Houston senator's 'illegal aliens' bill is itself illegal

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Senate Bill 174 proposed by state Sen. **Joan Huffman**, R-Houston, purports to deny "community supervision" to certain defendants who in state criminal courts are found to be "illegal aliens." Such a proposed rule is plainly unconstitutional under both the federal and Texas state constitutions. More than that, it illustrates the danger of branding people without any understanding of the complex immigration laws governing noncitizens.

The case of Arizona v. United States, decided by the U.S. Supreme Court in June, 2012, discussed the limits of a state legislature's ability to enforce the immigration laws. In that case, the high court reviewed Arizona's attempt to create a statutory scheme which sought to enforce the immigration laws.

The high court held that the federal constitution's Supremacy Clause trumps the efforts of states to create a patchwork of individualized immigration enforcement schemes. Specifically, the decision struck down three of four impugned provisions which had been proposed by Arizona.

The court struck a provision attempting to make it a state crime to be unlawfully present in the U.S.; authorizing the warrantless arrest of persons believed to be removable from the United States; and making it a misdemeanor to work unlawfully or "seek" to work unlawfully without authorization. The high court did allow in a limited fashion Arizona's law allowing state officials to verify a person's citizenship if stopped, arrested or detained.

Importantly, Arizona v. United States reaffirms the broad power that the federal government has in enforcing the immigration laws. More to the point relating to the Senate Bill 174 discussion, the case reaffirms that it is not permissible to allow state officials to determine who our executive branch should remove.

A state court judge sentencing someone for a minor offense should not be in a position to determine anyone's immigration status. It is interesting also that a state "deferred adjudication" under most circumstances will be considered under the Immigration and Nationality Act to be a "conviction" in any event, whether or not community service is granted. It is well-settled under our immigration laws that "probation" is still a "penalty" requiring that an immigration judge find a "conviction" exists for immigration purposes, even if the state itself would not even consider someone with deferred adjudication "convicted."

The fact that a vague and unfair term such as "illegal aliens" could still be used in proposed legislation after so much criticism and the rejection of the term by so many is troubling. The term is nowhere defined in the Immigration and Nationality Act. It has come under sound criticism for being misleading and demeaning. A person can be undocumented but still entitled to relief. There are many undocumented people with possible relief from deportation, such as asylum, cancellation of removal, deferred action, special immigrant juveniles and those with family members who may be able to petition for them under certain circumstances to allow their adjustment of status in the U.S. Therefore, to believe that a state court criminal judge would be able to make a ruling determining when someone is or is not "illegal" is absurd.

In a case called Plyler v. Doe, the Supreme Court held that so-called "illegal aliens" are entitled to protection under the Equal Protection Clause. Although a range of cases have applied strict scrutiny to laws that seek to discriminate on the basis of citizenship or residency status,it could be argued that those cases arelimited to noncitizens who are legally present.

In Plyler v. Doe, however, the targets of the proposed legislation were children in the country without authorization who sought to attend public schools. The Supreme Court recognized that such a rule would create an underclass of disenfranchised people, and held that such laws would violate equal protection and lacked a rational basis. There is no question that equal protection and due process

rights apply to all "persons" within the jurisdiction of the United States under the Fifth and 14th Amendments.

The Texas Constitution has similar, even arguably more expansive equal protection provisions. In section 3a, it provides that "Equality under the law shall not be denied or abridged because of sex, race, color, creed" or - importantly - because of "national origin."

Furthermore, section 3 of the state's constitution provides for equal treatment under the law, considering that "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments. …"

The Texas Legislature should carefully consider what a misguided rule like the one proposed in SB 174 would mean. Texas judges are not immigration judges. But even if they were, the determination whether or not someone should be branded an "illegal alien" is determined after a lengthy process by the **Executive Office for Immigration Review**, a branch of the U.S. Department of Justice.

The decision is made considering the availability of relief, after a full review of a person's personal and immigration history, among many other factors. A rule which brands people without due process, and in violation of equal protection, cannot stand.

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