁸ *Id.* § 1154(a)(1)(A)(iii).

⁹ *See id.* § 1357(g)(5).

¹⁰ *Id.* § 1101(a)(15)(S). The S-Visa is available to aliens who provide critical and reliable information to aid in a law enforcement investigation. *Id.*

¹¹ *Id.* § 1101(a)(15)(T)(i)(I). The T-Visa provides a means for victims of human trafficking to obtain nonimmigrant status. *Id.*

play a role in regulating noncitizens present within their borders.¹³ Some states have successfully barred certain noncitizens from becoming members of the bar of their state.¹⁴ Alaska has successfully barred undocumented immigrants from receiving the Alaska Permanent Fund Dividend, the money that is paid out to lawful residents of the state of Alaska every year because of our oil largesse.¹⁵

So there are a wide variety of roles,¹⁶ and I could probably best refer you to some law review articles that recite them.¹⁷ The main point is, when the states regulate immigration their efforts must complement and not conflict with the federal government.

Secretary Kobach: I would like to refer you to a law review article too. It is my own on that exact question.¹⁸ Basically, I divide the article into eight areas of permissible state activity and give examples of how

¹² *Id.* § 1101(a)(15)(U)(i)(I). The U-Visa provides a means for victims of other crimes including violent crimes to obtain nonimmigrant status if the victim had resulting substantial physical and mental abuse.

¹³ *See id.* § 1357(g)(1).

¹⁴ The Supreme Court has held unconstitutional a Connecticut rule requiring United States citizenship to apply to the state bar. *In re Griffiths*, 413 U.S. 717, 718 (1973). The Fifth Circuit, however, declined to apply the holding in *Griffiths* to nonimmigrant aliens, refusing to overturn a statute that only allowed citizens and permanent residents to sit for the Louisiana bar examination. *LeClerc v. Webb*, 419 F.3d 405, 410, 419 (5th Cir. 2005). The Supreme Court denied certiorari to the consolidated cases in *LeClerc v. Webb*. *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), *cert. denied* 551 U.S. 1158 (2007).

¹⁵ ALASKA STAT. § 43.23.005 (2011); ALASKA ADMIN. CODE tit. 15 § 23.154 (2011); Dept. of Revenue v. Andrade, 23 P.3d 58, 61–62 (Alaska 2001) (upholding the constitutionality of Alaska Statutes 43.23.005).

¹⁶ States also play various roles with regard to many employment-based immigrant and non-immigrant visas. *See, e.g.*, IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 731–32 (12th ed. 2010) (discussing the role that states play in the Conrad 20 International Medical Graduate Program); *see also id.* at 1021–23 (discussing the role that the State Workforce Agencies (SWAs) play in the recruitment process for obtaining a labor certification for a foreign worker).

¹⁷ *E.g.*, Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1730, 1738 (2010) (noting that states are permitted to pass laws that disadvantage illegal immigrants in order to force them out of the state, but those laws must not deny access to public education or involve racial or ethnic discrimination); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2055–56 (2008) (pointing out that some states pass illegal immigration laws regarding enforcement, employment, housing, and documentation as well as education, welfare, and healthcare, while other states pass laws seeking to protect illegal immigrants against federal law enforcement and to integrate them into society); Kathryn J. Couch, *This Land Is Our Land, a Local Solution to a Local Problem: State Regulation of Immigration Through Business Licensing*, 21 GEO. IMMIGR. L.J. 641, 642 (2007) (describing the actions of a city in Pennsylvania that enacted an ordinance that would revoke business licenses of businesses that hired illegal immigrants).

