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Criminalizing Unlawful Presence: Selected Issues

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Summary

Several bills introduced in the 109th Congress would make the unauthorized presence of aliens in the U.S. a criminal offense, including H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, introduced by Representative James Sensenbrenner on December 6, 2005 and passed by the House as amended on December 16, 2005, and S. 2454, the Securing America's Borders Act, introduced by Senator Bill Frist on March 16, 2006. The version of Chairman Arlen Specter's mark reported out of the Senate Judiciary Committee on March 27, 2006, (S.Amdt. 3192) does not contain a provision criminalizing unlawful presence, though the bill had initially contained such a provision. Neither version of the Comprehensive Immigration Reform Act of 2006 introduced in the Senate on April 24, 2006, as S. 2611 and S. 2612, which are commonly referred to as the Hagel/Martinez compromise, criminalize unlawful presence. Although unlawful entry into the United States is both a criminal offense and a ground for removal, unlawful presence is only a ground for deportation and is not subject to criminal penalty, except when an alien is present in the United States after having been removed. This report briefly discusses some of the issues raised by criminalizing unlawful presence.

Immigration law contains both civil and criminal provisions. The removal of aliens, however severe its consequences, has been "consistently classified as a civil rather than a criminal procedure" by the courts.¹ On the other hand, the Immigration and Nationality Act (INA) contains several provisions that are unambiguously penal in nature, subjecting offenders to imprisonment and/or fine under Title 18 of the U.S. Code.

Certain immigration violations carry civil and criminal consequences. An alien who enters or attempts to enter the United States without authorization is not only subject to removal or exclusion but is also subject to criminal prosecution, with a first offense

¹ *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952). *See also* *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); *Bugajewitz v. Adams*, 228 U.S. 585, 591(1913).

subject to six months' imprisonment (a misdemeanor) and any subsequent offense punishable by up to two years' incarceration (a felony).²

Although an alien who unlawfully enters the United States is potentially subject to removal and criminal prosecution, an alien found unlawfully present in the U.S. is typically subject only to removal. Unlawful presence is only a criminal offense when an alien is found in the United States after having been formally removed or after departing the U.S. while a removal order was outstanding.³

The availability of both criminal sanctions and removal authority for immigration violations does not mean that both tools will be used concomitantly, especially if one tool can more easily be employed than the other. The vast majority of aliens apprehended by the Border Patrol unlawfully entering the United States are either removed or (far more often) permitted to voluntarily depart in lieu of removal without being criminally prosecuted.⁴ This is largely because pursuing criminal charges in all cases would place a heavy burden upon prosecutorial resources and detention facilities. Unlawful entry prosecutions of aliens found in the interior of the U.S. are even rarer. Such cases are difficult to prove, as the government must present affirmative evidence that an alien unlawfully entered the U.S. It cannot base its case solely upon the inference that the accused's unauthorized presence in the U.S. was likely due to him unlawfully entering the country;⁵ an inference that might not always be accurate (e.g., with respect to a lawfully admitted alien who overstays his visa).

Proposals to Criminalize Unlawful Presence

A few proposals made in the 109th Congress would criminalize unlawful presence. The version of the Chairman Arlen Specter's mark reported out of the Senate Judiciary Committee on March 27, 2006 (S.Amdt. 3192) does not contain a provision criminalizing unlawful presence, though the bill had initially contained such a provision. However, § 203 of H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, introduced by Representative James Sensenbrenner on December 6, 2005 and passed by the House on December 16, 2005, would amend the INA to make both unlawful entry and presence felonies subject to a year-and-a-day's imprisonment. Heightened sentences would be available for subsequent offenses, as well as for aliens previously convicted of certain crimes. Section 206 of S. 2454, the Securing America's Borders Act, introduced by Senator Bill Frist on March 16, 2006, would also criminalize unlawful presence, but a first-time offense would be a misdemeanor subject to six months' imprisonment, while subsequent offenses would be felonies subject to two years'

² INA § 275(a); 8 U.S.C. § 1325(a). Unlawful entry has been a crime since 1929. Act of Mar. 4, 1929, § 2; 45 Stat. 1551.

³ INA § 276; 8 U.S.C. § 1326.

⁴ In 2004, for example, the Border Patrol seized approximately 1.16 million aliens who unlawfully entered or attempted to enter the United States from Mexico. Department of Homeland Security, Office of Immigration Statistics, YEARBOOK OF IMMIGRATION STATISTICS: 2004 (2005), at Table 38. Only about 16,000 aliens (mostly serial offenders) were convicted of the crime of unlawful entry. *Id.* at Table 50.

⁵ See, e.g., *United States v. Doyle*, 181 F. 2d 479 (2nd Cir. 1950).

imprisonment. Heightened penalties would also be made available in the case of aliens previously convicted of certain crimes. In addition, the offenses of unlawful entry and presence would be defined to continue until the alien is discovered within the United States by immigration officers.

