

**ANALYSIS OF THE “COMPROMISE” IMMIGRATION REFORM
PROPOSAL UNDER CONSIDERATION BY THE U.S. SENATE**

**A GUIDE FOR COMMUNITY-BASED ORGANIZATIONS, HOMETOWN
ASSOCIATIONS, RELIGIOUS GROUPS, UNIONS, STREET DEMONSTRATORS,
AND OTHER ORGANIZATIONS CONCERNED WITH
NATIONAL IMMIGRATION REFORM**

Prepared by

**Center for Human Rights and Constitutional Law
256 S. Occidental Blvd.
Los Angeles, Ca. 90057
Telephone: (213) 388-8693
Facsimile: (213) 386-9484
www.centerforhumanrights.org**

The Center for Human Rights and Constitutional Law is a public interest legal services and advocacy organization that has represented over one million undocumented immigrants in major class action cases, currently represents several hundred thousand immigrants in class action cases, and provides technical support to hundreds of community-based organizations and legal services providers assisting immigrant communities throughout the United States. The Center recently concluded settlements with the DHS and DOJ regarding the rights of over 100,000 immigrants under the amnesty program enacted in 1986. Comments on this report may be forwarded to Peter Schey at pschey@centerforhumanrights.org

(APRIL 10, 2006)

CONTENTS

1.	DETENTION AND DEPORTATION FOR MINOR CRIMINAL OFFENSES WILL SEPARATE FAMILIES OR CAUSE PEOPLE TO LIVE IN UNDOCUMENTED STATUS FOR INCONSEQUENTIAL CONVICTIONS	1
2.	DETENTION OF IMMIGRANTS WITHOUT ADEQUATE OR ANY RECOURSE TO RELEASE ON BAIL	2
3.	BLOCKING TRADITIONAL AVENUES LEADING TO LEGALIZATION OF STATUS WILL VASTLY INCREASE THE UNDOCUMENTED POPULATION DURING THE NEXT DECADE	3
4.	RESTRICTIONS ON FEDERAL COURTS' ABILITY TO REVIEW UNLAWFUL REMOVAL ORDERS WILL RESULT IN NUMEROUS IMPROPER DEPORTATIONS	4
5.	NEW LIMITS ON JUDICIAL REVIEW OF DENIALS OF CITIZENSHIP WILL LEAVE QUALIFIED APPLICANTS WITHOUT A REMEDY	7
6.	WIPING OUT VOLUNTARY DEPARTURE FOR MANY IMMIGRANTS WILL MAKE THEM DEPORTABLE AND INELIGIBLE FOR FUTURE VISAS	8
7.	FURTHER RESTRICTING IMMIGRANTS' ABILITY TO BRING MOTIONS TO REOPEN THEIR DEPORTATION CASES WILL LEAVE IMMIGRANTS IN UNDOCUMENTED STATUS DESPITE THEIR ELIGIBILITY FOR VISAS	10
8.	EXPANDED USE OF SECRET EVIDENCE AGAINST IMMIGRANTS WILL UNDERMINE THE RELIABILITY OF DEPORTATION DECISIONS.....	10
9.	EXPANDED USE OF "EXPEDITED PROCEEDINGS" TO DEPORT IMMIGRANTS WITHOUT FAIR HEARINGS	11
10.	NEW IMMIGRATION PENALTIES FOR U.S. CITIZENS WILL KEEP THEIR FAMILIES IN UNDOCUMENTED STATUS.	4
11.	AUTHORIZING AND ENCOURAGING STATE AND LOCAL ENFORCEMENT OF IMMIGRATION LAWS.	12
12.	MAKING IT MORE DIFFICULT FOR ASYLUM SEEKERS FLEEING PERSECUTION TO OBTAIN PROTECTION IN THE U.S.	12
13.	DEPORTATION OF SUSPECTED GANG MEMBERS WHO HAVE NEITHER COMMITTED NOR BEEN CONVICTED OF ANY CRIME.....	13
14.	CONCLUSIONS.....	13

ANALYSIS OF THE “COMPROMISE” IMMIGRATION REFORM PROPOSAL UNDER CONSIDERATION BY THE U.S. SENATE

A summary of positions the Center for Human Rights and Constitutional Law recommends for and against various aspects of national immigration reform appears in the Conclusions section of this report, along with a brief overview of the status of the debate in Congress as of April 7, 2006.

1. **Detention and deportation for minor criminal offenses will separate families or cause people to live in undocumented status for inconsequential convictions**

Thousands of lawful permanent residents immigrants, including many with U.S. citizen children, will face detention and deportation for largely petty criminal offenses, including minor offenses committed long ago. The compromise position redefines the term “aggravated felony”—convictions which make lawful immigrants deportable and intending immigrants ineligible for visas—to include new crimes that are neither felonies nor aggravated. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., § 203 (2006) (hereinafter “Hagel-Martinez Compromise”); *see also* Comprehensive Immigration Reform Act of 2006, S. 2454, 109th Cong., § 203 (2006) (hereinafter “Specter Bill”); Securing America’s Borders Act, S. _____, 109th Cong., § 203 (2006) (hereinafter “Frist Bill”). The expanded definition of an “aggravated felony” will also block thousands of undocumented immigrants with U.S. citizen and lawful resident family members from legalization their status.

