



The Chairman's Mark Misses the Mark on Due Process

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Following is a brief explanation of why provisions in the draft comprehensive immigration reform bill (the “Chairman’s Mark”) submitted by Senate Judiciary Committee Chairman Arlen Specter are excessively harsh and take us away from our country’s principles of justice and equal treatment under the law.

The Punishment does not fit the Crime

Provisions in the Mark dramatically expand the types of offenses which can be classified as an aggravated felony (a label in the immigration code that has been broadly applied under current law, and extended to shoplifting, writing a bad check, and public nuisance, and other offenses not considered “aggravated” or “felonies” outside of immigration law). The Mark stretches the aggravated felony label even further, to reach people who omit information from an immigration application, including a naturalization application; people who use a false passport to flee persecution and apply for protection in the United States; as well as individuals who entered the United States without inspection and who remain in the U.S. to work and contribute to society. The consequences of an “aggravated felony” conviction are severe—and include mandatory detention, permanent deportation, and ineligibility for any type of relief.

Similarly, a provision in the Mark increases the criminal penalties and preserves removability for non-citizens who fail to file a change of address with DHS. If ordinary Americans faced these kinds of penalties for failure to file an address change with their post office or credit card company, the U.S. prison population would be indeed more diverse. Imposing excessive punishments and applying overbroad definitions to detain, deport and banish hardworking immigrants, victims of trafficking and persecution, and family members is not the answer.

Finally, by expanding the categorical labels through which an immigrant can be denied relief, detained and/or deported, the Mark removes discretion from judges and officers to weigh favorable equities and individual circumstances. This is un-American.

Examples

- Yuko is a lawful permanent resident who worked as a sous chef in New York City and lived with her three U.S. citizen children. Ten years ago, Yuko borrowed her neighbor’s passport to enter the U.S. because she was desperate to leave her abusive husband. While Yuko pled guilty to entering the U.S. on a false name, she spent no time in jail. Beatrice, a Mexican woman, is a victim of domestic violence who used a false name to obtain a passport to seek refuge with her cousin in the U.S. Under the Mark, these convictions would automatically be labeled aggravated felonies, subjecting them to deportation, detention, and ineligibility for any kind of relief.
- Consider the case of Roberto, a 30 year old Mexican native male who is married to Rosa, a lawful permanent resident living in the U.S. Rosa has filed a family immigration petition for Roberto, which will take years to be processed. While Roberto waits in Mexico, his wife becomes very sick, and ultimately is diagnosed with lymphoma. Roberto makes a misstatement in his passport application, is issued a passport, and then uses it to enter the U.S. and care for Rosa. If the Mark passed, Roberto’s misstatement could be classified as a ground of deportability (for which there would be no waiver available even if he is otherwise eligible to participate in comprehensive

immigration reform) or an aggravated felony (subjecting him to mandatory deportation and detention).

Prolonged Detention

Provisions in the Mark 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.

Changing the Rules of the Game

The Mark creates new penalties for immigrants based on conduct that may have occurred years ago. For example, the Mark's permanent resident bar on refugees with aggravated felony convictions would apply retroactively.

Example

- A woman from Iran was granted asylum ten years ago based on years of abuse and mistreatment by local government officials because of liberal religious beliefs. This woman has two children in the United States and has been working and paying taxes for the past ten years. Seven years ago she was convicted of shoplifting children's clothes and given a suspended sentence with no jail time. This currently qualifies as an aggravated felony, but was not an aggravated felony at the time that she pleaded guilty. Under the Mark, this woman would be barred from receiving permanent status, regardless of her equities.

The problem with applying a law retroactively is that people can be punished for activity that occurred many years ago, and to a person who specifically relied on the law in effect at the time to make important legal decisions. The Supreme Court has made clear “[T]his 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)).

Weakening Checks and Balances

Provisions in the Mark 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. Federal judges and the Department of Justice's own Attorney General have expressed concern with the substandard decision making by immigration judges (who are part of the Justice Department).

In a recent federal court decision, Judge Posner noted that “[T]he ‘tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.’” Similarly, the Attorney General has launched a comprehensive review of the immigration courts and Board of Immigration Appeals.

Specter's Mark moves in the opposite direction by stripping court review of certain agency decisions to deny citizenship, immigration benefits, or relief from removal, and by creating a certification process where a single judge at the stroke of a pen can deny court review. Remarkably, the Mark also forces eligible immigrants to "waive" their rights to any administrative or judicial review as a condition for being granted conditional worker status.

Criminalizing Immigrants and Vulnerable Populations

The Mark makes it a "crime" to be unlawfully present, subjecting millions of immigrants to prosecution. The Mark also contains provision that would criminalize a number of document- and passport-related offenses. This makes felons out of vulnerable individuals, such as refugees, asylum seekers, trafficking victims, victims of domestic violence or abuse, and victims of snakeheads and coyotes, who often do not have control over what documents are presented to immigration officials on their behalf.

Preventing Hardworking Immigrants from Participating in Comprehensive Immigration Reform

The punishments imposed in the Mark would bar the very people that members of Congress and President Bush would like to include in comprehensive immigration reform: hardworking immigrants who are filling U.S. labor needs and family members who are seeking to reunite with their loved ones.

Together, provisions in the Mark would have a damaging impact on the United State economy, criminal justice system, and our tradition as a nation of immigrants, and also undermine the efforts of Members of Congress and the Administration who are working to fix our immigration laws holistically.