

Roadblocks to Amnesty State Sovereignty, Double Jeopardy, and Legalization

By Steve Zawacki, Esq.

In an October 2009 speech on the West Lawn of the U.S. Capitol, Rep. Luis Gutierrez (D-Ill.) outlined a plan for a so-called “comprehensive immigration reform” bill. The centerpiece of this bill is a legalization program for aliens now living here illegally. Similarly, President Obama has expressed support for creating a “path to citizenship” for illegal aliens. Pro-legalization activists are pressing for Congress to take up a bill early in 2010.

As the United States Congress moves toward attempting to legitimize the estimated 12 million persons within the country who have no lawful authority to be here, certain realities according to the constitutions and laws of the United States and the states, especially in the context of criminal law, must be recognized. The most important of these considerations deal with the concepts of dual sovereignty, double jeopardy, prosecutorial discretion, executive clemency, and suspect class. These fundamental legal principles could seriously complicate any expansive legalization program that seeks to absolve illegal aliens of crimes they have committed here, including crimes commonly associated with illegal residence and employment, such as identity theft and using false documents.

First, the general definitions for these legal concepts:

- a. **Dual Sovereignty** is where more than one sovereign entity (such as the federal government and any state government, or two or more state governments) can, if they desire, separately prosecute a person if the person’s action violates the laws of each sovereign entity, and the prohibition against double jeopardy doesn’t apply.
- b. **Double Jeopardy** basically protects a person against a second criminal prosecution for the same offense after acquittal, against a subsequent prosecution for the same offense after conviction, and against multiple punishments for the same offense.
- c. **Executive Clemency** is the authority exercised by a president in federal criminal cases, and a governor in state convictions, to pardon a person convicted of a crime, commute the sentence (shorten it, often to time already served), or reduce it to another, lesser sentence.
- d. **Prosecutorial Discretion** is the authority inherent with being a prosecuting attorney for a government entity to decide whether or not to bring criminal charges, and what charges to bring, in any case where evidence exists that a violation of a statute occurred.
- e. **Suspect Class** is when a presumptively unconstitutional distinction can be made between persons on the basis of race, national origin, alienage, or religious affiliation in a statute, ordinance, regulation, or policy.

The legalization proposals advanced so far have offered amnesty to illegal aliens who can show that they have been employed, paid taxes, and can pass a background check. (See the bill entitled “The Security Through Regularized Immigration and Vibrant Economy” or STRIVE Act, introduced by Rep. Gutierrez in 2007, H.R. 1645.) Yet a considerable number of persons unlawfully within the United States, certainly hundreds of thousands, have been convicted of or are indictable for a variety of criminal acts, often in connection with illegal employment. These include identity theft, unlawful use of identity documents, unlawful re-entry after deportation/removal, larceny, fraud, bigamy, prostitution, tax evasion, firearm possession, and a host of others. Some criminal acts violate federal law, others violate state law, and many violate both federal and state law. Federal law now stipulates that those convicted of serious or controlled substance crimes, prostitution or commercial vice offences, and those who have

Steve Zawacki, Esq. is a private practitioner residing in Central Florida. In April, 2009 he retired from government service, having served as a senior immigration advisor at Headquarters, Department of Homeland Security.



used fraud to enter the United States are inadmissible, and therefore could not benefit from a legalization. The ultimate eligibility for any kind of lawful immigration status for these persons will rest with how the aforementioned concepts, singularly and in combination, are resolved, if at all.

Dual Sovereignty and Double Jeopardy. As affirmed by the U.S. Supreme Court (*United States v. Lanza*, 43 S. Ct. 141 and *Heath v. Alabama*, 106 S. Ct. 433 (1985)), situations exist where a person can be tried by more than one government (sovereign) without violating double jeopardy. State governments are considered as separate sovereigns, and the federal government is a separate sovereign. Each sovereign has its own interests governed by its laws, and where situations occur when the laws of multiple sovereigns are violated, even from the same act, then each sovereign has a separate recourse against the person. The U.S. Supreme Court held that double jeopardy isn't violated when two separate states convict a person for the same offense; likewise for when the federal government and a state government convict a person for the same offense. A recent example demonstrating dual sovereignty and double jeopardy not attaching involved professional quarterback Michael Vick, who accepted a plea bargain with the federal government for his involvement in an illegal dog-fighting ring and then found himself indicted by the State of Virginia — all based on the same criminal act, but violating statutes of two sovereigns.

Executive Clemency and Prosecutorial Discretion. The constitutions of the United States and the separate states provide each sovereign's chief executive (i.e., the president and the governors) with authority to exercise mercy at the executive's discretion to persons who have committed crimes under that sovereign's laws. Neither the president nor any governor can grant clemency for any crimes committed under another sovereign's jurisdiction. So, a person convicted by two different sovereigns for the same act (like the Vick situation) must seek and be granted executive clemency by the chief executives for all involved sovereigns in order to be free (or mitigated) of the stigma and penalty attached to the criminal act.

For those situations where a person is alleged to have committed a criminal act, the sovereign's prosecuting attorney has almost limitless discretion to decide if it serves the sovereign's best interest to prosecute a person for a crime. Where the laws of multiple sovereigns are involved, each sovereign's prosecuting attorney has independent authority whether to prosecute or not and is not bound by the decision of any other sovereign's prosecutor. The criteria for prosecute-or-not involve many factors, oftentimes including what is in the best public

interest as determined by the current political leadership through directives and legislative action.

Suspect Class and Prosecutorial Discretion. The Fifth (due process) and Fourteenth (equal protection) Amendments of the U.S. Constitution form the basis for the suspect classification doctrine. The concept of suspect classifications, particularly regarding nationality or race, raised its head most dramatically during World War II with the forced relocation of Americans who were of Japanese ancestry. Although the U.S. Supreme Court (*Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944)) ultimately upheld the forced relocation, Justice Black, speaking for the majority, noted: "all legal restrictions which curtail the Civil Rights of a single group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."

