

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 99-30174-GPM
	)	
DALMIRO BANEGAS-FERNANDEZ,	)	
	)	
Defendant.	)	

**DEFENDANT'S MEMORANDUM IN SUPPORT  
OF HIS MOTION TO DISMISS INDICTMENT**

*I. Introduction*

In his Motion to Dismiss Indictment, Defendant raises two issues, (1) selective prosecution; and (2) the fact that his Temporary Protected Status (TPS) prohibits him from being charged with possession of false documents. These issues will be discussed seriatim.

To a large extent these issues will hinge on what is adduced at the Hearing on the Motion to Suppress, and therefore the undersigned feels that this Motion to Dismiss should be heard at a time subsequent to the Hearing on the Motion to Suppress.

*II. Selective Prosecution*

At the outset, any argument regarding selective prosecution involves the decision making process of the particular Assistant U.S. Attorney who charges a Defendant. Here, that would be Assistant U.S. Attorney Robert Garrison who is lead counsel in this case, and the undersigned wants to assure the Court and Mr. Garrison that the argument which follows is not meant in any way to impugn Mr. Garrison.

The Fourteenth Amendment to the Constitution prohibits selective enforcement of criminal laws based upon an unjustifiable standard, and in the case at bar the Government arbitrarily classified the original 37 Gilster Mary-Lee (GML) Defendants into two groups. *All* 37 Defendants possessed false social security cards and false green cards, yet the

Government originally charged by way of Criminal Complaint 33 Defendants with the misdemeanor crime of entry without inspection. The *remaining four Hondurans*, who at the time of their arrest had been granted Temporary Permanent Status were charged with felonies. Four of the original 37 misdemeanor Defendants had the temerity to plead innocent to the charges against them and the Government then charged them by way of indictment with the felony crime of possession of false documentation.

So, there were two criminal statutes involved, one being the misdemeanor entry without inspection and the other being the felony charge of possession of false documentation. The Government chose to proceed differently with the four Hondurans who at the time of their arrest were residing and working in the United States legally as a result of having been granted Temporary Protected Status.

A long and protracted legal argument is not necessary, since in order to prove that selective prosecution occurred the Defendant need only show that (1) others similarly situated have not been prosecuted and (2) that the prosecution is based on an impermissible motive. U.S.A. v. Cyprian, 23 F.3d 1189 (7<sup>th</sup> Cir. 1994)

This case is unique from others dealing with the issue of selective prosecution insofar as here there *is* a definite class of 37 individuals *all* of whom possessed false documentation. Only the four Hondurans who were in the United States legally were charged with felonies, and Defendant believes that the reason he was treated differently than the other 33 individuals, who like him possessed false documentation, was because of a bias that the Government has against immigrants who have been granted Temporary Protected Status, which is patently unconstitutional.

Defendant has met the two prongs to show selective prosecution, and he requests that a Hearing be held and that the Government be required to prove that the other 33 Defendants who were similarly situated to Defendant were not treated differently, and also that an impermissible motive did not exist. After a Hearing, the Defendant intends to renew his request that the Indictment against him be dismissed on the basis selective prosecution.

### *III. Temporary Protected Status Prohibits Defendant From Being Charged With Possession of False Documentation*

In 1986 President Ronald Reagan signed the Immigration Reform and Control Act (IRCA) which granted amnesty to and legalized the immigration status of hundreds of thousands of immigrants who had entered, resided, *and worked* in the United States illegally. Upon the IRCA becoming law, individuals who had been in the United States illegally could no longer be charged with the misdemeanor crime of entry without inspection. However, several U.S. Attorneys' offices throughout the United States continued to charge these former illegal immigrants with the crime of possessing false documentation prior to the enactment of the IRCA in 1986.

Seeing the obvious injustice of this, and seeking to make the Department of Justice adhere to common sense, H.R. 5828 was passed and the Conference Agreement stated:

“However, persons legalized under IRCA are still subject to prosecution for use of a false social security number or card under section 208 of the Social Security Act. As a result, alien workers who are granted temporary or permanent legal resident status under IRCA, and who apply for a correct social security number or attempt to correct their earnings records with the Social Security Administration, may be subject to prosecution as a result of their previous use of a false number or card.”

The proposed House bill included a provision to amend the Social Security Act so that those illegal immigrants who became legalized under the IRCA would not be prosecuted for the crime of possessing a false social security card or number. However, “the exemption would not apply to those who sold social security cards, possessed social security cards with intent to sell, possessed counterfeit social security cards with intent to sell or counterfeited social security cards with intent to sell.”

The House focused on *intent to sell* the false documents, rather than the simple possession of said documents which will be important because an illegal immigrant granted Temporary Protected Status is in the identical position as an illegal immigrant whose status was legalized under the IRCA.

Congress recognized that *“the use of false social security numbers was a common practice among illegal aliens attempting to work in the United States.”* Actually, at the time the IRCA was enacted the fact that these now legal immigrants could still be charged with “using a false social security number or card . . . was not even addressed.”

