



“Hagel-Martinez Compromise” Immigration Reform Legislation: Due Process Highlights and Lowlights

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The Hagel-Martinez “compromise” was introduced as the “Comprehensive Immigration Reform Act of 2006” (S. 2611 and S. 2612). Notably, the bill contains positive reforms, including renovations to the family immigration system, a “McCain-Kennedy” like temporary worker program for immigrants entering in the future, the DREAM Act, a modified version of the AgJOBS program and a legalization program for undocumented immigrants. Despite these groundbreaking reforms, the compromise raises many due process-related concerns. Below is a summary of these provisions.

LOW LIGHTS

Aggravated Felony Expansion: The compromise dramatically expands the types of offenses that can be classified as an “aggravated felony.” For example, an immigrant who omits factual information in her visa application can be later prosecuted and classified as an aggravated felon. The consequences of an “aggravated felony” conviction are severe—and include mandatory detention, permanent deportation, and ineligibility for any type of relief. Detention and permanent banishment from the United States is an excessive punishment to impose on someone who comes to the United States to escape violence or to find work because she omits a word in an immigration application or travels with a document bearing a different name. (*Same or similar as Senate Judiciary bill*) Some of these newly created aggravated felony labels only apply to prospective conduct due to the retroactivity amendment which was adopted (see Highlights).

Indefinite Detention of Immigrants: The compromise contains provisions that would make it possible for the Department of Homeland Security to indefinitely detain immigrants with final orders of deportation who cannot be deported due to no fault of their own. The US cannot deport these individuals because we lack diplomatic ties with their home countries, their home countries refuse to accept their return, or the individuals are stateless. The Rehnquist Supreme Court (with Scalia writing one of the opinions) twice ruled that the Executive Branch giving life sentences to immigrants who cannot be deported raises serious due process and Constitutional concerns. The compromise overturns these two Supreme Court decisions. (*Same or similar as Senate Judiciary bill*)

New Criminal and Immigration Penalties for Document Related Offenses: The compromise contains provisions that would make a number of passport and document related offenses a crime punishable under the U.S. criminal code. Some of the “new” crimes are not actually related to passport or document fraud. For example, the provisions expose well-intentioned immigrants to federal criminal prosecution for acts such as omitting information or including the wrong address on a visa application. The bill also takes the dramatic step of making every person identified in the newly expanded category of passport and document related offenses inadmissible and/or deportable. This means that individuals who merely admit to including a wrong birth date or omitting information on a passport application, family petition, or frankly any piece of paper that is made part of the application record can be deemed inadmissible and barred from receiving an immigration benefit or relief, including legalization. (*Same or similar as Senate Judiciary bill*). These provisions apply primarily to prospective conduct.

Mandatory Detention and Expedited Removal: The compromise contains provisions to codify the mandatory detention of nearly all undocumented immigrants caught at or between ports of entry

who are not Mexican or Cuban. The compromise also statutorily mandates expedited removal (quick deportations by immigration officers without an opportunity for review or a day in court) to certain criminal immigrants as well as those “other than Mexicans” caught within 100 miles of the border who cannot prove they have been in the United States for more than 14 days. *(Same or similar as Senate Judiciary bill)*

Increase in Detention Bedspace: The compromise contains a provision that increases detention bed space by 10,000. *(Same or similar as Senate Judiciary bill)*

Limitations on Judicial Review: The compromise still contains several provisions that would severely limit judicial review on decisions made by the Department of Homeland Security without regard to whether the decision is based on factual or legal errors. This removes the important role of the judiciary to serve as a check and balance to overreaching decisions or abuses made by the Executive Branch. *(Same or similar as Senate Judiciary bill)*

State and Local Cops: The compromise would expand the entry of data on millions of immigrants who have civil immigration violations into the National Crime and Information Center (NCIC) and require DHS to seek MOUs in each state for purposes of federal immigration law enforcement. *(Same or similar as Senate Judiciary bill)*

Penalties for Failure to File a Change of Address: The compromise includes provisions that create new penalties for failure to file a change of address. For example, it modifies the penalties for failure to file a change of address by providing for an increase in fines and by providing for imprisonment up to 6 months. If the alien has not been inspected or admitted or if the alien has failed to submit an address on more than one occasion, he or she shall be presumed a flight risk. These penalties are unnecessary and incommensurate with the offense. In addition, labeling immigrants as “flight risks” based on the number of times they failed to file a change of address form is disingenuous and removes the ordinary discretion that judges use to determine true flight risks and dangers to the community. It is worth noting that INS acknowledged that it had failed to ever record hundreds of thousands of change of address notices that were filed by immigrants. *(Same or similar as Senate Judiciary bill)*

Due Process Erosions and Excessive Ineligibility Bars for Certain Undocumented Immigrants: Title VI of the compromise splits the undocumented population into three categories based on the number of years a person has resided in the United States. One category of these immigrants would be subject to “Deferred Mandatory Departure” (DMD) and be required to waive any right to administrative or judicial review or appeal of their eligibility, as well as waive any right to contest any removal (other than refugee-related relief). Moreover, immigrants in this category who have been ordered removed, excluded, deported or to depart voluntarily as well as those who have failed to comply with any “request for information” from DHS would be statutorily ineligible for DMD status. This could potentially bar anyone who did not file a change of address form within 10 days of moving or who did not comply with the “special registration” program.

HIGHLIGHTS

Criminalization of the Undocumented and People Who Help Them: The compromise does not contain the language that would make it a “crime” to be unlawfully present. It also contains a

“humanitarian” exception to “smuggling” for groups and individuals who provide assistance including medical care, housing, counseling, victim services, and food, or to transport the alien to a location where services can be rendered. *(Same or similar as Senate Judiciary bill)*

Exempting Certain Vulnerable Populations from Criminal Prosecution for “Document Fraud”: While the compromise contains provisions that would make a range of passport and document related offenses a crime punishable under the U.S. criminal code, it includes an exemption for certain refugees, asylees, and vulnerable populations (i.e., victims of trafficking, juveniles and those eligible for relief under the Violence Against Women Act) from criminal prosecution. This provides limited protections for refugees and other victims who often rely on false documents to flee to the United States. *(Same or similar as Senate Judiciary bill)* It is important to note that this “carve out” exception does not protect these vulnerable populations from being found inadmissible for use of fraudulent documents.

Retroactive Application of Punitive Immigration Provisions: The compromise retains an amendment passed in the Senate Judiciary Committee bill repealing the retroactive application of certain punitive “Title II” provisions. This will prevent some immigrants from being punished for conduct that occurred many years ago, if the conduct was not punishable at the time it occurred. *(Same or similar as Senate Judiciary bill)* Without this important provision, many, if not most, of those hoping to legalize would be barred.

Judicial Review of Naturalization Denials and Delays: The compromise retains an amendment passed in the Senate Judiciary Committee bill to restore limited judicial review for certain denials and delays on naturalization applications. *(Same or similar as Senate Judiciary bill)*

Court Reforms: The compromise makes several positive modifications to the Senate Judiciary bill with respect to administrative and judicial court reforms.