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

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Below is a rough outline of how the February 23, 2006 version of Senate Judiciary Chairman Arlen Specter's draft immigration bill treats undocumented immigrants, future foreign workers, family-sponsored immigrants, and the enforcement of immigration laws. **This is not a detailed or complete summary**, but merely highlights some of the most important provisions in the 300-page bill.

The Undocumented: From Underclass to Underclass with Work Authorization

- Immigrants who were present in the U.S. unlawfully and working as of January 2004 could apply for a conditional temporary visa that would allow them to work legally and travel internationally. They would not have to leave the U.S. to apply.
- Among other things, the immigrant would have to "plead guilty" to being in the U.S. unlawfully, show proof of employment, pay back taxes, waive his right to administrative review or a court hearing if his case was denied, waive his right to contest a future deportation, show that he is "admissible," have his employer pay a $500 application fee, and submit an application within one year of date of enactment.
- In addition to persons who arrived after the cutoff date (January 4, 2004), many thousands of others would be ineligible for a variety of reasons, including but not limited to having been ordered removed in the past; not departing after agreeing to depart voluntarily; failure to attend a removal hearing; encouraging or aiding in any way another person entering unlawfully; and for other reasons. In addition, there are other grounds that would make individuals not eligible unless they obtained a waiver from the Department of Homeland Security (DHS). These waivers can be difficult if not impossible to obtain. On the one hand, this bill acknowledges the importance of undocumented workers to our economy by creating this new visa program, but on the other hand it creates or leaves in place bars to obtaining the visa that will leave many unable to take advantage of the program.
- Eligible family members could join the applicant, but would not be eligible to work.
- The applicant would not receive work authorization or proof of status until all background checks are completed.
- The conditional temporary visa and work authorization would be indefinite.
- If the immigrant loses his job, he would have 45 days to find a new employer who is eligible to hire someone under the new H-2C temporary worker program (see below). Barring that, the immigrant would have to leave the U.S. (An immigrant with this status would not be able to, for example, retire or take time off to have a child.)
- Anyone who meets the presence and employment requirements but fails to apply for this nonimmigrant status would, if apprehended, be barred from being able to avoid deportation through cancellation of removal or an agreement to depart voluntarily.
- While undocumented immigrants who gain temporary visas under this program would not appear to be barred from adjusting to permanent status, if the only path to permanent residence for the

undocumented is through the revised system as proposed (see below), there would be millions added to the family and worker visa backlogs. In effect, most of the undocumented would spend their lives in a second class status, without ever gaining a chance to become citizens.

More Family and Worker Visas

- The cap on family-based immigrants would be raised by exempting immediate relatives of U.S. citizens from counting against the worldwide cap of 480,000.
- "Family preference" visas (which are awarded to the spouses and children of legal permanent residents as well as to the siblings and adult children of citizens and unmarried adult children of permanent residents) would increase from the current 226,000 to 480,000 per year, and the increased number of visas would be re-allocated among the those categories. Visas that go unused in one year due to processing delays would be "recaptured" for use in the next year.
- Per-country immigration limits would be increased slightly.
- Employment-based green cards would be increased to 290,000 from 140,000; visas that go unused due to processing delays would be "recaptured" for use in the next year; and per-country limits would be slightly expanded.
- "Essential workers" (or lesser-skilled "other workers" in the current system) would be given 30% (87,000) of the employment-based visa total.
- Though visas for these "other workers" would increase to 87,000 from the present 5,000 per year, the new total is plainly inadequate if this would be one of the only ways the current undocumented population could obtain permanent residence. On top of those potential millions of applicants will be a portion of workers from the new proposed temporary worker program (see below) who might wish to apply for permanent status.

A New Temporary Worker Program

- The bill would create a new temporary worker program, known as H-2C.
- The H-2C visa holder would receive travel permission and work authorization for 3 years. His status could be renewed one time for a total of 6 years. He could return on another H-2C visa, but only after spending at least one year back in his home country.
- There appears to be no bar to adjustment to permanent residence, but the path would be through a revised visa allocation system (described above) that would be severely backlogged with new applications due to there not being a separate path to permanent residence for the undocumented. Depending on demand from the undocumented who would be in perpetual temporary status, a wait for a permanent visa for a temporary worker who wanted to obtain a green card could extend beyond 100 years.
- Family members of H-2C workers could come with the visa holder, but would not receive work authorization.
- Individuals who had previously lived in the U.S. unlawfully, and are subject to grounds of inadmissibility in current law, would not be eligible for the H-2C program.
- If the H-2C worker loses his job, he would have 45 days to find new employment with an employer who is eligible to hire someone under the new H-2C temporary worker program. Barring that, he would have to leave the country, but could re-enter on his same visa if he finds a job with an eligible employer and the three years have not expired.

- The H-2C worker could not apply to change his status to another nonimmigrant visa category. Failure to depart upon expiration of the worker visa would bar the individual from future immigration status (except for refugee-related relief).
- There is no cap for these worker visas.
- An employer would first attempt to recruit a U.S. worker in his geographic area. If he is unable to hire a U.S. worker, he could apply for an H-2C worker.
- The employer would have to offer a wage rate for this position that is at least the greater of the wage of similarly-employed individuals or the prevailing wage; obtain adequate insurance coverage for workplace injuries; attest that there is no work stoppage, strike, or lockout at the place of work; and attest that the hiring of an H-2C worker would not displace or harm U.S. workers.
- Other labor protections in the bill include: whistleblower protections, a prohibition on treating an H-2C worker as an independent contractor; registration and monitoring of labor recruiters; and an administrative process to bring grievances against employers for violating the H-2C program.
- The bill would require bilateral agreements with sending countries that would require them to accept return of deported nationals in a timely manner, share information with U.S. authorities about criminal and other illegal activity, and help to discourage unauthorized migration.

