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Why No Indictment for Bernard Kerik?

by Jacob G. Hornberger

Amidst all the hubbub over Bernard Kerik's decision to remove himself from consideration as director of Homeland Security owing to his reported hiring of an illegal-immigrant nanny, no one, including the press, seems to be asking an important question: Why aren't the feds seeking a criminal indictment against him? After all, hasn't it been a federal felony offense since 1986 for any American to hire an illegal immigrant? Didn't the feds charge [Tyson Foods](#) officials with hiring illegal immigrants just last year? Haven't they also [targeted Walmart executives](#) for possible indictment for the same thing?

So, why no federal criminal indictment for President Bush's cabinet nominee Bernard Kerik for hiring an illegal immigrant?

One of the *legal* principles of a free society is that of "equal application" of the law. What that principle means is that if the representative body of the people (e.g., the Congress) makes a certain activity a criminal offense, then the law should be enforced on everyone across the board, regardless of whether the offender is rich or poor, politically powerful or politically weak, and regardless of the consequences.

A related *political* principle is known as the "rule of law" What that principle means is that a free society entails everyone's having to answer only to a law that has been duly enacted and is clearly on the books, as compared with a society based on the "rule of men," where people are expected to respond to the arbitrary and capricious dictates of government officials.

For almost 20 years, the law against hiring illegal immigrants has been enforced arbitrarily and selectively. While the feds periodically go after this business or that, such as Tyson Foods or Wal-Mart, they have permitted others, such as rich and famous cabinet nominees, to get a pass from prosecution. Federal criminal prosecution for hiring illegal immigrants turns on who you are rather than on what you've done.

A criminal-justice process in which federal officials are selectively and systematically determining who is to be prosecuted for a certain crime and who isn't violates the equal-

application principle and also converts an ostensible “rule of law” system to an actual “rule of men” system.

Perhaps worst of all, as is the case with economic crimes in such countries as China and Russia, the arbitrary and discretionary manner in which this regulatory law is enforced provides the perfect vehicle for ensuring that business community does not get too far out of line, that is, by openly dissenting against government policies. After all, what business that might be hiring illegal immigrants, either knowingly or unknowingly, wants to make waves that could result in a felony prosecution, large fines, and exorbitant attorney’s fees? With the federal sword of Damocles hanging over its head for illegally hiring the foreigners, the American business community is as likely to go along to get along with the feds as its counterparts in China and Russia with their governments.

Has the law against hiring illegal immigrants stemmed the tide of illegal immigration, which was its supposed purpose in the first place? It’s hard to see that it has, given the millions of illegal immigrants still residing in the United States — and presumably working for American businesses. Moreover, by criminalizing what is in essence a private transaction between two adult parties, the law violates the fundamental principles of freedom of association and freedom of contract.

When laws are not enforced equally on everyone, people tend to lose respect for the law in general. Given that the feds give a pass to the rich and powerful who are accused of violating the law, such as federal cabinet nominee Bernard Kerik, the only proper course is for Congress to repeal the law and pardon those select few who have been charged and convicted of it. Moreover, since the law isn’t accomplishing its end anyway, what’s the point of retaining it on the books?

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