



## Senate Judiciary Committee's Immigration Bill: Due Process Highlights and Lowlights

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On March 27, the Senate Judiciary Committee passed an immigration bill that significantly ameliorated some of the worst due process erosions found in the bill as introduced. This summary is based on the best information available at the time it was written.

### HIGHLIGHTS

*Criminalization of the Undocumented and People Who Help Them:* Senator Durbin's amendment to strike provisions that would make it a crime to be unlawfully present passed. In addition, Senator Durbin's amendment to improve the language on alien "smuggling" so that groups and individuals who provide "humanitarian assistance" to undocumented immigrants are not criminalized passed. Contrast this to the original bill, which contained only a narrow exception for people who provide "emergency assistance" without compensation. Senator Cornyn (R-TX) offered a "second degree amendment" that would require every organization and individual seeking an exception to "register" with the DHS. Another "second degree amendment" was offered by Senator Kyl (R-AZ) to create a more limited exception. Both failed.

*Prosecution of Immigrants Who Engage in Document Related Fraud:* The bill passed with provisions that would make a breathtaking number of passport and document related offenses a crime punishable under the U.S. criminal code. Senators Feinstein and Kennedy offered an amendment that would exempt certain refugees, asylees and vulnerable populations (i.e., as victims of trafficking, juveniles and those eligible under VAWA) from criminal prosecution. This provides limited protections for refugees and other victims who often rely on false documents to flee to the United States. Senator Kyl offered a second degree amendment that would codify and require prosecutorial guidance in compliance with Article 31 of the 1951 Convention relating to the Status of Refugees and with U.S. protection for individuals eligible for classification under select provisions in the INA. Both amendments passed.

*Retroactive Application of Punitive Immigration Provisions:* Senator Kennedy's amendment to repeal the retroactive application of certain punitive immigration provisions in the bill passed with modification. This amendment will prevent some immigrants from being punished for conduct that occurred many years ago, even if the conduct was not punishable at the time it occurred.

*Judicial Review of Naturalization Denials and Delays:* Senator Feingold's amendment to restore limited judicial review for certain denials and delays on naturalization applications passed.

*Consolidation of Judicial Review into a Single Court of Review:* Senator Specter agreed to table (not include) Title VII as part of the committee bill. Notably, Senator Specter mentioned the criticisms he and others received from federal judges about these provisions.

*"McCain-Kennedy" Amendments Addressing the Undocumented and Future Flow:* Senator Graham's amendment/substitute to provide a work visa and path to citizenship for the undocumented (after working a certain number of years and meeting monetary, security and related requirements) passed.

Senator Kennedy also offered the McCain-Kennedy temporary worker program/path to citizenship (after working a certain number of years and meeting monetary, security and related requirements) as an amendment/substitute to the Mark. This amendment also passed. Senator Kyl also offered amendments on his “report to deport” and “temporary worker” language from his immigration bill—both of which failed. Passage of the “McCain-Kennedy” amendments reflect a due process victory as it preserves a participant’s right to administrative and judicial review, certain confidentiality provisions, and labor protections. By contrast, the Specter and Kyl-Cornyn proposals are unworkable and require participating immigrants to waive fundamental due process protections.

*DREAM Act:* Senator Durbin offered the DREAM Act as an amendment. It passed by a voice vote.

*AgJOBS:* Senator Feinstein introduced an amendment to create an agricultural worker program that includes earned legalization. This amendment passed.

## **LOW LIGHTS**

*Aggravated Felony Expansion:* The Judiciary bill passed with dramatic expansions to 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 felony. 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.

*Indefinite Detention of Immigrants:* The Judiciary bill passed with provisions that would make it possible for the Department of Homeland Security to detain immigrants indefinitely. This means that immigrants can languish in detention for years at a time after serving their sentences and despite the fact that they can never be deported in those cases where their home country refuses to accept their return. By giving the Executive Branch authority to give life sentences to immigrants who cannot be deported, the Mark overturns two Supreme Court decisions, undermines basic due process, and drains precious resources.

*New Criminal and Immigration Penalties for Document Related Offenses:* The Judiciary bill passed with 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 potentially millions of people 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.

*Mandatory Detention and Expedited Removal:* The Judiciary bill passed with amendments which would codify the mandatory detention of certain immigrants caught at or between ports of entry as well as

statutorily mandate expedited removal (quick deportations by immigration officers without an opportunity for review or a day in court) to certain immigrants (OTMs) caught within 100 miles of the border who cannot prove they have been in the United States for more than 14 days.

*Increase in Detention Bedspace:* Senator Sessions offered an amendment that would increase detention bedspace by 10,000. This amendment passed.

*Limitations on Judicial Review:* The Judiciary bill 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.

*State and Local Cops:* The Judiciary bill passed with CLEAR-like amendments offered by Senators Sessions and Cornyn that would codify the “inherent authority” of local police to enforce criminal immigration laws; expand the entry of data on millions of immigrants into the National Crime and Information Center (NCIC); and require DHS to seek MOUs in each state for purposes of federal immigration law enforcement. The CLEAR-like amendments are less harsh than HR 4437 but nonetheless overreaching.

*Penalties for Failure to File a Change of Address:* The Judiciary bill passed with 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. The failure to timely file a change of address form should never be criminalized or result in deportation or loss of immigration status. 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 .

## RELATED MATERIALS FROM THE NATIONAL IMMIGRATION FORUM

Summary of Select Provisions in Senator Specter’s February 23 Draft Comprehensive Immigration Reform Legislation:

<http://www.immigrationforum.org/documents/PolicyWire/Legislation/SelectSummaryCIRMark.pdf>

The Chairman’s Mark Misses the Mark on Due Process:

[http://www.immigrationforum.org/documents/PolicyWire/Legislation/MissesMark\\_DueProcess.pdf](http://www.immigrationforum.org/documents/PolicyWire/Legislation/MissesMark_DueProcess.pdf)

Chairman Specter’s Mark Analysis on Amendments Related to Document and Passport Fraud:

<http://www.immigrationforum.org/documents/PolicyWire/Legislation/ChairmansMarkDocumentFraud.pdf>