¹⁸ Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do To Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459 (2008).

different states have implemented policies to reduce illegal immigration. I also discuss court decisions that have supported these efforts. The eight areas I identify where states can act constitutionally are as follows:

- A. Denying public benefits to illegal aliens;
- B. Denying resident tuition rates to illegal aliens;
- C. Prohibiting the employment of unauthorized aliens;
- D. Enacting state-level crimes that mirror federal immigration crimes [Arizona's law being one that is obviously in contention now];
- E. Enacting state-level crimes against identity theft;
- F. Providing state and local law enforcement assistance to ICE [Immigration and Customs Enforcement];
- G. Presuming illegal aliens to be flight risks for bail purposes;
- H. Denying driver licenses to illegal aliens.¹⁹

States have many options in dealing with illegal immigration in conjunction with the federal government.

Ms. Stock: It is important to know that the states can also provide benefits to immigrants. California just had its provision providing tuition to undocumented immigrants and other residents of the state upheld by its own court.²⁰

Secretary Kobach: Certiorari to the Supreme Court is pending.²¹

Ms. Stock: That statute is probably going to withstand review on appeal—states are allowed to do things that benefit immigrants also.²²

Audience Question 2: I have a question for the panel that has been bothering me ever since this Arizona suit has been filed. The Constitution specifically states that an action filed against the state is within the original jurisdiction of the Supreme Court.²³ How can this case have been litigated in Phoenix in a district court?

¹⁹ *Id.* at 465.

²⁰ *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 860 (Cal. 2010); *see* CAL. EDUC. CODE § 68130.5 (West 2003).

²¹ *Martinez*, 241 P.3d 855, *petition for cert. filed*, (Feb. 14, 2011) (No. 10-1029).

²² *See* 8 U.S.C. § 1621(d) (2006).

²³ U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”).

Secretary Kobach: I can answer that question; many people are asking that question. The Supreme Court has interpreted that provision in Article III giving the Supreme Court original jurisdiction in cases where a state is a party as non-exclusive, meaning lower federal courts could also have jurisdiction over such cases.²⁴ Some people were urging the state of Arizona to contest that point and try to reopen that issue,²⁵ but Arizona decided not to do so.²⁶

Ms. Stock: I do not know if Mr. Ho wants to comment on that question. What do you think would happen if they actually had a trial on it before the Supreme Court?

Mr. Ho: A trial? I am not going to comment on what would happen in that case, but thank you.

²⁴ In *Ames v. Kansas*, the Supreme Court described its jurisdiction in suits against states as follows:

With respect to States, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a State was a party, except between a State and its citizens, and ... between a State and citizens of other States or aliens, in which latter case its jurisdiction should be original but not exclusive. Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a State and citizens of other States or aliens. . . . [T]he practical effect . . . was, therefore, to give the Supreme Court exclusive original jurisdiction in suits against a State begun without its consent, and to allow the State to sue for itself in any tribunal that could entertain its case. In this way States . . . were protected from the compulsory process of any court other than one suited to their high positions, but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction. . . . This, of course, did not prevent a State from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose.

Ames v. Kansas, 111 U.S. 449, 465 (1884). The Supreme Court clarified the meaning of its original jurisdiction for cases in which a state is a party as allowing lower courts to have concurrent jurisdiction of these cases. In fact, this idea was codified in the United States Code. 28 U.S.C. § 1251 (2006) (“The Supreme Court shall have original but not exclusive jurisdiction of: . . . All controversies between the United States and a State . . .”). From the passage in *Ames*, it appears as though the Supreme Court would retain exclusive original jurisdiction if a state is sued without its consent; however, later court decisions have ruled that consent is not required. *E.g.*, *United States v. Texas*, 143 U.S. 621, 646 (1892) (states gave their consent to be sued by the United States by accepting the Constitution and being admitted as a state); *United States v. Louisiana*, 339 U.S. 699, 701–02 (1950) (rejecting Louisiana’s argument that *United States v. Texas* should be overruled).

²⁵ See Joe Wolverton, II, *Does the District Court Have Jurisdiction in Case Against Arizona?*, NEW AM. (Aug. 2, 2010 3:00 PM), <http://www.thenewamerican.com/index.php/usnews/constitution/4199-does-the-district-court-have-jurisdiction-in-case-against-arizona> (arguing that the district court does not have jurisdiction to hear the case).