The expanded definition of an “aggravated felony” would apply retroactively to recent convictions as well as those that took place decades ago, regardless of the immigrant’s subsequent rehabilitation or productivity while living in this country, or support of U.S. citizen children. *See* Hagel-Martinez Compromise, § 203(a)(1); Specter Bill, § 203(a)(1); Frist Bill, § 203(a)(1).

Retroactive application of the proposed law violates fundamental principles of fairness given that many individuals relied upon the law that was in effect at the time they entered guilty pleas in their cases. The majority of defendants in criminal cases eventually waive their rights to proceed to trial and have their guilt proven beyond a reasonable doubt, instead reaching agreements to enter guilty pleas often to lesser charges. Thousands of immigrants over many years have entered such pleas when they were not considered “aggravated felonies” and did not render the immigrants subject to deportation. The U.S. Supreme Court has declared that “[t]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.” *INS v. St. Cyr*, 533 U.S. 289 (2001).

In reality, the vast majority of lawful residents and intending immigrants barred from legal status because of minor convictions will remain in the country in undocumented status rather than depart and separate from their family members (or jobs that support their families). They will add to the size of the undocumented population, work in underground jobs, and indefinitely live in extreme poverty, all because of inconsequential and often stale convictions that have no rational connection to the national security or safety of local communities. This will hardly lower the number of undocumented immigrants living in the U.S., or make the country any more secure.

2. Detention of immigrants without adequate or any recourse to release on bail

Except for Cubans willing to denounce Fidel Castro, tens of thousands of immigrants in formal removal proceedings may be detained while hopelessly backlogged and under-funded immigration judges process their cases. *See* Hagel-Martinez Compromise, § 131; Specter Bill, § 131; Frist Bill, § 225. The U.S. will have to construct new detention centers for immigrants, usually placed in remote areas of the country where building and operational costs are lower. Because they lack adequate access to counsel in these remote detention sites, tens of thousands of immigrants, unfamiliar with their rights, will clog the immigration courts each year with a wide range of hand-written petitions and appeals seeking release or legal status.

Likely tens of thousands of immigrants who would otherwise be working and contributing something of value to society, and supporting their families while their removal proceedings are pending, will instead be languishing in detention centers that the likes of Halliburton will make handsome profits building and operating. Cost to the U.S. taxpayers will certainly run into the hundreds of millions of dollars each year.

At the same time as detention of immigrants will expand, the right of those immigrants to challenge the legality of their detention in the courts will be restricted. *See* Hagel-Martinez Compromise, § 202(a)(9); Specter Bill, § 202(a)(9); Frist Bill, § 202(a)(9). This is a recipe for mass sweeps in ethnic—mainly Latino—neighborhoods, mass arrests and detentions, and virtually no access to the courts to challenge illegal detentions.

Thousands of detained immigrants may also join the ranks of the Guantanamo prisoners of war, facing indefinite detention if third countries refuse to accept them. Section 202 of the Frist bill and section 202 of the Specter bill are intended to override the U.S. Supreme Court's decision in *Zadvydas v. Davis* by allowing for indefinite and possibly permanent detention.¹ These

¹ *Zadvydas v. Davis*, 533 U.S. 678 (2001). In *Zadvydas* the Court held that when removal of an individual is "a remote possibility at best," indefinite detention under the Immigration & Nationality Act is an unconstitutional infringement of

sections allow indefinite detentions by (1) modifying the starting point for calculating the 90-day removal period; (2) permitting the Secretary of the DHS to detain individuals, who are inadmissible or deportable for criminal offenses, beyond the 90-day removal period “without any limitations;” and (3) authorizing the Secretary to indefinitely renew certifications that an individual is a “threat” to public health or safety, the determination of which may be based on “secret evidence.”

Citizens will pay for this policy in ways not even yet imagined. Businesses whose employees are detained will pass on to their customers the added costs of replacing those workers. Detainees’ U.S. citizen children will be eligible for government social service programs they otherwise would never have needed. As indefinite detentions lead to old age of migrant detainees that third countries refused to accept, the taxpayers will pick up the costs of elder medical care and eventually burials.

Since even with major increases in detention the vast majority of undocumented immigrants will still never be apprehended or detained, the detention policy will hardly serve as a deterrent to encourage undocumented migrants to leave the country or to discourage new ones from coming.

3. Blocking traditional avenues leading to legalization of status will vastly increase the undocumented population during the next decade

What the compromise position being considered by the Senate offers with its right hand—a reduction in the size of the undocumented population through a legalization program that may benefit several million immigrants—it takes away with the left hand by blocking avenues to legal status for millions of other immigrants.