Both would also provide that a conviction for unlawful presence (as well as unlawful entry), at least in certain circumstances, would have immigration consequences. Both § 201 of House-passed H.R. 4437 and § 203 of S. 2454 would designate unlawful presence, entry, and reentry as “aggravated felonies” for purposes of the INA in cases where the offender was sentenced to at least one year imprisonment. Conviction for an “aggravated felony” makes an alien ineligible for many immigration benefits,⁶ and also makes an alien permanently inadmissible upon removal.⁷ While first-time convictions for unlawful presence and entry could potentially constitute aggravated felonies under House-passed H.R. 4437, under S. 2454 only subsequent offenses could potentially be designated as such.

Selected Issues

The criminalization of unlawful presence would raise a number of legal issues. The nature of some of these issues would be shaped by the manner in which immigration and law enforcement authorities apply an unlawful presence statute. Indeed, it is ultimately up to the discretion of federal prosecutors as to whether to pursue cases against individual aliens who may fall under the purview of a statute criminalizing unlawful presence.

Rights in a Criminal Prosecution Versus a Removal Hearing. Removal hearings are not criminal proceedings. Whereas criminal cases are conducted through judicial trial, removal cases are usually conducted through administrative proceedings before the Executive Office of Immigration Review (EOIR) within the Department of Justice. Though orders of removal may be reviewed by a federal court, statute and court jurisprudence generally provide that such review is limited in scope and largely deferential to the administrative authorities charged with implementing immigration laws.⁸

The constitutional rights accorded to an alien in a removal hearing are generally less than those to which the accused is entitled in a criminal proceeding. Among other things, in a criminal case the accused often has a right to both a trial by jury and appointed counsel, while an alien in a removal hearing does not (though an alien does possess the right to obtain counsel at no expense of the Government).⁹

⁶ See generally CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia and Larry M. Eig.

⁷ INA § 212(a)(9)(A); 8 U.S.C. § 1182(a)(9)(A).

⁸ INA § 242, 8 U.S.C. § 1252. In cases where congressional intent is unclear or ambiguous, federal courts give significant deference to immigration authorities’ interpretation of the laws they administer, so long as such interpretations are “based on a permissible construction of the [INA].” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

⁹ INA § 240(b)(4); 8 U.S.C. § 1229a(b)(4) (describing rights of alien in general removal (continued...))

Perhaps most notably, the burden of proof required to convict someone of a criminal offense for unlawful presence — proof “beyond a reasonable doubt” — is greater than that needed to order an alien removed. In removal proceedings for unlawful presence, it is *the alien’s burden* to prove “by clear and convincing evidence, that...[he] is lawfully present in the United States pursuant to a prior admission.”¹⁰ If the alien is able to demonstrate that she or he was lawfully admitted into the United States, immigration authorities must demonstrate by “clear and convincing evidence” that the alien thereafter committed a deportable offense;¹¹ a less onerous burden than proving guilt “beyond a reasonable doubt” in a criminal prosecution.¹²

As previously noted, the availability of both criminal sanctions and removal authority for an immigration violation does not mean that both tools will be used. For reasons described above, it may often be simpler to remove an alien for unlawful presence than to successfully prosecute him for such an offense. Whether this means that prosecutors will forgo pursuing criminal charges against many aliens who may be removed on account of unlawful presence, and selectively bring charges only against certain categories of aliens (e.g., serial offenders, aliens suspected of unlawful activity) remains to be seen.

Effects of Making Unlawful Presence a Felony Versus a Misdemeanor.

Proposals to criminalize unlawful presence differ as to whether to make it a misdemeanor or felony offense. Misdemeanors are considered less serious crimes than felonies, and are generally subject to a maximum sentence of imprisonment of a year or less, whereas felonies are subject to greater penalties. A grand jury is usually required to issue an indictment before a felony prosecution may proceed, whereas that would not be required in the case of a misdemeanor prosecution for unlawful presence.¹³ Further, if unlawful presence is made subject to more than six months’ imprisonment, as is proposed by House-passed H.R. 4437, it would constitute a “serious crime” for which the accused would have a right to a jury trial.¹⁴ In contrast, if unlawful presence is made subject to a maximum of six months’ or less imprisonment, as proposed in S. 2454, the accused would probably not have a right to a jury.¹⁵

⁹ (...continued)

proceedings). Arriving aliens in expedited removal proceedings have even fewer rights.

¹⁰ INA § 240(c)(2); 8 U.S.C. § 1229a(c)(2).

¹¹ INA § 240(c)(3)(A); 8 U.S.C. § 1229a(c)(3)(A).

¹² *E.g.*, *Allen v. Bowen*, 657 F.Supp. 148, 152 (N.D.Ill. 1987) (“Proof beyond a reasonable doubt is proof that a fact is almost certainly true, while clear and convincing evidence means simply proof that a fact is highly probable.”).

¹³ “No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury.” U.S. CONST. amend. V. Whereas felonies constitute “infamous crimes,” misdemeanors generally do not. *See, e.g.*, *United States v. Purvis*, 940 F.2d 1276, 1280 (9th Cir. 1991). It is the policy of the United States to accord persons having a right to a jury trial the right to a grand jury, as well. 28 U.S.C. § 1861.

¹⁴ *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989).

¹⁵ *Id.* Crimes punishable by six months or less might nevertheless trigger a right to a jury if
(continued...)