²⁶ The State of Arizona and Governor Janice K. Brewer’s Answer and Counterclaims at 2–3, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-01413-SRB).

Audience Question 3: I have a question primarily for Ms. Stock. With Congress' stated policy under Section 212, it states that the Department of Labor must consider the wages and working conditions of Americans and lawful permanent residents²⁷ and the regulations that prohibit the hiring of undocumented aliens.²⁸ Specifically, the Arizona provision and SB 1070 make it a crime to apply for a job while being undocumented.²⁹ I think it makes the crime a misdemeanor.³⁰ How does that conflict with the federal law as opposed to complementing it, and also how does that conflict with the current Administration's approach in terms of bypassing a lot of these smaller deportation cases?

I know that in Houston, for instance, ICE attorneys have been going into immigration court and asking aliens, "Do you have any convictions?" If the response is "No," they ask, "How long have you been here?" Depending on the answer, ICE attorneys may not proceed with the removal of the aliens and may turn them loose.³¹ How does it conflict with Congress' intent?

Ms. Stock: That particular provision is probably going to be the one that is the most interesting for people to watch. It appears that the argument is a field preemption argument based on the design of the statute,³² because Congress has passed such an extensive set of rules and regulations regarding who gets to work and who does not.³³ Although it is illegal for most undocumented immigrants to be employed in the United States, there are still some immigrants who are "grandfathered" from prior to 1986.³⁴ Once undocumented immigrants are employed, they also have some rights to certain protections under federal law, such as against unpaid wages.³⁵ The federal judge ruled in this case that what

²⁷ 8 U.S.C. § 1182(a)(5)(A)(i) (2006).

²⁸ *Id.* § 1324a(a)(1).

²⁹ ARIZ. REV. STAT. ANN. § 13-2928(C) (2011).

³⁰ *Id.* § 13-2928(F).

³¹ Susan Carroll, *Feds Moving To Dismiss Some Deportation Cases*, HOUS. CHRON., Aug. 25, 2010, at A1; *see also* Julia Preston, *Immigration Agency Ends Some Deportations*, N.Y. TIMES, Aug. 27, 2010, at A14.

³² For an explanation of the different types of preemption, *see* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226–28 (2000).

³³ For an example of the complexity of determining visas for employment, *see* 8 U.S.C. § 1151(d) in conjunction with 8 U.S.C. § 1153(b).

³⁴ 8 U.S.C. § 1324a(a)(4) (2006) (also known as the "grandfather provision"); *see also* *Maka v. U.S. Immigration & Naturalization Serv.*, 904 F.2d 1351, 1360 (9th Cir. 1990).

³⁵ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–92 (1984) (concluding that undocumented immigrants come under the definition of "employee" under the National Labor Relations Act); *Patel v. Quality Inn S.*, 846 F.2d 700, 706 (11th Cir. 1988) (holding

Arizona is trying to do goes beyond what is allowed and conflicts with the complex scheme that was enacted by Congress.³⁶

I am not quite sure how the 9th Circuit will rule on that issue,³⁷ but I do think the reasoning under *DeCanas v. Bica*, in terms of the philosophy laid out in the decision, is probably still applicable;³⁸ however, the actual court decision, since it predates the Immigration Reform and Control Act of 1986 (“IRCA”),³⁹ is probably suspect.

Secretary Kobach: With this particular preemption argument, the federal government is once again testing a rather novel theory. The Justice Department is arguing that Arizona’s lawmaking, in making it a misdemeanor to seek employment unlawfully when one is an unauthorized alien, goes beyond the scheme envisioned by Congress; however, there is no federal law that says this, or anything close to it. In this instance, the Justice Department argument is not that preemption occurs through an executive decision not to enforce the law.⁴⁰ Rather, it is saying that preemption occurs through congressional silence.⁴¹ In other words, the Justice Department is claiming that if Congress does not speak in an area, then Congress has preempted state legislation by declining to speak.⁴² Now that is a very dangerous notion if you think about it. Preemption requires an unmistakable statement by Congress. If preemption occurs through congressional silence, it becomes an invitation for courts to divine preemption where none exists.

that “undocumented workers are ‘employees’ within the meaning of the FLSA and that such workers can bring an action under the act for unpaid wages and liquidated damages”).