Strict (e.g., rigid) scrutiny is exactly as it sounds. It is much more stringent than the normally applied rational basis test, which simply requires that a reasonable ground exists for the challenged statute, regulation, or policy. Strict scrutiny requires the government to demonstrate that the actions delineated in the challenged item are necessary to achieve a compelling state interest and that the item implementing the actions is narrowly tailored to achieve the intended result. The burden of proof falls on the government in cases where suspect class/strict scrutiny are at issue. If the government fails to achieve the strict scrutiny standard, it results in the reversal of any presumption that the statute, regulation, or policy is constitutional.

When federal prosecutors decide whether or not to prosecute they apply the criteria within the United States Attorney's Manual (http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/). Section 9-27.260A1 of this manual specifically demands that "In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by: 1. The person's race, religion, sex, national origin, or political association, activities or beliefs" Similar criteria apply to state prosecutors as well.

Criminal defendants can claim selective prosecution due to suspect classification based on a government statute, regulation, or policy to target (or not) a person based on race; national origin; alienage; or political association, activities or beliefs. If such a claim is made, the government must demonstrate its adherence to Section 9-27.260A1 of the aforementioned manual (or state equivalent).

Putting It All Together, Plus Immigration. The underlying goal of “comprehensive immigration reform” (CIR) has always been to resolve the problem of having millions of persons in the United States without lawful authority to be here, with a secondary goal of establishing an immigration system that ensures the “undocumented” phenomenon is not repeated. The latest series of plans have as their foundation various “paths to citizenship” based on the federal government turning a blind eye toward past violations of the law. However, all of the plans have assumed that the federal government is the only sovereign involved, ignoring the fact that the states, who also are sovereigns, have as much (if not more) involvement with the “undocumented” population.

As a hypothetical (but very plausible) example, let’s imagine there is a person from a Central American country who has been living in South Florida without legal authority for over five years. Let’s further imagine this person has purchased a “three pack” of documents (counterfeit driver’s license, Social Security card, and employment authorization document) from an illegal source, so the person could assimilate into the region. The person gets a job (based on the fraudulent documents) and quietly assumes what appears to be a normal life. As time goes by, the person’s spouse and children arrive one day and also take up residence at the South Florida address. The children enroll in the public school (as they can legally do) and the spouse also acquires a “three pack” tailored to match the original person’s fraudulent documents.

Along comes a CIR law. The person now wants to apply for whatever legal status the new law authorizes. Applicants likely will have to prove that they have been employed, paid taxes, and so on, but this process could leave them open to the discovery of illegal employment-related crimes. They now must rely on the U.S. Attorney’s Office to exercise discretion to decline any prosecution according to 18 U.S.C. §506 (for the purchase and use of the “three pack”). Any conviction under this statute would make the person an “aggravated felon” according to Section 101(a)(43) of the Immigration and Nationality Act (INA) and subject to removal/deportation for life. For this example, the U.S. Attorney’s Office decides not to prosecute the person (and a couple hundred thousand others in the same situation), so the person subsequently applies for the new CIR benefit.

Now appears the state of Florida as an involved sovereign. Florida has a comparable law (in this case, Title XLVI, Chapter 817.568(9) of the 2009 Florida Statutes) to the federal statute dealing with fraudulent use of personal information. The Florida State Attorney could decide to prosecute the person according to the Florida statute for the person’s fraudulent use of the “three pack”

documents. The Florida offense is considered a third-degree felony, punishable by imprisonment for up to five years. The person is so charged by the Florida State Attorney; indicted, convicted, and sentenced to two years in prison by a Florida criminal court; and if the fraud is considered to have caused the person’s victim(s) a loss valued at least \$10,000 (which can take many forms), the person also qualifies as a deportable aggravated felon (INA §101(a)(43)(M)(i)).

In the meantime, the U.S. Attorney’s Office decides to prosecute a U.S. citizen for buying and using a “three pack” set of fraudulent documents to establish a new identity for nefarious reasons. Since the enactment of CIR, the U.S. Attorney’s Office has declined prosecution under the same statute regarding hundreds of thousands of non-citizens who purchased fraudulent documents under similar circumstances for essentially similar reasons as the prosecuted U.S. citizen. The U.S. citizen defendant could claim a defense of selective prosecution based on nationality, adhering to the criteria the U.S. Supreme Court has delineated for such a claim (*United States v. Armstrong*, 517 U.S. 456 (1996)).

While these events are occurring, in order to ease the administrative burden and backlogs incurred with CIR benefits processing, the president of the United States issues a general pardon for federal convictions relating to a selective list of crimes to all persons otherwise eligible for lawful immigration status under CIR. Similar general pardons are issued by governors of 20 states, while the remaining governors refuse to do the same. Prisoners’ rights groups around the nation claim abuse of discretionary powers by the sovereign chief executives exercising authority to pardon based predominately, if not solely, on nationality.

So ends the hypothetical example.

Conclusion

As demonstrated, there are serious legal considerations to any Congressional action that tries to legislate absolution for past and current criminal transgressions by a distinct population, or relies on the administration to exercise through the Attorney General and the U.S. Attorney’s Office prosecutorial discretion to ignore these criminal transgressions. Congress may have plenary power regarding immigration and non-citizens in general, but that power does not reach into the states when the behavior of non-citizens violates a state’s criminal laws. And any action by Congress and the administration that can be shown to be discriminatory against U.S. citizens can have not only unintended and highly divisive repercussions, but may also result in CIR’s constitutionality being seriously questioned.