When traditional avenues for legalization are cut-off—for example for immigrants filling jobs U.S. workers refuse to accept and for those with U.S. citizen and permanent resident families—immigrants don’t hold garage sales and quietly slip out of the country. They simply remain in order to be with their families, or to work so that they may support their families, and swell the size of the undocumented population.

liberty. *Zadvydas* at 690; see also *Clark v. Martinez*, 125 S.Ct. 716 (2005). Indefinite civil detention, which may also be permanent detention, is unconstitutional because “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent,” *Zadvydas* at 693. In *Clark*, the Court held that the holding in *Zadvydas* also applies to inadmissible, not only deportable, individuals, who cannot be removed. *Clark* at 724.

The Senate compromise will make millions of immigrants now and in growing numbers in the future ineligible to convert from undocumented to documented status for a range of reasons, including, for example, their use of false social security numbers to obtain employment. *See* Hagel-Martinez Compromise, § 209; Specter Bill, § 209; Frist Bill, § 209. Similarly, immigrants who misrepresented their status on employer I-9 forms to obtain employment will be ineligible for visas. *See id.* As mentioned above, thousands of immigrants with minor convictions will become ineligible for visas. Section 2, *supra*. For the first time in the nation's history, U.S. citizens with certain types of convictions will be precluded from petitioning to legalize the status of their spouses or children. Immigrants denied voluntary departure under the Senate compromise will become subject to formal deportation orders making them ineligible for visas in the future.

When Congress passes laws effectively cutting off traditional avenues to legal status for undocumented immigrants, it contributes to the size of the undocumented population because very few immigrants leave the country simply because their path to legalization has been blocked. As social conservative family-values oriented elected officials should understand, the drive to remain with one's family, or on a job that helps to support one's family, is too powerful to be undone by a person having to endure the exploitation and mistreatment that accompanies undocumented status.

The result of blocking traditional routes to legalization is therefore unquestionably to inexorably increase the size of the undocumented population.

4. Restrictions on federal courts' ability to review unlawful removal orders will result in numerous improper deportations

The fundamental problem with unfairness in removal proceedings—entirely ignored by the immigration reform compromise—has its roots in the Department of Justice immigration court system itself. Currently about 215 immigration judges hear approximately 300,00 removal cases per year. *See* Letter from Hon. Richard Posner to Hon. Richard Durbin (March 15, 2006). This caseload makes it virtually impossible for immigration judges to avoid frequent errors in deportation orders. The Board of Immigration Appeals (BIA), comprised of about 11 judges, also has an unmanageable caseload of some 43,000 appeals per year. *Id.* In the past few years this massive caseload, combined with the limited resources made available to the BIA, has caused the Board to affirm immigration judges' deportation orders with one-line decisions that avoid any explanation how or why the decision was reached.

Judicial review of removal orders made by immigration judges is particularly important given the high number of erroneous decisions issued by these judges and the one-sentence decisions affirming these decisions often issued by the Board of Immigration Appeals. Recently, immigration judges have

been under fire regarding their poor decision-making. In a 2005 decision a federal appeals court noted that about 40% of all deportation orders reviewed by the appeals court were overturned on appeal. *See Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005).

Supporters of the Senate's compromise version of immigration reform simply ignore the catastrophe immigrants face in obtaining fair removal proceedings, and instead offer proposals that will even further strip immigrants of the right to fair removal proceedings and accurate deportation decisions.

Section 701 of the Specter bill and section 501 of the Frist bill would remove jurisdiction of the Federal Circuit Courts of Appeals over possibly unlawful deportation orders by consolidating all such appeals before one court in Washington DC, the United States Court of Appeals for the Federal Circuit. *See* Frist Bill, § 501; Specter Bill, § 701; *but see* Hagel-Martinez Compromise, § 707 (refraining from centralization of appeals and instead establishing GAO study on the appellate process for immigration appeals). Senate Judiciary Committee Chairman Arlen Specter withdrew Title VII Immigration Litigation Reform of the draft Chairman's Mark. Chairman Specter held hearings on April 3, 2006 to further examine the topic of immigration litigation reform. Because some form of these provisions may very well be included in any final Senate bill, the sections of Title VII are included in this analysis.

The Federal Circuit court was established in 1982 with the merger of the United States Court of Customs and Patent Appeals and the appellate division of the United States Court of Claims. The Federal Circuit is unique among the thirteen federal Circuit Courts of Appeals in that its jurisdiction and experience is generally limited to cases involving international trade, government contracts, patents and trademarks, certain money claims against the United States government, and federal personnel claims.

Consolidating appeals from throughout the nation in the Federal Circuit court in Washington DC will in many cases limit immigrant's access to judicial review of erroneous deportation decisions. As the Brennan Center for Justice points out in a letter to Senate Judiciary Committee Chairman Specter and Senator Leahy: "A failure to confront the questions on how to get to an immigration court to have one's claim heard, or who will be admitted to practice before such a court, will result in a court that is dangerously disengaged from the wider community and claimants, who cannot get a fair hearing because they literally cannot get to court." *See* Letter from the Brennan Center for Justice to Hon. Arlen Specter and Hon. Patrick Leahy (March 1, 2006).