³⁶ *United States v. Arizona*, 703 F. Supp. 2d 980, 992, 994–96 (D. Ariz. 2010).

³⁷ Following the panel discussion, a three-judge panel of the Ninth Circuit ruled against Arizona on this issue. *United States v. Arizona*, No. 10-16645, 2011 U.S. App. LEXIS 7413, at *1–4, *71–72 (9th Cir. Apr. 11, 2011). Writing for the majority, Judge Richard Paez wrote that Arizona could not criminalize the act of seeking employment because Congress had made a choice “to exert the vast majority of pressure on the employer side” through its “affirmative protections to unauthorized workers” and a complex scheme of employer sanctions. *Id.* at *47–48.

³⁸ The Supreme Court began its discussion by stating that “[p]ower to regulate immigration is unquestionably exclusively a federal power.” *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). However, the Court noted that it had never ruled a state statute preempted merely because it dealt with immigrants. *Id.* at 355. The Court determined that in the absence of federal legislation, California’s statute forbidding state employers from hiring illegal aliens would not be preempted. *Id.* at 355–56.

³⁹ The Immigration Reform and Control Act was passed on November 6, 1986, ten years after the Supreme Court decided *DeCanas v. Bica*. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

⁴⁰ Plaintiff’s Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof at 42–43, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-1413-NVW).

⁴¹ *Id.*

⁴² *See id.* at 44.

It is a bizarre dormant preemption concept whereby Congress somehow preempts the states without acting. What Congress did in 1986 through the enactment of IRCA was to make it a crime under certain circumstances to knowingly hire or employ unauthorized aliens.⁴³ Congress did not go into the subject of whether the alien has committed a criminal offense by knowingly seeking unlawful employment.⁴⁴ Congressional silence, however, in no way constitutes preemption.

I also do not think that field preemption⁴⁵ applies here because IRCA expressly stated that there are certain places on the field where states are still allowed to operate. The most notable example is the one that was at issue in the Legal Arizona Workers Act case that is now before the Supreme Court.⁴⁶ The question is whether a state may take away business licenses from companies that are knowingly employing unauthorized aliens.⁴⁷

The Legal Arizona Workers Act,⁴⁸ which I also assisted in the drafting of, is based on the exception that was carved out by Congress in 8 U.S.C. 1324a(h)(2). That subsection of federal law says that states can take away business licenses from employers that hire illegal aliens.⁴⁹ Since Congress has allowed for the states to be on the field, it is quite difficult for a field preemption argument to work because you are saying that they are simultaneously allowed on the field but pushed off the field too.

Ms. Stock: No, it is because Congress put the exception in the statute for that, and it did not put an exception in for the other issues.

Audience Question 4: My question is for Kris Kobach. What can we do to educate the public to the effect that there is a war going on in the southwestern part of our country and that we are being invaded?

The second part of the question is, what can we do to counteract the fact that the President of the United States and his predecessor, in spite of their window-dressing in deporting a few people, really are not

⁴³ 8 U.S.C. § 1324a(a)(1) (2006).

⁴⁴ Working without employment authorization can, however, be a violation of an alien's immigration status, rendering the alien removable.

⁴⁵ See Nelson *supra* note 32.

⁴⁶ *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom.* Chamber of Commerce of the United States v. Candelaria, 130 S. Ct. 3498 (2010).

⁴⁷ *Napolitano*, 558 F.3d at 860–61.

⁴⁸ ARIZ. REV. STAT. ANN. §§ 23-211 to -216.

