The Judges' Book

Volume 2 Article 7

9-2018

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When, if ever, may private parties rely on official assurances that federal law will not apply to them? This question arises in a bewildering array of contexts, from humdrum to monumental. At the most everyday level, federal park police might promise to allow parking in a no-parking zone only to return with a ticket, or harried Internal Revenue Service personnel might provide mistaken guidance on how to complete a tax return. But other assurances are more consequential. Federal law enforcement and intelligence officials may promise undercover agents immunity from prosecution for joining a criminal operation as a means of uncovering crimes; some federal agencies issue no-action letters or advisory opinions indicating that planned conduct will not be punished; and a panoply of administrative agencies issue enforcement policies indicating how they plan to enforce the many detailed statutes and regulations they administer.

In particularly dramatic exercises of this power, the Obama Administration publicly announced extensive nonenforcement policies regarding both marijuana and immigration. Although possessing or distributing marijuana remains a federal crime, the Department of Justice issued guidance indicating that federal prosecutors generally would not devote resources to enforcing federal narcotics laws against parties operating in compliance with state law. Similarly, in two controversial programs (one ultimately blocked by a preliminary injunction), the Department of Homeland Security invited broad categories of undocumented immigrants to apply for "deferred action," a two- or three-year promise of non-deportation that entailed eligibility for work authorization and other potential benefits. The Trump Administration has revoked this marijuana guidance. It hopes also to terminate the Obama Administration's deferred action program, although a court has temporarily barred it from doing so. Yet the Trump Administration itself has slackened enforcement in many areas of regulation, from environmental law to healthcare and labor, that might well encourage reliance by regulated parties.

All such policies raise difficult reliance concerns because such policies, like other nonenforcement promises, are formally nonbinding:

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1. Summarized and adapted from Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017).

in the marijuana and immigration examples, for instance, the policy documents made clear that they guaranteed nothing. Yet as a practical matter, such policies may well encourage legal violations. Again, the marijuana and immigration policies dramatically illustrate the point: both policies effectively invited millions of people, many of them legally unsophisticated, to take significant legal risks. If the government resumes enforcement, marijuana entrepreneurs could be guilty of multiple federal crimes with stiff penalties, while deferred action applicants will have provided the government with a removal case "on a platter," as one scholar has put it.[2]

At present, this reliance question is governed by an untidy and undertheorized set of cases holding that due process bars enforcement in some circumstances of reliance but not in others. I offer here an account of this case law and propose an organizing principle for the doctrine. Although key decisions have often framed the issue in terms of intuitive unfairness, in fact, reliance defenses require balancing separation of powers concerns against considerations of individual fair notice. On the one hand, protecting individual reliance on promised nonenforcement would enable executive officials to wipe away substantive laws, a result that would defy the basic separation of powers principle that executive officials can alter substantive legal obligations only if Congress has delegated authority to do so. On the other hand, failing to protect individual reliance risks punishing individuals for conduct that they lacked fair notice was subject to sanction.

On the whole, without quite framing the issue in these terms, existing case law has struck this balance in favor of enforceability and against individual reliance, while at the same time carving out a narrow exception in some cases when enforcement officials invited unlawful conduct with assurances of legality rather than mere promises of nonenforcement. Federal courts thus have sometimes protected reliance when official assurances involved at least an apparent exercise of delegated interpretive authority to determine legal meaning or when executive officials held authority to enlist private parties in government operations not subject to generally applicable legal prohibitions. In contrast, courts have generally rejected reliance on promised nonenforcement—even when doing so results in acute unfairness—when officials made no representation that conduct was lawful and promised only to exercise their discretion not to prosecute.

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2. Mary D. Fan, *Legalization Conflicts and Reliance Defenses*, 92 WASH. U. L. REV. 907, 939-40 (2015).