Judge Richard Posner of the Seventh Circuit Court of Appeals notes in a letter to Senator Durbin that consolidating appeals in the Federal Circuit would "disserve the judiciary and the immigrant community" because the Federal Circuit primarily reviews patent appeals and therefore does not have immigration law expertise. Immigration appeals often also involve questions of

constitutional law, criminal law, and specialized administrative law, areas in which the Federal Circuit has little experience.

Another practical concern is whether one court will have the capacity to adequately manage the caseload of appeals. According to Judge Posner, nearly 1,500 cases are filed annually with the Federal Circuit. These cases are divided among 12 judges approximately totaling 125 cases per judge. The number of appeals for review of deportation orders filed annually is more than 12,000. If these appeals are consolidated in the Federal Circuit, each judge will be responsible for their original 125 cases plus an additional 1,000 immigration appeals. This unmanageable caseload will hinder the court's ability to provide genuine judicial review and will undermine immigrants' rights to due process.

To even further limit the right to judicial review of erroneous deportation orders, Section 707 of the Specter bill and section 507 of the Frist bill, establish a screening process for appeals of Board decisions under which appeals of removal orders will be referred to a single judge on the Federal Circuit Court of Appeals. Only if the immigrant appealing a deportation order establishes a "prima facie" case that the appeal should be granted, will the single judge screening the appeal issue a "certificate of reviewability," which will allow the appeal to proceed before a three-judge panel. *See* Specter Bill § 507; Frist Bill, § 707. If the screening judge declines to issue a certificate of reviewability or fails to issue such certificate within the 60-day allotted time period, the appeal is simply dismissed. *See id.* The Senate compromise offers no further appeal of the screening judge's decision to block the appeal from going forward or from the judge's failure to issue a certificate within 60 days.

Given the large number of appeals filed annually by immigrants seeking judicial review of deportation orders, and the small number of judges who serve on the Federal Circuit, judges assigned to screen immigrants' appeals will at most have a few minutes to review each case and decide whether to allow the appeal to proceed or not. Asylum cases often involving life and death matters, and appeals involving the permanent separation of families from their US citizen children or spouses, will therefore be decided by judges with little or no experience in federal immigration laws, forced to make their decisions in a matter of minutes. "[W]orkload pressures will prevent the judges from giving more than cursory attention to the petitions." This streamlining process will not provide meaningful judicial review and will likely lead to the summary dismissal and denial of appeals that actually have merit. *See* Letter from Judicial Conference of the United States to Hon. Arlen Specter (March 31, 2006).

This new process also will, for the first time in U.S. law, waive the Government's obligation to file with the appeals court a response to a petition to review a removal order, which may in turn eliminate any possibility of settling such appeals. *See* Specter Bill § 507; Frist Bill, § 707. "The immigration agency's current obligation to respond to all petitions before the federal courts often brings to light claims that inarticulate and/or pro se plaintiffs have not identified and prompts settlement offers without need for court intervention." *See* Letter from the Brennan Center for Justice (March 1, 2006).

5. New Limits on Judicial Review of denials of citizenship will leave qualified applicants without a remedy

Section 204 of the Frist bill (and section 609 of the Sensenbrenner bill) strip the federal courts of jurisdiction to review a DHS decision in citizenship applications whether “an alien (1) is a person of good moral character; (2) understands and is attached to the principles of the Constitution of the United States; or (3) is well disposed to the good order and happiness of the United States.” *See* Frist Bill, § 204; Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong., § 609 (2005) (hereinafter “Sensenbrenner House Bill”)

Because these standards are subject to varying interpretation--whether an applicant has “good moral character,” or “understands and is attached to” the Constitution—judicial review of erroneous or arbitrary decisions by immigration officials is crucial. Such review is even more critical in cases in which immigration officials claim to rely upon “secret evidence” to deny citizenship to long-term resident immigrants.

Making appeals of denials on such grounds beyond review by any federal court invites abuses of discretion and unlawful denials masked by a finding of “bad moral character,” or perhaps based upon secret evidence the applicant has never even seen.

Section 204(d) of the Hagel-Martinez Compromise and section 204(d) of the Specter bill retain judicial review of the above-mentioned DHS discretionary determinations. These sections impose a 120-day time limit on seeking federal court review and it allows the court to determine whether there was substantial evidence in the administrative record and findings of the DHS to indicate that the individual possesses good moral character, is attached to the principles of the Constitution, and is well disposed to the good order of the United States. *See* Hagel-Martinez Compromise, § 204(d); Specter Bill, § 204(d).

However, section 204(g) of the Hagel-Martinez compromise and the Specter bill limit federal district court review when the Government delays in adjudicating a naturalization application. An individual may seek review in a federal court when the DHS fails to adjudicate the application within a 180-day time period beginning on the date on which the agency states that it has completed all examinations and interviews. *See* Hagel-Martinez Compromise, § 204(g); Specter Bill, § 204(g). However, the DHS makes the determination as to when it has completed all examinations and interviews, and unlawful delays in completing such examinations therefore becomes non-reviewable by the federal courts. *See id.* The Senate bills and compromise give DHS the power to define the terms “examinations” and “interviews.” *See id.* This in turn gives the agency the power to determine when these stages are complete and when the 180-day to

make a citizenship decisions expires. See Letter from Lenni Bension and Stephen Yale-Loehr to Senator Arlen Specter (March 16, 2006).