⁴⁹ 8 U.S.C. § 1324a(h)(2) (2006).

interested in enforcing the law and in effect are actually aiding and abetting the criminals who are invading our country?⁵⁰

Secretary Kobach: It is an interesting point. There literally is a war going on in Mexico. The Mexican federal government is having real difficulty asserting authority over portions of its own territory; the drug cartels have successfully prevented the Mexican Army from asserting control in these areas.⁵¹ I do not need to go into the statistics concerning the number of fatalities because I am sure you have heard them. I think most Americans who regularly follow the news have heard what is going on. It is extraordinary, though. And the mayhem and death that is happening south of the border frequently spills across the border into the border cities and border counties of the United States.⁵²

So, I think the public is certainly aware of it. The question is, will the Executive Branch, and to a lesser extent Congress, become sufficiently concerned about it that they will try to do something meaningful? And will they recognize the importance of state and local law enforcement in dealing with this violence near the border?

As I explained earlier, ICE agents do not normally go on patrols looking for illegal aliens. They do not drive around looking for violations in the way that a police officer on the beat cruises through a violent neighborhood looking for lawbreakers. Consequently, if you are a smuggler and you are bringing in your human cargo, once you get past the 100-mile zone where the Border Patrol operates, you are likely to be free and clear.⁵³ You will likely never run into a federal law enforcement officer. The only law enforcement officer that you are likely to come into contact with is a state or local law enforcement officer. In most regions of the country, the federal government is like a baseball team that has pulled the outfield and is just playing with an infield. All the alien

⁵⁰ See Sen. Graham Says President Obama's Proclaimed 'Unwavering' Commitment to Immigration Reform 'Doesn't Pass the Smell Test,' ABC NEWS (Mar. 15, 2010 10:32 AM), <http://blogs.abcnnews.com/politicalpunch/2010/03/sen-graham-says-president-obamas-proclaimed-unwavering-commitment-to-immigration-reform-doesnt-pass-.html> (reporting Senator Graham's views that President Obama is not doing enough in immigration reform).

⁵¹ Marc Lacey, *With Deadly Persistence, Mexican Drug Cartels Get Their Way*, N.Y. TIMES, Mar. 1, 2009, at A1.

⁵² For example, a Mexican drug cartel threatened to kill local police officers in an Arizona border city if the officers interfered with drug trafficking while off duty. Joshua Rhett Miller, *Mexican Drug Cartel Warns Police Officers in Arizona Border Town To 'Look the Other Way'*, FOXNEWS.COM (June 22, 2010) <http://www.foxnews.com/us/2010/06/22/mexican-cartel-threatens-target-officers-arizona-border-town/>.

⁵³ See Colin Woodard, *Far from Border, U.S. Detains Foreign Students*, THE CHRON. OF HIGHER EDUC. (Jan. 9, 2011), <http://chronicle.com/article/Far-From-Canada-Aggressive/125880/>; see also Nina Bernstein, *Border Sweeps in North Reach Miles into U.S.*, N.Y. TIMES, Aug. 30, 2010, at A1.

smugglers have to do is hit the ball beyond the infield to score a homerun. They are unlikely to get caught by federal authorities in the interior of the country, unless they become the target of a particular investigation. That is why it is so crucial for state and local police to fill the gap.

Ms. Stock: That simply is not true, Mr. Kobach, and I give the Amway example. That incident was in the middle of Nebraska, and it was an ICE agent who was at McDonald's and called in the troops. They came in, right in the middle of Nebraska, and grabbed everybody on the bus.⁵⁴

Secretary Kobach: It was a very unusual case, because it involved a chance intersection of the ICE agent and the bus at a McDonalds. It illustrates my point; the ICE agent was not out there patrolling for illegal aliens.

Ms. Stock: I have been in southern Vermont and passed through checkpoints in southern Vermont on the interstate highway.⁵⁵

Secretary Kobach: If you get more than a hundred miles from border, you will not find many Border Patrol agents.