These differences may influence law enforcement decisions as to how seriously to pursue criminal charges against unlawfully present aliens. On the one hand, prosecutors might be more willing to devote resources to the prosecution of unlawful presence violations if such offenses were made subject to greater penalties. On the other hand, the additional rights accorded to the accused in felony cases may impose a greater strain on prosecutorial resources than in misdemeanor cases.

State and Local Law Enforcement Issues. The proper role of states and localities in the enforcement of immigration laws is a matter of some debate. While state and local law enforcement's ability to enforce the INA's civil provisions remains unclear, there is broad agreement that these entities may apprehend persons for violating the INA's criminal provisions and briefly detain such persons pending their transfer to federal custody, at least to the extent states and localities authorize such practices.¹⁶

If unlawful presence is criminalized, state and local law enforcement may play an important role in assisting federal authorities in the apprehension of offenders. The degree to which state and local law enforcement would assist the federal government in apprehending aliens for criminal prosecution might be dependent on a number of factors. Some states and localities may lack the resources to assist in the apprehension of unlawfully present aliens. Community relations concerns may also cause states and localities to prohibit law enforcement from asking persons about their immigration status (i.e., sanctuary cities). State and local assistance may also be determined by the federal government's willingness to prosecute unlawfully present aliens who are seized by state and local law enforcement. As previously discussed, federal prosecutors pursue criminal charges against only a small percentage of aliens apprehended for unlawful entry, and it is unclear whether they would be more willing to prosecute unlawful presence offenses.

Requisite Intent Necessary for Unlawful Presence to be a Criminal Offense. Whereas some proposals criminalizing unlawful presence, such as S. 2454, provide that an alien must "knowingly" be present in violation of applicable immigration laws and regulations to be guilty of an offense, other proposals, including House-passed H.R. 4437, do not contain such language. Some have questioned whether proposals that do not specify a requisite intent for unlawful presence would permit some aliens to be held criminally liable even if they had no reason to be aware that they had engaged in unlawful activity (e.g., when a clerical error by immigration authorities causes an alien to overstay his visa).

It seems unlikely that a court would interpret any of the proposals criminalizing unlawful presence as imposing a scheme of strict liability. Courts have recognized that the "existence of a *mens rea* [for criminal offenses] is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."¹⁷ Accordingly, courts have generally interpreted statutes criminalizing conduct as having a *mens rea*

¹⁵ (...continued)

additional statutory penalties, such as heavy fines, are sufficiently severe.

¹⁶ For background, see CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Lisa M. Seghetti, Stephen R. Vina, and Karma Ester.

¹⁷ *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978).

requirement for liability, “even where the statutory definition did not in terms include it.”¹⁸ Given this background, it seems likely that a reviewing court would interpret a statute criminalizing unlawful presence as requiring an offense to be committed knowingly, even if the statute does not expressly announce this requisite intent for criminal liability.

Racial Profiling Issues. Another issue related to the criminalization of unlawful presence concerns whether it might result in the harassment of certain racial and ethnic groups by law enforcement. In the 1968 case of *Terry v. Ohio*, the Supreme Court held that the Fourth Amendment permits a law enforcement officer to stop and briefly detain a person when the officer reasonably suspects that the person has committed a crime.¹⁹ Reasonable suspicion may not be based on a mere hunch, but instead upon “specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience.”²⁰

On several occasions, courts have decided cases involving law enforcement authorities stopping persons for suspected immigration violations on account of those persons’ suspected Mexican ancestry. Supreme Court jurisprudence holds that race or ethnicity cannot be the sole factor giving rise to a law enforcement stop for suspected immigration violations, but that at least in cases near the U.S.-Mexican border, stops may be *partially* based on race.²¹ Nevertheless, the Court has suggested that a different conclusion might have been reached if stops based partially on Mexican ancestry occurred in places farther removed from the U.S.-Mexican border.²² In 2000, the Ninth Circuit, sitting *en banc*, ruled that the Border Patrol could not take into account Hispanic origin when making stops in Southern California, concluding that in areas “in which the majority — or even a substantial part — of the population is Hispanic,” as was the case in Southern California, the probability that any given Hispanic person “is an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.”²³

In sum, court jurisprudence indicates that law enforcement may not stop persons for suspected immigration violations solely on account of such persons’ race or ethnicity, but that at least in certain circumstances, suspicion may partially be based on such considerations. Additional considerations, including population demographics, may also affect the weight to which suspicions based on race or ethnicity may be permissibly given.

¹⁸ *Staples v. United States*, 511 U.S. 600, 605-606 (1994) (*quoting* *United States v. Balint*, 258 U.S. 250, 251-252).

¹⁹ 392 U.S. 1 (1968).

²⁰ *Id.* at 27.

²¹ *Compare* *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (ruling unconstitutional a roving stop of a vehicle by the Border Patrol near the U.S.-Mexican border, when the stop was based solely on the vehicle occupant’s apparent Mexican ancestry) *with* *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (permitting the stopping of persons at fixed inspection checkpoints near the Mexican border when such stops were partially based on race).

²² *Martin-Fuerte*, 428 U.S. at n.17.

²³ *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000).