In addition, unlike current law that in delay cases permit the federal court to actually grant citizenship, the Senate compromise limits the federal courts to review and then remand cases to the DHS, presumably with instructions to issue citizenship in cases in which all examinations and interviews have been completed. See Hagel-Martinez Compromise, § 204(g); Frist Bill, § 204(g); Specter Bill, § 204(g); see e.g., *United States v. Hovsepian*, 359 F.2d 1144, 1160 (9th Cir. 2003) (“Congress intended to vest power to decide languishing naturalization applications in the district court *alone*, unless the court chooses to ‘remand the matter’ to the INS, with the *court’s* instructions”).

By effectively wiping out judicial review of citizenship applications, and barring the federal courts from granting or denying such applications, a process no federal courts have complained about, the Senate compromise position will likely cause thousands of citizenship cases erroneously denied to avoid judicial review every year. The result will not only be to deny full integration into society of long-term lawful resident immigrants, but to limit their ability to legalize immediate family members. This in turn, as with many of the other compromise positions discussed above, will swell the ranks of the undocumented population.

6. Wiping out Voluntary Departure for many immigrants will make them deportable and ineligible for future visas

Historically the immigration laws have included a provision permitting immigration judges to grant undocumented immigrants “voluntary departure” in lieu of formal “deportation” from the country. Generally to obtain voluntary departure the immigrant must show that he or she is a person of good moral character, has no serious criminal convictions, and can afford to pay his or her way out of the country. Such voluntary departure is usually granted to qualifying immigrants for a period of 30 to 60 days, after which, unless the voluntary departure period is extended, a formal order of deportation goes into effect.

Obtaining voluntary departure is critically important to immigrants who have available to them avenues to legalize their status through close family members or Government-approved job offers. While voluntary departure orders generally do not block an immigrant’s ability to lawfully immigrate in the future or be granted a visa based upon an already pending application, the entry of a formal deportation order for the most part renders immigrants ineligible for visas. If such immigrants do not depart the country, they add to the population of undocumented permanent residents. Preserving voluntary departure opportunities is therefore yet another significant tool in controlling the size of the undocumented population. As with so many other provisions, the Senate compromise will add to the size of the undocumented population by cutting

back on voluntary departure eligibility. See Hagel-Martinez Compromise, § 211; Frist Bill, § 211; Specter Bill, § 211.

This result is accomplished by barring the courts from reinstating, enjoining, delaying, staying, or tolling any period of voluntary departure. See *id.* These proposals reverse current policy and the decisions of the appellate courts that in many cases extend voluntary departure upon the filing of timely appeals or motions to reopen cases. See e.g., *In re A-M-*, 23 I. & N. Dec. 737, 743 (BIA 2005) (stating “recent statutory and regulatory changes have not altered the basic principle...that the timely filing of an appeal with the Board stays the execution of the decision of the Immigration Judge during the pendency of the appeal and tolls the running of the time authorized by the Immigration Judge for voluntary departure”); *Matter of Chouliaris*, 161 I. & N. Dec. 168 (BIA 1977); see also *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (“in cases in which a motion to reopen is filed within the voluntary departure period and a stay of removal or voluntary departure is requested, the voluntary departure period is tolled during the period the BIA is considering the motion”); *Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005) (holding that “the *pre-IIRIRA* voluntary departure provision requires that aliens be afforded a reasonable opportunity to receive a ruling on the merits of a timely-filed motion to reopen”).

To make matters worse, the Senate bills modify the law to require that an immigrant effectively waive his or her right to appeal an erroneous deportation order as a condition of applying for voluntary departure. See Hagel-Martinez Compromise, § 211; Frist Bill, § 211; Specter Bill, § 211. This anti-due process proposal places immigrants in the absurd position of having to waive a legitimate appeal simply to preserve their right to seek voluntary departure so that they may legally immigrate in the future.

In summary, the voluntary departure provisions of the Senate compromise will remove judicial review of voluntary departure decisions, encourage erroneous and arbitrary decision-making, and force immigrants to elect between a legitimate appeal of an erroneous deportation order versus preserving their right to voluntary departure. Most people denied voluntary departure will likely remain in or return to the U.S. in undocumented status since they will be ineligible for visas despite having qualifying family members or job offers in the U.S. Again, the Senate compromise takes away with one hand what it grants with the other through a possible legalization program.

7. Further restricting immigrants’ ability to bring Motions to Reopen their deportation cases will leave immigrants in undocumented status despite their eligibility for visas

Section 508 of the Frist bill and section 708 of the Specter bill (as well as section 212 of the Sensenbrenner House bill) state that decisions to grant or deny motions to reopen or motions to reconsider deportation and other immigration

decisions are in the discretion of the Attorney General and his or her subordinate officers. Further, there shall be no review by the federal courts of decisions that are to be made in the discretion of the Attorney General's subordinate officers. *See* Frist Bill, § 508; Specter Bill, § 708; Sensenbrenner House Bill, § 212.

