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R STREET SHORTS NO. 35

September 2016

CRIMINAL-JUSTICE REFORM IS NO BOON TO ILLEGAL ALIENS

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INTRODUCTION

A common avenue of attack against criminal-justice reform, particularly its mandatory-minimum provisions, is to invoke the bogeyman of illegal immigration. The argument generally suggests that incarcerated aliens would receive some sort of windfall from the legislation.

One frequently touted statistic holds that, of the 514 federal inmates who were serving a sentence for "simple possession" as of March 2016, 95.5 percent were non-citizens (which would leave just 24 U.S. citizens serving a federal sentence for simple possession).¹

On its face, the argument appears to suggest that, if Congress passes sentencing reform, illegal aliens would be released onto American streets. Dissecting this argument, one sees various points at which it breaks down.

THE CONSTITUTION PROTECTS ALIENS

To begin, when making a decision about policies that affect thousands of people – not only inmates, but also their families – citing a group of just 514 inmates should not carry tremendous weight.

The argument also implies that criminal-justice reform is inadvisable if it would in any way benefit illegal aliens. But the U.S. Constitution is clear that aliens enjoy the Equal Protection clause – "nor shall a state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Further, the Supreme Court held in 2001's *Zadvydas v. Davis* decision that even illegal aliens are afforded the same protections as citizens.²

We don't give illegal aliens harsher sentences for drug trafficking, so why would they not receive sentencing relief?

THE INA'S TOUGH REQUIREMENTS

Most importantly, the argument ignores the immigration code's mandatory-detention requirements. Under the Immigration and Nationality Act, noncitizens with certain criminal convictions must be detained by Immigration and Customs Enforcement agents upon their release. They aren't entitled to bond hearings before immigration judges and must remain detained during their removal proceedings and through their deportation.³

The INA makes crystal clear that the attorney general "shall take into custody any alien" who commits certain enumerated acts "when the alien is released." Aliens who commit one of the triggering crimes never hit the streets, because they literally go from criminal prison to immigration detention.⁴

The INA is also very broad in defining triggering crimes. Under Section 212(a)(2), a violation "relating to a controlled substance" triggers mandatory detention, which would cover the 490 "noncitizens" in prison for simple possession.⁵ It would also cover all other drug convictions committed by aliens.

Section 237(a)(2)(A)(i) goes further still, requiring mandatory detention for those convicted of a "crime of moral turpitude."⁶ What constitutes a crime of moral turpitude is somewhat nebulous, but it's safe to say the category covers crimes with any sort of "evil intent," from the obvious murder, rape and assault to shoplifting, tax evasion and perjury.

CONCLUSION

While the question of illegal immigration is an important one, the reforms to our criminal-justice system currently under consideration would not affect how that issue is handled.

ABOUT THE AUTHOR

Arthur Rizer is justice policy director and a senior fellow at the R Street Institute, where he heads the institute's agenda on a variety of issues related to crime, corrections and policing.

Before joining R Street, Arthur was associate professor at West Virginia University College of Law and visiting professor at Georgetown University Law Center. He previously spent nine years as a trial attorney with the U.S. Justice Department, including as a criminal division prosecutor, working narcotics and national-security cases. Other DOJ postings included serving as an attorney with the Federal Program's Guantanamo Bay Litigation Team and a prosecutor in the U.S. Attorney's Office for the Southern District of California. Arthur began his legal career as a U.S. district court judicial law clerk.

Arthur served as a military police and armor officer in the reserve and active U.S. Army. He retired as a lieutenant colonel from the West Virginia National Guard. In the military, Arthur was deployed to Fallujah, Iraq, where he was awarded the Bronze Star and Purple Heart medals. Before law school, Arthur also worked as a civilian police officer in Washington State.

ENDNOTES

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3. U.S. Citizenship and Immigration Services, "Immigration and Nationality Act," Sept. 10, 2013. <https://www.uscis.gov/laws/immigration-and-nationality-act>
4. U.S. Citizenship and Immigration Services, "INA: ACT 236 - APPREHENSION AND DETENTION OF ALIENS," accessed Sept. 5, 2016. <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-5570.html>
5. U.S. Citizenship and Immigration Services, "INA: ACT 212 - GENERAL CLASSES OF ALIENS INELIGIBLE TO RECEIVE VISAS AND INELIGIBLE FOR ADMISSION; WAIVERS OF INADMISSIBILITY," accessed Sept. 5, 2016. <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-2006.html>
6. U.S. Citizenship and Immigration Services, "INA: ACT 237 - GENERAL CLASSES OF DEPORTABLE ALIENS," accessed Sept. 5, 2016. <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-5684.html>