

## **Immigration Reform: Problematic Provisions in the Senate's Reform Bills\***

**by Stanley Mailman and Stephen Yale-Loehr\*\***

In Congress' march toward immigration reform, two major themes have emerged. Should a bill focus only on tightening up our borders? Or should it also include a way to regularize some or all of the estimated 11 million undocumented immigrants in the country? The House of Representatives passed a bill (H.R. 4437) last December that focused on the former. The Senate is leaning toward a combined enforcement and legalization bill, but has failed to reach consensus so far. It may take up the issue again, but it remains unclear whether a final bill can be enacted this year.

In the meantime, several other provisions that threaten the rights of immigrants already in the country lurk in all the major Senate immigration reform bills. They have not received wide media attention, and deserve more scrutiny.

This article focuses on the latest Senate bill (S. 2611), which is 614 pages long and reflects the various compromises made in the Senate so far. The provisions below have been in all the major Senate bills under consideration this year, and are likely to remain in a final bill unless public pressure forces a change.

### **Easier Deportation on Criminal Grounds**

S. 2611 would expand the concept of "aggravated felonies" for immigration purposes. "Aggravated felony" is a term of art in immigration law. The term was first used in 1988, and at the time referred only to serious crimes such as murder and rape. Over the years Congress has expanded it to include a multitude of crimes, including a crime of violence for which the jail term is at least a year, theft offenses, and certain crimes involving fraud or deceit. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). It can even include convictions for crimes that are only considered misdemeanors under state law. *See, e.g., Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005) (conviction for solicitation of sexual act by minor under Illinois state law, although a misdemeanor, constituted an aggravated felony for immigration purposes). Noncitizens convicted of aggravated felonies are subject to mandatory detention and are ineligible for most types of immigration relief, including asylum, cancellation of removal, and voluntary departure. They are also generally precluded from judicial review. *See generally* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 71.05[2] (2006).

The House bill would expand the list of aggravated felonies. *See generally* Stanley Mailman & Stephen Yale-Loehr, *Immigration Reform: Restrictionists Win in the House*, *New York Law Journal*, December 28, 2005, at 3. The Senate bill would do more of the same. For example, section 225 of S. 2611 would make conviction of a third drunk-driving offense an aggravated felony for immigration purposes, even if the offense is only a misdemeanor under state law. This provision would apply retroactively. For example, a 60-year-old green card holder who has three DWI offenses from the 1970s would overnight become an "aggravated felon" and therefore mandatorily deportable. This would be so even though DWI was not a deportable offense when he pled guilty and he had not touched a single drink since his 20s.

Section 203 of S. 2611 would expand the list of people who are considered aggravated felons not because they committed a crime themselves but because they assisted, conspired or solicited others. INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U). For example, a person who helps another person fill out an immigration application that later turns out to be fraudulent could be treated as an aggravated felon.

The Senate bill fails to provide any safety valve provision allowing for waiver of deportation in aggravated felony cases when deportation doesn't serve the net interests of the United States. Take someone who supports a U.S. family, employs U.S. citizen workers, or is serving or has served in the U.S. military.

### **Easier Deportation for Immigration Fraud**

S. 2611 imposes new criminal and immigration penalties for document fraud. This would make people caught by these new penalties deportable and therefore ineligible for the bill's legalization and temporary worker provisions. Thus, for many, what the bill gives with one hand, it takes away with the other.

Specifically, section 208 of S. 2611 would redefine the definition of “false statement” in U.S. criminal law to include an omission. The section would also expand the definition of “immigration document” to include any document submitted in support of an immigration application.

Section 208 would also amend 18 U.S.C. § 1546 to: (1) create a new crime for knowing use of any immigration document issued or designed for use by another; (2) expand the crime of knowing use of a forged or counterfeit immigration document so that it covers *any* immigration document; and (3) expand the crime for false statements in an application for immigration documents by striking the requirement that such statements be made under oath.

People who violate 18 U.S.C. § 1546 concerning document fraud are already considered aggravated felons. INA § 101(a)(43)(P), 8 U.S.C. § 1101(a)(43)(P). Section 208’s expansion of the crimes included in section 1546 and the expanded definitions of the terms applied to section 1546 would mean that many more noncitizens would become deportable and would be mandatorily detained as aggravated felons. For example, assume that Jorge, a Mexican restaurant dishwasher, applies for the new temporary worker program that Congress may enact. He includes a false social security number on his application. That makes him a criminal under 18 U.S.C. § 1546 for committing immigration fraud and in turn makes him deportable and subject to mandatory detention. As with the aggravated felony provisions discussed above, the Senate bill deprives the government of discretion to waive deportation in sympathetic cases.