Justice: It's Such a Bother

Many of the bill's enforcement provisions were taken from the House bill (HR4437) in modified form. The bill continues a trend from the past decade of restricting an immigrant's ability to rely on the courts to check an abuse of power or to correct the mistakes of the DHS or immigration judge. The circumstances that can be appealed are being constricted, and in those circumstances where an immigrant can still appeal, the cards are being stacked against a full and fair hearing.

Immigration judges and the administrative appeals unit available to immigrants—the Board of Immigration Appeals (BIA)—are part of the Justice Department. An immigrant who has been wrongly denied a benefit may not receive a fair and unbiased hearing until his or her case enters the federal courts. In recent years, the federal courts, not beholden to the Justice Department or to DHS, have overturned many outrageous decisions made by the DHS, immigration judges, and the BIA. Now, there is an effort in Congress to restrict the role of the federal courts in reviewing immigrant appeals.

- The bill sets up a system for making it more difficult for cases to get a full and fair hearing in the federal courts. A petition to the court for review of a case would be denied, unless a single judge charged with reviewing the case issues a "certificate of reviewability." A decision not to grant a certificate of reviewability could not be reconsidered.
- The bill would provide more power to DHS to detain individuals regardless of whether they pose a flight risk or are a danger to the community. It would also limit judicial review of detention decisions. In some instances, detention may be indefinite. This would overturn a Supreme Court decision related to indefinite detention.
- The bill would bar federal courts from reviewing decisions that DHS agents make about an immigrant's "good moral character," a condition for naturalization. Such decisions can be very subjective and open to abuse. For example, an individual in Seattle successfully had his bar to citizenship overturned in federal court after U.S. Citizenship and Immigration Services (USCIS) found that he did not have "good moral character" based on the fact that he had a $150 ticket for

picking twelve clams above the allotted limit. Such an individual under this bill would be out of luck and barred from U.S. citizenship.

- The bill removes the only resource individuals had—district court power to grant naturalization—for dealing with the failure of USCIS to adjudicate their naturalization applications. (Many people have been waiting years for a decision, without any indication of when one is forthcoming). The provision is applied retroactively.

Creating More Criminals by Changing Definitions

The bill casts a wider net that will ensnare more immigrants in the deportation bureaucracy—not because the immigrant has committed new or more horrible crimes, but because definitions are changed. An offense that is not now considered serious will be, if the bill is enacted, an offense that might result in the immigrant being banned from the U.S. And these provisions are applied retroactively.

- The bill poses a contradiction in that it makes unlawful presence a crime even as it offers undocumented immigrants temporary work visas in a different section (see above). Unlawful presence would be punishable by a fine or imprisonment up to six months. Greater sentences are imposed for subsequent violations, including for subsequent illegal entries.
- The bill expands the definition of "alien smuggling" beyond its ordinary meaning to include conduct relating to transporting, housing, and employment of unauthorized persons. This provision could ensnare persons who assist or employ undocumented immigrants—knowingly or unknowingly.
- The bill would bar a finding of "good moral character" needed to naturalize to a person with an "aggravated felony" conviction (which has been redefined in immigration law in recent years to include many crimes that would neither be considered "aggravated" nor "felonies" in criminal law). It would allow DHS to consider events further back in the person's history than is currently the case and it codifies that findings of "good moral character" are in the discretion of the DHS officer. Given that the "aggravated felony" definition includes minor crimes, an individual with a ten year old shoplifting conviction who has otherwise lived an exemplary life, or a person who received at $200 ticket for trespassing and vandalism in high school as part of his football team prank could be forever denied citizenship under this bill.
- The bill would criminalize a broad range of document-related offenses, making them "aggravated felonies," which in turn would bar people from immigration relief. Examples of who might be considered to have committed a crime under this bill would include a refugee who borrowed someone else's passport to flee her persecutor or a worker who might otherwise be eligible for a work visa created by this bill.
- The bill increases the criminal penalties for immigrants who change their residence and neglect to file a change of address with DHS. Such persons could be sentenced to six months in prison. If the person fails a second time to notify DHS of a change of address, the person would be presumed to be a flight risk.

A Presumption of Guilt

The bill creates punishments based not on a finding that a person has done something wrong, but on a charge by the government.

- The bill contains provisions that would deny immigration benefits, including asylum, to individuals based on their suspected activity relating to "terrorism" or other security-related reasons. The Attorney General's say-so, not a conviction, would trigger the denial.
- The bill would deny a finding of "good moral character" (needed in order to naturalize), and would bar naturalization to individuals suspected of certain activities. For example, a permanent resident who donated money to an organization providing relief for victims of the Asian tsunami disaster might be found to lack "good moral character" if the organization receiving the donation in the Aceh province of Indonesia or in Tamil Tiger-controlled parts of Sri Lanka had a subgroup that the DHS deemed to be a terrorist organization. For that, the person could be denied citizenship.

(Thanks to the Asian American Justice Center for examples on how the enforcement provisions might apply to actual cases.)