The Conference Committee concluded that:

*“The Conferees intend that this exemption apply only to those individuals who use a false social security number to engage in otherwise lawful conduct. For example, an alien who used a false social security number in order to obtain employment which results in eligibility for social security benefits or the receipt of wage credits would be considered exempt from prosecution.”*

On November 29, 1990, public law 101-649 “the Immigration Act of 1990,” was passed and Title III entitled “Family Unity and Temporary Protected Status” amended the 1986 Immigration Act as follows:

“Authorizes temporary protected status in the U.S. for eligible aliens whose home country is disrupted by war, natural disasters, or other extraordinary conditions determined by the Department of Justice.”

In order to even apply for Temporary Protected Status, the alien must be in the United States illegally, and to be granted TPS, Immigration and Naturalization forms I-821 and I-765 have to be completed by the applicant. (See Exhibits A & B) Here, Defendant completed the I-765 “Application for Employment Authorization,” was granted Temporary Protected Status and was issued a new work permit and social security number. The fact that a Temporary Protected Status applicant (who at the time the forms are completed is illegal) is required to request a work permit demonstrates that Congress recognized that these illegal immigrants were working in the U.S. with false documentation.

Here, Defendant used false documentation in order to obtain employment, and nowhere does the Government or “special” agent Merchant claim that Defendant used his false documentation for any purpose other than lawful conduct, and in accord with H.R. 5828 the Government should be prohibited from prosecuting Defendant for something which transpired *prior to* applying for Temporary Protected Status.

Congress obviously did not foresee that contrary to H.R. 5828 which dealt with an immigrant “legalized” under the IRCA, a U.S. Attorney’s office would still prosecute an immigrant “legalized” granted Temporary Protected Status with a crime which occurred *prior to* being granted Temporary Protected Status. There is no difference between an “IRCA legalized immigrant” and a “Temporary Protected Status legalized immigrant,” since both are in the United States illegally and both are granted amnesty from deportation proceedings. Quite simply Congress’ intent regarding a legalized immigrant being charged with possession of false documentation *prior to* being granted the “legalized status” is clear and as such the Indictment against Defendant should be dismissed.

Turning to the issue of the effect a felony conviction would have on Defendant and Congress’ intent regarding same, the Immigration Act of 1990 was codified at 8 CFR Section 244.1 through Section 244.13. Section 244.4 states that “an alien is ineligible for Temporary Protected Status if the alien: (a) has been convicted of any felony . . .” This means that if an alien is granted Temporary Protected Status, and is convicted of the felony of possession of false documentation which he used *prior to* being granted Temporary Protected Status, he would still automatically lose his TPS status and would be deported.

The whole idea behind Temporary Protected Status was that foreign nationals not be returned to their countries because that particular country cannot cope with any returning citizens. For that reason, when Temporary Protected Status is granted to a particular country ***all deportation proceedings are halted.*** Here, the Government is cleverly treating the 4 Hondurans differently so that upon conviction of a felony they will be deported.

Honduras’ request to be granted Temporary Protected Status was granted on January 5, 1999 (64 FR 524), and actually, as early as October of 1998 when Hurricane Mitch annihilated much of Honduras, President Bill Clinton halted deportation of ***all*** non-felon Hondurans. In an INS News Release dated December 30, 1998 (Exhibit C), INS Commissioner Meisner stated that the decision to grant Hondurans Temporary Protected Status “builds on the Administration’s commitment to provide humanitarian assistance to the

people of those countries that have been so devastated by Hurricane Mitch.” For the Government to now be allowed to charge Hondurans such as this Defendant with the felony crime of possession of false documents, simply goes against the spirit of why Temporary Protected Status was originally included in the Immigration Act of 1990, and in reality is a subterfuge so that Defendant and the three other Hondurans can be deported which is contrary to the intent of Congress.

Just as Congress failed to mention anything about possession of false documentation in 1986, the modified Immigration Act of 1990 also fails to mention anything about an immigrant granted Temporary Protected Status being charged with the crime of possession of false documentation. H.R. 5828 clearly shows that Congress intended to grant a “pass” to an illegal immigrant who becomes “legalized” under an Immigration Act, and that an immigrant who possessed false documentation which was used for the lawful purpose of working *prior to* becoming “legalized” was not meant to be prosecuted.

The most compelling argument that Congress did not intend for Hondurans granted Temporary Protected Status to be charged with possession of false documents *prior to being granted Temporary Protected Status* is that this is the first time in the United States that this has occurred.

This Honorable Court is in the position to right a wrong, and has the authority to determine that based on H.R. 5828, Congress did not intend for an individual similarly situated to Defendant be charged with possession of false documentation *prior to* being granted Temporary Protected Status, and accordingly dismiss the Indictment.

#### V. Conclusion

If this case is not dismissed, *every* immigrant who has been granted Temporary Protected Status can be charged with the crime of possession of false documentation, and hopefully, the Court will see the injustice of such a situation, as well as a situation where 33 similarly situated individuals are treated differently than four Hondurans, and for the reasons stated above dismiss the indictment against Defendant.

DALMIRO BANEGAS-FERNANDEZ

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 14<sup>th</sup> day of October, 1999, a copy of the attached *Defendant's Memorandum in Support of His Motion to Dismiss* was served on the following persons by faxing and depositing a copy of same in an envelope with postage prepaid in the United States Mails in the Post Office in East Alton, Illinois addressed as set out, namely:

Mr. Steve Clark, Esq.  
Assistant U.S. Attorney  
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