Preserving judicial review of erroneous decisions by immigration judges or the Board of Immigration Appeals in response to motions to reopen or reconsider cases is critically important to immigrants who have a way to legalize their status but can only do so if they are able to get an old removal hearing reopened.

Most such cases involve immigrants with old orders of deportation who qualify to legalize their status through U.S. citizen or lawful resident immediate family members or job offers approved by the Department of Labor. While such immigrants may be approved for the issuance of visas by the DHS, because they have old deportation orders, they are required to bring their requests for adjustment of status before the immigration judges or the Board of Immigration Appeals. They do so by filing a motion to reopen their old deportation cases.

Immigration judges and the Board of Immigration Appeals not infrequently deny motions to reopen cases for improper legal reasons or abuse their discretion by failing to take into account relevant evidence, or considering irrelevant evidence, or by not properly weighing the evidence of record. The enormous backlogs facing immigration judges and the Board of Immigration Appeals, and pressure to make decisions as rapidly as possible to reduce such backlogs, certainly contribute to these errors.

Without the ability to have these decisions reviewed by a federal court, immigrants with erroneous denials of their motions to reopen will be left with no remedy whatsoever to legalize their status, despite their underlying eligibility to do so based upon already approved visa petitions filed by their family members or employers.

8. Expanded use of secret evidence against immigrants will undermine the reliability of deportation decisions

Section 204 of the Hagel-Martinez compromise, section 204 of the Frist bill and section 204 of the Specter bill, (and section 609 of the Sensenbrenner House bill) expand the "Terrorist Bars" and allow for the expanded use of "secret evidence," inviting violations of individuals' fundamental rights and the principle of government accountability.

When the government uses secret evidence to make decisions in immigration and deportation proceedings, the immigrant has no opportunity to confront and dispute the evidence, or test its reliability.

The use of secret evidence coupled with the bills' land compromise's imitation on judicial review will undermine the due process rights of immigrants and the fundamental fairness of immigration proceedings.

9. Expanded use of "expedited proceedings" to deport immigrants without fair hearings

The Senate bills expand expedited removal by making individuals convicted of an "aggravated felony," a firearm offense, and offenses related to espionage and treason subject to expedited removal. *See* Hagel-Martinez Compromise, § 227; Frist Bill, § 227; Specter Bill, § 227. As discussed above, under an expanded definition of "aggravated felony," a long-term immigrant could be exiled from the U.S. through the "expedited" process and without a formal due process hearing because he had three drunk driving misdemeanor guilty pleas twenty years earlier.

Immigrants placed in "expedited removal" proceedings face deportation whether or not they would otherwise possess a right to apply for relief from removal based upon their many years of residence or family relationships.

Persons subject to "expedited removal" almost are provided no meaningful judicial review. Thus, individuals wrongly placed in "expedited removal" proceedings or wrongly ordered deported in such proceedings will likely never have an effective means to challenge adverse Government decisions, regardless of their legality or illegality.

10. New immigration penalties for U.S. citizens will keep their families in undocumented status.

The Hagel-Martinez compromise would for the first time in the nation's history limit the right of U.S. citizens to petition to obtain visas and lawful residence for their immediate relatives, including spouses or minor children, if the U.S. citizen has been convicted of certain "aggravated felonies."

While the Congress characterizes these aggravated felonies as "serious sexual offenses," in reality the provisions include misdemeanors with no jail sentences.

Enforcing this proposal will require a criminal background check on *all* U.S. citizens who petition to immigrate their family members. These background checks will be a massive drain on scarce law enforcement resources and drastically delay the processing of already badly back-logged family visa applications.

The new restriction will also force immediate relatives of U.S. citizens who permanently reside in the U.S. to remain in undocumented status for the rest of

their lives, or be separated from their loved ones. Most will remain with their families in the U.S., contributing to the size of the underground undocumented population.

11. Authorizing and encouraging State and local enforcement of immigration laws.

The compromise would give local and state police the authority to assist the federal government in enforcing federal immigration laws. Hagel-Martinez Compromise, § 229; *see also* Specter Bill, § 229; Frist Bill, § 229.

Many state and local law enforcement authorities oppose this measure because it would destroy community policing, divert time and attention from local safety priorities, and discourage immigrants from coming forward to report crimes and cooperate in their investigation and prosecution.

Another provision in the bill will lessen the utility of an important federal database, the National Crime Immigration Center (NCIC) database. By expanding the types and numbers of people who would be entered into the NCIC to include those with civil violations of immigration law, this provision will make it more difficult for the police to use NCIC as a tool to enforce criminal laws.

12. Making it more difficult for asylum seekers fleeing persecution to obtain protection in the U.S.

There are numerous ways in which the Senate compromise will disadvantage immigrants fleeing persecution from obtaining asylum in the United States.