Ms. Stock: Well, a hundred miles is pretty far inside the country.

Secretary Kobach: As to the question of how we inform the public, I believe in some respects the public is already well informed on this issue generally. There has been so much media coverage of it in recent years. You saw this during the 2007 and 2008 debates on the DREAM Act⁵⁶ and on the other amnesty proposals.

Because of the Internet, certain cable news programs, and talk radio, there is a great amount of information out there. I was amazed at how informed the public was during those recent debates; in many instances members of the public were better informed than their

⁵⁴ *ACLU Files Legal Claim Against ICE on Behalf of United States Citizens Arrested in Unwarranted Immigration Roundup*, ACLU (Nov. 15 2010), <http://www.aclu.org/immigrants-rights/aclu-files-legal-claim-against-ice-behalf-united-states-citizens-arrested-unwarran>.

⁵⁵ *See Border Patrol Stops*, ACLUVT.ORG, http://www.acluvt.org/issues/border_patrol_stops.php (last visited Mar. 31, 2011).

⁵⁶ WHITE HOUSE, *THE DREAM ACT: GOOD FOR OUR ECONOMY, GOOD FOR OUR SECURITY, GOOD FOR OUR NATION*, available at <http://www.whitehouse.gov/sites/default/files/DREAM-Act-WhiteHouse-FactSheet.pdf>; see Ernest Istook, *States in Rebellion*, WASH. TIMES, Oct. 21, 2007, at B1.

respective members of Congress. One would hear members of Congress talking about the issue in media interviews, and it was clear that they were unaware of exactly what certain provisions of the bill contained. So, I think public information is actually unusually high on the subject of illegal immigration, compared to congressional information.

Ms. Stock: I think we put out some misinformation tonight, which is that there is no enforcement going on. In fact, the Obama administration is breaking records on the number of deportations.⁵⁷ They have deported more people this past year than ever in United States history.

Secretary Kobach: Although these were cases which were initiated before the Obama administration came into office.⁵⁸

Ms. Stock: They are deporting more. Even as we speak, they're going to break 400,000 this year in terms of deportations.

Secretary Kobach: You said that they're breaking records. In the Houston sector and, as the one questioner just mentioned, North Dakota, the administration is now having ICE attorneys drop removal cases by the thousands.

Ms. Stock: Cases are being dropped against minor violators, so they can put their resources on more serious violators.

Secretary Kobach: You just told us they were breaking numerical records for deportations.

Ms. Stock: Yes, they are.

Secretary Kobach: In certain districts, the political leadership of ICE has ordered ICE attorneys to drop thousands of cases midway through the removal proceeding.

Ms. Stock: Right, because Congress has only given them the resources to detain and deport 400,000 people throughout the whole country.⁵⁹

⁵⁷ Shankar Vedantam, *U.S. Deportations Reach Record High*, WASH. POST, Oct. 7, 2010, at A10.

⁵⁸ *Statement from FAIR in Response to Sec. Napolitano's 'State of America's Homeland Security'*, PR NEWswire (Jan. 27, 2011), <http://www.prnewswire.com/news-releases/statement-from-fair-in-response-to-sec-napolitanos-state-of-americas-homeland-security-114751474.html>.

Secretary Kobach: So how are we to believe that the Obama Administration truly wishes to deport a record number of aliens, when the Administration is simultaneously dropping thousands of cases that were already pending?

Ms. Stock: And they're trying to deport the murderers, the rapists, the drug dealers, the bank robbers.⁶⁰

Mr. Ho: Unfortunately, we are out of time, and unlike in a game of football, we don't have overtime today. This clearly is an emotional issue. Please join me again in thanking the panel. This was a wonderful debate, a real testament to the Federalist Society. Thank you.

⁵⁹ Peter Slevin, *Record Numbers Being Deported*, WASH. POST, July 26, 2010, at A1.

⁶⁰ *Id.*