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A Crime to Work: The Part of “Illegal” I Don’t Understand

By Dr. Erik Camayd-Freixas

Sept. 8, 2008

After the Postville raid, alien workers were threatened with “aggravated identity theft” to force them to plead guilty to lesser charges, spend up to a year in jail, and be deported without a hearing. In my 27 years as a state and federal interpreter, I have always seen charges describe fairly accurately the alleged actions and behaviors of defendants. But in Postville the charges did not fit.

On July 22, a petition was filed with the US Supreme Court to ascertain whether “ID theft” requires the government to prove that the defendant knew the ID document belonged to an actual person. The matter had come up for appeal in six different circuit courts. The split was 3-1 against; but after Postville two other circuits have ruled in favor, making it a 3-3 split. Postville showed that applying “ID theft” to undocumented workers is highly questionable at best.

Yet, there are other problems with this charge. “ID theft” was defined by a 1998 Act as taking another person’s identity to commit credit fraud or empty bank accounts, a crime committed mostly by American citizens. Meanwhile, employer restrictions were forcing illegal aliens to buy false papers to be able to work. Back then this was not considered a security problem or even a form of ID theft. For instance, how can you “steal” something you actually bought and even overpaid? In fact, alien workers increasingly became victims of extortion by a growing false document cartel and by unscrupulous employers, having to pay hundreds of dollars over and over to “renew” their papers.

But sometime after 9/11, it was discovered that terrorists had stolen identities to further their murderous plans. This led to the “Identity Theft Penalty Enhancement Act” of 2004 and the “Addendum” of 2005, which provided heavier penalties with a two-year minimum sentence; broadened the scope of ID theft, from transferring, to include possessing or using; and designated \$2 million a year for investigations. Cracking down on ID theft became an anti-terrorist priority.

So the following year, 2006, worksite raids skyrocketed as an easy means of fishing for “ID thieves” —or workers who could be so construed. “Possession” had just been declared equivalent to “theft” in order to facilitate prosecution of would-be terrorists and embezzlers; but if mere possession of false documents was a felony, maybe alien workers could be charged criminally too. That way the raids would be self-justified by the bounty of workers-turned-thieves they would net. The government tried filing such felony charges in a few cases over the next year and a half, as though testing the waters. It perfected its prosecutorial tactics and saw that it all worked, winning convictions and, for a while, appeals as well. This culminated in a pilot project

expected to become the norm: the mass prosecutions of Postville under the fast-tracking judicial procedure.

Still deeper problems with the charges are evident from the language of the statutes. 18 USC Sec. 1028A Aggravated ID Theft: “Knowingly transfers, possesses, or uses a means of identification of another in relation to any felony violation.” But seeking work is not a felony violation. So in order to prove ID theft, the government first has to prove an underlying felony. This is where the lesser charges come in, which Postville defendants pled to as the quickest way to get back home, and indeed their only way to avert the threat of ID theft, with its two-year minimum sentence, accepting five months instead. In contrast, the lesser charges by themselves would generally mean probation and no jail time, at the discretion of the judge.

The first of the lesser charges was 18 USC Sec. 1546(a) Document Fraud: “Knowingly forges, counterfeits, alters, or uses a false document as evidence of authorized stay or employment, if the offense was committed to facilitate a crime.” Again, seeking work is not a crime. But also notice that this charge does not distinguish between counterfeiting and simply using false documents. So these workers are falsely being made a part of organized crime and today’s false document cartel, when in reality they are victims who are taken advantage of by the counterfeiting ring. This is an obsolete law that fails to recognize today’s false document trade as organized crime. The workers’ use of false documents is not only incidental, it is also involuntary: they are forced to do so to survive and feed their families.

In Postville, the employer’s two low-level supervisors who were indicted, both Mexican, pled to charges of “aiding and abetting” the use of false documents –lesser charges, that is, than those lodged against the workers themselves. That would be like charging street pushers with “aiding and abetting” their addicted customers, instead of charging them with trafficking or distribution. This shows how disconnected this set of laws is from present-day reality, and how distortedly it describes the actual behavior, knowledge, and intent of defendants such as the Postville 300.

Moreover, the fact that 1546(a) requires that the offense be “committed to facilitate a crime” means that, as with ID theft, the government would first have to prove an underlying crime that such document fraud facilitated. This brings us to the least of the charges, on which nonetheless the heavier ones depend.

Last and least is 42 USC Sec. 408(a) Social Security Fraud: “Knowingly alters, buys, sells, or counterfeits a social security card; or, falsely represents a social security number with intent to deceive.” This was really meant as a “benefit fraud” charge –tapping into the benefits of others. To the contrary, we know that illegal alien workers contribute billions in withholding taxes for which they can never receive benefits. Furthermore, like the previous charge, this one fails to distinguish between the organized counterfeiting criminal and the desperate worker who is

forced, between the government and the criminal cartel, to use false documents in order to engage in honest work. But the beauty of this charge of using a false SSN is that it must be “with intent to deceive”; that is, the worker is criminalized for “deceiving” the employer, by a charge specifically designed to let the employers off the hook.

In this case, the employer supposedly did not know that 76% of its workforce was undocumented. In this case, over 100 false IDs were seized from the employer’s HR department, which reportedly filled out the I-9 forms for the illiterate workers, and even assigned them a SSN. In this case, the employer appeared to have agents, both on the premises and on the street, who provided the false documents. There are allegations that workers were docked for “immigration fees.” But now it is too late, because the government has forced its 300 witnesses to admit that they “deceived” the employer; so their testimonies are useless. This case, however, showed that “intent to deceive” cannot be seriously assumed.

If there is any doubt that ICE targets workers, not employers, consider that even this lightest of charges has a deception aspect –which makes it a crime of “moral turpitude” that renders the workers ineligible to even apply for deportation relief, and bars them for life, as convicted felons, from ever returning legally to the US. Too bad: many of these were good workers, with great workmanship and a steadfast work ethic. Thus far they have proven impossible to replace.

Congress needs to pass a legitimate law that fits reality: making the use of false documents, for the specific purpose of gaining or maintaining employment, a misdemeanor offense. Then workers would not be worth prosecuting, so the authorities can concentrate on serious criminals instead. This, however, would not save workers from being administratively charged, only to languish indefinitely in immigration detention, waiting for a deportation hearing. Such human rights violations call for much higher regulation and accountability of the immigration detention process and centers, and ultimately require for the worksite raids to stop.

Far from making the country safer, this legal scenario actually serves to camouflage real would-be terrorists and embezzlers. It fuels the false document trade, paints millions of common workers as ID thieves, and provides a huge crowd where the real thugs can hide.