Document fraud provisions included in the compromise plan will adversely impact on many asylum seekers who obtain or use false documents precisely to escape persecution or to enter third countries to seek protection from persecution. *See* Section 3, *supra*. The restrictions on judicial review of deportation decisions discussed elsewhere in this report will weigh most heavily on asylum seekers who often have only been saved from deportation back to countries where they faced persecution through appellate decisions of the federal courts. *See* Section 5, *supra*.

Even more troubling are proposals that would in many cases prevent the federal courts from granting even a temporary postponement of deportation while a court reviews an immigrant's appeal of a deportation order and denial of asylum. The proposal will allow thousands of asylum seekers to be deported to countries where they may be persecuted while their appeals of denials of asylum remain pending before the federal courts. This position likely violates due process of law as well as international obligations of the United States under the United Nations Protocol Relating to the Status of Refugees. It also is horrible public policy.

Finally, like tens or hundreds of thousand of other immigrants, many asylum seekers will face mandatory detention while seeking to appeal denials of asylum and indefinite detention if they are ultimately denied asylum but no third country is prepared to accept them. It hardly seems to serve the national interest to require the widespread detention of asylum seekers and indefinite detention of those denied asylum whose home countries often refuse to take them back.

13. Deportation of suspected gang members who have neither committed nor been convicted of any crime.

Immigrants who have never committed crimes or been convicted of any crimes nevertheless face deportation and denied future immigration benefits if an immigration officer has "reason to believe" that the person is or was either a "member" of a "gang," or participated in "activities" that promoted a "gang." Hagel-Martinez Compromise, §§ 206(a)(1)-(2); Specter Bill, §§ 205(a)(1)-(2); Frist Bill, §§ 205(a)(1)-(2).

This proposal leaves wide discretion with immigration officers to determine what groups qualify as gangs, whether an immigrant was actually a "member," or whether the immigrant intentionally participated in an activity to somehow promote a gang. Thousands of young immigrants, mostly from Central America, who have committed no crimes, will nevertheless face detention and deportation under this proposal.

Many such youth may have had only brief membership in a gang long ago. Or may have joined a gang solely to participate in its lawful activities. Or may have eventually rejected gang life or even participated in programs to end gang violence.

When word spreads on the streets that once a gang member always a gang member in the eyes of the federal law, gangs may be strengthened not weakened as gang leaders convince their members that there is no point in leaving the gang in order to obtain immigration status.

Studies unquestionably show that youth gang membership is caused in major part by poverty. Many immigrant gang members are the children of immigrants who were unable to legalize their status and pull themselves out of extreme poverty thanks to current immigration policies and backlogs. Now their children will face detention and deportation, ineligibility for visas, and consigned to living out their lives in this country, unless apprehended, in undocumented status.

14. Conclusions

The Senate debate on immigration ended a few days ago with Senators disagreeing on the process to deal with the so-called "Hagel/Martinez

compromise" that many Senators and the White House endorsed in principle. The Senate compromise includes a legalization program in exchange for massive new border and interior enforcement measures that will undoubtedly cause widespread arrests, detentions, and confrontations in Latino and ethnic communities throughout the country.

The Senate compromise will leave millions of immigrants in undocumented status, greatly increase the size of the undocumented population in the next few years by blocking traditional avenues of legalization, and drastically cut-back on the legal and human rights of immigrants residing and working in the United States.

Mostly opponents of the compromise have offered about 400 amendments, most of which would further restrict the legalization provisions of the compromise and further cut-back on the human and civil rights of immigrants. Negotiations between the Democrats and Republicans broke down over how many amendments the full Senate would be permitted to consider. Minority Leader Reid unsuccessfully pushed for an agreement that would have limited each party to three proposed amendments on the floor of the Senate. Republican Senators insisted on the ability to introduce 20 to 30 amendments. Senators recessed for two weeks with Republicans and Democrats trading accusations and blame for the impasse.

From the standpoint of the immigrant community, and the interest of the country in rational and humane immigration reform, the Congressional impasse may be a blessing.

The House bill would move immigration policy into the stone age. Slashing away at traditional paths to lawful status while offering no legalization program at all, the House bill, if ever enacted, would inevitably and substantially expand the size of the undocumented population. Its proposal for a Berlin wall along the U.S.-Mexico border is a 16th Century response to a 21st Century problem. People fleeing hunger and poverty, or political persecution, or seeking to unite with their families, will figure out ways to get over, under, and through any great walls that Rep. Sensenbrenner may dream up.

The Senate compromise will have much the same result, although it would temporarily reduce the size of the undocumented population by offering a legalization program to probably about 4 million immigrants. But the Senate's draconian cut-backs on the due process rights of immigrants, and blocking of historical paths to lawful status, will also soon result in increases in the size of the undocumented population, enforcement sweeps in minority communities, mass and indefinite detentions of immigrants, further criminalization of the border and border communities, and mass deportations of immigrants with no realistic access to judicial review to determine if they are being lawfully deported.