Far from tracking any intuitive notion of fundamental fairness, this pattern of case results ultimately reflects the important separation-of-powers principle, accepted even by most proponents of broad nonenforcement policies, that enforcement discretion entails authority to ignore completed violations but not to excuse, in advance, future ones. With the doctrine framed in these terms, I give it an uneasy defense. Historically, executive authority to cancel legal prohibitions was known as the "suspending" or "dispensing" power, and though English monarchs exercised this authority, the Constitution repudiates it by requiring that Presidents "faithfully execute[]" federal laws. This anti-suspending rule—that, absent more specific legislative delegation, executive officials have discretion over which violations to pursue, but not over whether conduct violates the law in the first place—forms an important constitutional background principle against which Congress legislates. The principle preserves ultimate legislative responsibility for the content of law (or at least the scope of interpretive delegations to executive agencies), and it enables creation of regulatory structures that leverage limited enforcement resources to achieve broader societal compliance with substantive law.

A broad reliance defense would undermine this separation-of-powers principle by creating a legislatively unauthorized suspending power by operation of due process: executive officials could eliminate legal prohibitions simply by inducing reliance on promised nonenforcement. Courts have properly precluded this result by cabining the contexts in which reliance will receive legal protection. To put the point most sharply, individuals who accept any invitation by the President or executive officials to undertake illegal conduct must do so at their peril. Due process cannot normally shield them from future enforcement.

Yet if limits on reliance defenses thus advance separation-of-powers values, framing reliance defenses in terms of a balance between fair notice and separation of powers may help identify additional contexts, like cases involving mistaken assurances of legality, in which the balance should tip the other way. This inquiry carries the inevitable imprecision of all incommensurate balancing tests: it involves, to some degree, assessing "whether a particular line is longer than a particular rock is heavy."[3] Nevertheless, I suggest several types of cases in which more limited separation-of-powers costs or more acute fairness concerns may justify broader legal protection for reliance.

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3. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (criticizing a balancing test as applied to the dormant Commerce Clause).

Civil and Administrative Estoppel: One limited reform is that federal courts should reconsider their current hostility to case-specific estoppel claims outside the criminal context. Lower courts appear to have applied the due process defense based on mistaken legal assurances only in criminal cases. More generally, despite the Supreme Court's refusal to close the door completely on civil and administrative estoppel, federal courts almost never accept such claims. Some recent "fair notice" cases in the administrative context, however, have drawn lines similar to those suggested by criminal due process case law, and in any event the same due process principles of fair warning should logically extend beyond criminal law to other penal sanctions. An analogous defense thus should apply in appropriate civil- and administrative-penalty cases—albeit with the same limits and qualifications as in the criminal context. Thus, to be concrete, in limited circumstances when regulated parties can plausibly claim genuine confusion about the law, even formally nonbinding no-action letters and advisory opinions from enforcement agencies like the Securities and Exchange Commission might sometimes support an anti-entrapment estoppel defense. So too should assurances provided through IRS help lines and other official sources accessible to everyday citizens seeking to comply with the law as best they can.

Provision of Information: When the government obtains information by assuring nonenforcement, due process principles of fair notice should limit the government's use of that information in future enforcement efforts. That is so because, in this context, fairness concerns are particularly acute, while the cost of transgressing the separation of powers is limited when the government may still pursue the substantive violations in question by other means. For example, to apply for deferred action under the Obama Administration's programs, individual immigrants were required to provide identifying information, such as their names and addresses, and document that they met specified eligibility criteria. Immigrants provided such information, which effectively handed the government a deportation case against them, based on assurances the information would not be used against them. Though formally nonbinding, such assurances invited reliance in a far more focused and consequential way than a typical nonenforcement policy, and allowing use of such information is not necessary to preserve the primacy of underlying substantive laws over revocable enforcement policies: power to revoke deferred action itself suffices to prevent a de facto suspension of statutory requirements. Accordingly, due process should generally bar using application information against beneficiaries of these deferred-action programs.