### **Adding Civil Immigration Law Violations to NCIC Criminal Database**

Under section 231 of S. 2611 the Department of Homeland Security (DHS) would have to provide the FBI’s National Crime Information Center (NCIC) with information on noncitizens who have: (1) been ordered deported; (2) have an expired voluntary departure agreement or who have violated a condition of their voluntary departure order; (3) been found to be unlawfully present in the United States; or (4) had their visas revoked. Police who use the NCIC would then be charged with picking up civil immigration law violators in the course of their regular duties.

This provision would turn the NCIC, which has been used only to track criminals, into a database that includes information about millions of civil immigration law violators. What’s wrong with that? For one thing, police worry that immigrants will be less likely to cooperate with them if this provision becomes law. As Ray Samuels, Chief of the Newark California Police Department, wrote Congress, “By turning police into immigration agents, all of our agency’s efforts to gain the trust of immigrants—both legal and illegal—would be undermined as immigrants would be discouraged from coming forward to report crimes and suspicious activity.”

Others worry about dumping inaccurate immigration data into a critical police database, with no guarantee that status changes will be updated immediately. According to a report by the Migration Policy Institute, “[f]orty-two percent of all NCIC immigration hits in response to a police query were ‘false positives,’ where DHS was unable to confirm that the individual was an actual immigration violator.” Migration Policy Institute, *Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using the National Crime Information Center Database, 2002-2004*, at 3 (Dec. 2005), available at [http://www.migrationpolicy.org/pubs/MPI\\_report\\_Blurring\\_the\\_Lines\\_120805.pdf](http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf). This number could skyrocket as new categories of individuals are loaded in. It could be a huge waste of time for law enforcement, and also lead to false arrests.

### **Expanded Detention of Immigrants**

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court held that indefinite detention of an immigrant violates the Immigration and Nationality Act (INA). The Court established a rebuttable presumption that immigrants should be released 90 days after their removal order if their home country refuses to accept them.

Section 202 of S. 2611 would erode that 90-day limit. The bill would grant the DHS discretion to detain someone beyond the 90-day limit by: (1) modifying the starting point for calculating the 90-day removal period; (2) permitting the DHS to detain individuals beyond the 90-day removal period if they have committed certain crimes; and (3) authorizing the DHS to detain people indefinitely if the agency certifies that an individual is a threat to public health or safety, the determination of which may be based on secret evidence. The section would also limit judicial review of such certifications to habeas corpus actions brought in the U.S. District Court for the District of Columbia. So, someone

detained in California would have to find a lawyer in Washington DC to file a habeas corpus petition on his behalf, or file it himself.

Long detentions are already a problem under current law. For example, in *Nadarajah v. Gonzales*, No. 05-56759, 2006 U.S. App. LEXIS 6615 (9th Cir. Mar. 17, 2006), a Sri Lankan was twice granted asylum by an immigration judge, but the DHS branded him a national security threat. He spent over four years in a U.S. jail while the government tried to deport him. He was released only after the Ninth Circuit held his detention illegal under *Zadvydas*. Such lengthy detentions could occur more often if section 202 becomes law.

Section 202 is not the only provision dealing with detention. Section 223 of S. 2611 states that noncitizens who fail to notify the DHS when they move can be considered flight risks and therefore subject to detention. This could subject millions of noncitizens to detention. It also ignores the DHS's problems with its address systems, language issues, and confusion about where to file address changes.

## **Conclusion**

This article has summarized just a few of the many problematic provisions in the Senate immigration reform bill. Other provisions would restrict voluntary departure, limit judicial review of many immigration decisions, and impose more restrictions on asylum seekers. Senators will have to weigh these concerns against the bill's legalization provisions to determine whether the good outweighs the bad.

It remains unclear whether the Senate will actually pass a comprehensive immigration reform bill this spring. If it does, a conference committee would have to reconcile the very different House and Senate bills. Whether Congress could then agree on a final compromise measure, especially in an election year, are still big questions.

In our view, Congress should consider immigration reform more slowly. The last major immigration bill that tried to balance legalization and enforcement was enacted in 1986. It occurred only after careful study, hearings throughout the country, consideration of demographic and economic data on migration, and public consultations with businesses, unions, religious groups, immigrant communities, and law enforcement. No such deliberative process has taken place concerning the present immigration reform proposals. Moreover, congressional leaders have set absurdly tight deadlines simply to say that they have voted on immigration reform. Congress and the country would be better off holding comprehensive hearings on all the ramifications of immigration reform before trying to enact anything.

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