It is unclear whether the immigration debate will be placed back on the Senate's agenda when lawmakers return on April 24th. Senate Judiciary

Committee Chairman Arlen Specter (R-PA) wants the Senate Judiciary Committee to promptly reconvene and again address the issue of immigration reform when Senators return from their recess. What Senate majority leader Frist does next will probably be dictated more by his presidential ambitions than anything having to do with rational long-term immigration reform.

Had President Bush addressed immigration reform as an important national issue early in his presidency, when he still really had some “political capital” to spend, he may have had the authority that it takes to push Congress to address the subject in a serious way. Its likely too late for that now. As much as the country needs to revise its immigration policies, the interests of the nation and the immigrant communities may now be best served by a Senate impasse, as long as the public keeps up the pressure for reform so that the matter is revisited and this time seriously addressed in the next Congress.

During the next two weeks we urge community-based organizations, religious groups, unions, community leaders and others to continue and expand the show of strength exhibited in recent mass demonstrations in cities throughout the country, and to continue communications by way of letters, visits, and phone calls to their Senators or their aides. We also urge local groups to hold public forums on what real immigration reform might look like.

We recommend that all concerned people and organizations:

- Oppose any compromise that cuts back on the already limited human and civil rights that immigrants possess in this country;
- Oppose any compromise that cut-backs on the critical role the federal courts have played for over 100 years protecting the fundamental human and civil rights of immigrants from unlawful and unconstitutional policies adopted by Government agencies;
- Oppose any compromise that will result in the mass and indefinite detention of hundreds of thousands of immigrants who have committed no serious crimes;
- Oppose any compromise that cuts off traditional avenues for immigrants to legalize their status through family relationships, asylum, or approved job offers for positions U.S. workers are unavailable to fill;
- Oppose any compromise that includes a “guest worker” program without a mechanism for these workers to eventually apply for permanent resident status and full labor rights to prevent under-cutting U.S. workers;
- Oppose any compromise that increases the difficulties legitimate asylum seekers face in winning protection from return to countries where they face persecution;
- Oppose any compromise that further increases in the criminalization and militarization of the US-Mexico border, policies that have caused the deaths

of thousands of immigrants crossing the border, substantially increased the dangers faced by border patrol officers, encouraged armed vigilantism, destroyed the infra-structure of border communities on both sides of the border, and done little to stop the flow of migrants.

- Oppose any compromise that criminalizes immigrants based upon their undocumented status.

We recommend that all concerned individuals and organizations:

- Support serious study by the Congress of immigration reform as took place prior to the enactment of the last major reform law in 1986 (the Immigration Reform and Control Act), when a Select Commission on Immigration and Refugee Policy was constituted to come up with real solutions, not election year “bumper-sticker” solutions;
- Support a realistic long-term legalization program for undocumented immigrants, including a reasonable statute of limitations on illegal entry for productive otherwise law-abiding immigrants;
- Support dramatic and immediate reductions in the millions of backlogged visa petitions that keep immigrants in undocumented status for upwards of ten years;
- Support labor rights for all immigrant workers in order to reduce the preference employers have for undocumented workers precisely because they have fewer protections under U.S. labor laws than U.S. workers;
- Support greater protections for legitimate asylum seekers to avoid their being returned to countries where they face imprisonment, torture, and death;
- Support humane border enforcement using available technologies and enhanced border surveillance techniques without further criminalizing and militarizing the U.S.-Mexico border;
- Support prompt adjustment of status for the hundreds of thousands of Central American refugees, many of whom came here as a result of U.S. policies in Central America, who are languishing in a legal twilight zone after long-ago applying for ABC, TPS, or NACARA relief;
- Support legislation to curb and more consistently punish the activities of those who engage in violence against immigrants, including border vigilantes, traffickers, and perpetrators of domestic violence;
- Support legislation to rationally adjust per country visa quotas to take into account visa demand;
- Support legislation to repeal the three and ten-year bars that make immigrants who have been in the U.S. for six months in undocumented status

ineligible for visas without returning to their home countries for three years, and those who have been here for one year or more in undocumented status ineligible to receive visas without returning to their home countries for ten years.

"An immigration system that forces people into the shadows of our society, or leaves them prey to criminals is a system that needs to be changed," Bush said at the National Catholic Prayer Breakfast last Friday. "I'm confident that we can change our immigration system in ways that secures our border, respects the rule of law, and, as importantly, upholds the decency of our country."

The President may be right. However, the last major legalization program was achieved in 1986 after careful study, hearings throughout the country, consideration of demographic and economic data on migration, consideration of a range of views held by migration experts, and public consultations with representatives of business, unions, religious groups, immigrant communities, law enforcement, and others. No such deliberative process has taken place with regards to the present Congressional proposals. Bills have been whipped out of elected officials back pockets, there have been virtually no hearings of any substance, and absurd deadlines have been set by Congressional leaders for the production of a new "comprehensive" law. If the result of this ineptitude is an impasse, the country is probably better off revisiting immigration reform in a serious way after the November elections.

We welcome comments on the positions set forth in this report. Forward comments to pschey@centerforhumanrights.org

///