Secondary Violations: A reliance defense might also be plausible with respect to legal prohibitions ancillary to the primary prohibition that executive officials indicated they were unlikely to enforce. The federal Controlled Substances Act, for example, not only prohibits possession and distribution of controlled substances—including marijuana—but also prohibits knowingly and intentionally leasing or otherwise making property available for use in drug operations. The government has accordingly threatened landlords with criminal prosecution, civil penalties, or forfeiture based on tenants' operation of illegal businesses, including state-licensed marijuana dispensaries, on their property. Much as with information disclosure, however, individual reliance interests are acute in this context, as the federal government's marijuana nonenforcement policy may have led landlords and others to perceive entering leases or other contracts with marijuana dispensaries as no different from doing so with respect to other ostensibly lawful businesses. At the same time, the separation-of-powers costs to protecting reliance are attenuated given the government's ability to vindicate statutory policies by pursuing those who have violated the law directly. Thus, again, at least in suitably compelling cases, the claim of individual unfairness should prevail over countervailing separation-of-powers concerns about executive licensing of unlawful conduct.

Congressional Nonenforcement: A further implication of my analysis is that courts should recognize broader reliance defenses with respect to congressionally mandated nonenforcement, as opposed to nonenforcement adopted by enforcement agencies on their own initiative. If anxieties about enabling executive dispensations from substantive law properly explain courts' reluctance to recognize reliance defenses based on nonenforcement decisions, courts should be more solicitous of individual fairness concerns—and thus more willing to recognize legal protections for reliance—when such separation of powers anxieties are inapplicable because Congress, rather than the executive branch alone, has mandated the nonenforcement. Congress does so routinely by denying appropriations to enforce disfavored regulations, and it has done so recently through recurrent riders barring the use of Justice Department funds to prosecute state-compliant medical marijuana users and distributors. Because Congress may sometimes have sound reasons to proceed through appropriations rather than substantive legal changes, a blanket estoppel rule would be inappropriate in this context. Courts may, however, consider reliance claims case-by-case and protect reliance when it was reasonable under the circumstances.

Policy-based Desuetude: Due process may also protect reliance when an overt nonenforcement policy has persisted without change or apparent violation over an extended period of time. As we have seen, the balance between separation of powers compliance and individual reliance generally must favor the former at the expense of the latter, so as to avoid creating an executive suspending power by operation of due process. At some point, however, the balance should tip the other way, at least with respect to *malum prohibitum* offenses like drug prohibition. If the government effectively creates a settled expectation of legality by adhering over a lengthy period to an overt policy of nonenforcement, due process should eventually bar retrospective enforcement in violation of the policy—notwithstanding the significant cost to congressional lawmaking authority that results. Accordingly, had the Trump Administration (or a Clinton Administration) chosen to continue the Obama Administration's marijuana and immigration policies instead of revoking them, courts might have concluded after a sufficiently lengthy period (I propose fifteen years) that due process precluded disruption of resulting nonenforcement expectations.

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Due process principles may thus mitigate at the margins some harsh effects of the general rule that nonenforcement reliance cannot receive constitutional protection. The tradeoffs involved in balancing fairness and separation of powers are necessarily messy and contestable. As a general matter, as courts have by and large recognized, this balance should tilt against protecting reliance. Protecting individual reliance in all cases, or even when concerns about fair notice are substantial, would undermine important legal limits on enforcement officials' authority by giving them effective power to authorize legal violations. Nevertheless, in at least some situations—when the government pursues violations despite authoritatively deeming conduct lawful; when it relies on particular information obtained by promising nonenforcement, or when it pursues violations prohibited only as a secondary means of implementing unenforced primary prohibitions; when Congress, rather than an enforcement agency alone, has mandated nonenforcement; or when an overt nonenforcement policy has persisted without revision or salient violations for an extended period—the balance should tip the other way and give due process protection to reliance.