

Main Refugee Protection Concerns Raised by Specter’s Chairman’s Mark of the “Comprehensive Immigration Reform Act of 2006”

Limiting Access to the Federal Courts

Section 701 would shift jurisdiction over all new petitions for review of removal orders and appeals of District Court orders for habeas review to the U.S. Court of Appeals for the Federal Circuit. This change would significantly limit a refugee’s physical access to the court and increase the costs and difficulty of securing counsel. This change in jurisdiction would apply to cases that have been litigated throughout the administrative process under the law of the circuits where they arose. It is unclear what law would apply to these cases at the appellate level under this system, and it seems unrealistic to expect the Federal Circuit, a court of specialized jurisdiction with no institutional experience in immigration law, to manage the very large and extremely varied caseload it would take on under this scheme.

Section 707 creates a system for immigration cases within the Federal Circuit, under which an asylum seeker’s case would be dismissed unless a single judge took affirmative action to let it go forward. All petitions for review of BIA decisions would be assigned to a single judge on the Federal Circuit. Unless that judge issued a “certificate of reviewability” within 60 days after the asylum seeker or other immigrant filed his brief, the case would be dismissed. The bill would also bar any reconsideration, review, or reversal of this single judge’s decision by the Federal Circuit. **Section 701** of the bill proposes to increase the number of judges on the Federal Circuit from 12 to only 15. This is totally inadequate to deal with the number of cases that this bill would add to that Court’s docket. The overburdening of individual judges that would result, combined with the Federal Circuit’s lack of exposure to immigration cases, sets the stage for hasty and flawed decision-making that the Court itself would be prohibited from reviewing.*

Criminalizing Asylum Seekers and Other Vulnerable Populations

Section 203 expands the definition of aggravated felony to include a range of statutory offenses that are themselves greatly expanded by this legislation. This section also strips DHS and DOJ of discretion to grant a waiver to refugees and asylees who have been convicted of an aggravated felony but show compelling reasons why they should be allowed to adjust their status. This is of particular concern given this bill’s attempt to greatly expand the aggravated felony definition and to make that expansion retroactive.

* **On a positive note, Section 712** takes steps towards fixing the problem of immigration appeals at its source, by reversing some of the flawed “streamlining” provisions imposed on the Board of Immigration Appeals by former Attorney General Ashcroft in 2002. Section 712 offers asylum seekers and others a better chance that their cases will receive serious review at the BIA, by making review by a 3-member panel the norm again and limiting affirmance without opinion to cases where summary treatment is actually appropriate. These proposals are good, and reduce the need for the flawed measures proposed in sections 701 and 707.

Section 206 makes it a crime to knowingly be out of status—e.g. from having overstayed a visitor’s visa. This would criminalize the large numbers of asylum seekers who fall out of status while they are figuring out how to apply for asylum, as well as trafficking victims, battered women, and other vulnerable groups. Although a first offense under this new provision would not fall under the expanded aggravated-felony definition (and thus bar a person from asylum), the criminalization of a simple status violation is unwarranted.

Section 208 amends 18 U.S.C. Chapter 75 to include new passport/document fraud offenses. Any knowing use of a false passport or immigration-related document would be subject to imprisonment for up to 15 years; the language of the bill is even unclear as to whether a person would need to have used the passport to try to enter the U.S. There is no exception for refugees, children or other vulnerable groups. The full damage this section would do to asylum seekers and others comes from its interaction with **section 221** of this bill.

Section 221 would define *all* of the offenses in 18 U.S.C. Chapter 75—as expanded by this legislation—as aggravated felonies. This means that an asylum seeker who was unable to obtain a passport from the government that was persecuting him, and fled to the United States on a borrowed document, could be jailed for up to 15 years *and* barred from asylum and withholding of removal because of this.

Other Changes Limiting Eligibility for Asylum

Section 212 would make anyone who has been ordered removed ineligible for “any discretionary relief from removal,” unless “a timely motion to reopen is granted under section 240(c)(6),” subject to an exception allowing for an application for withholding of removal or CAT protection based on changed country conditions. Current INA section 240(c)(6) allows for applications for asylum as well as withholding, and it is important that this be maintained. Section 212 would apply retroactively to persons ordered removed before its enactment, which is also problematic.

Section 705 provides that if a person reenters the U.S. illegally after having been deported or having left under a removal order, the prior order shall be reinstated without any need for further removal proceedings “or other proceedings before an immigration judge.” The reinstatement process has been in effect since 1996, but currently the regulations provide that people who express a fear of persecution or torture if deported and pass “reasonable fear” interviews are allowed to apply for withholding of removal before an immigration judge. To avoid violation of our obligations under the Refugee Convention and CAT, the language of section 705 should be clarified to ensure that this process is maintained.

Prolonged or Indefinite Detention of Asylum Seekers and Others

Section 202 would effectively extend the statutory “removal period” to six months from the date of the final order of removal, a date that would itself be tolled by any stays of removal. It would also give the DHS Secretary authority to certify a person for further detention in additional increments of six months. These provisions would provide explicit statutory authority for the prolonged detention of asylum seekers whose cases are on appeal to the federal courts, would allow for the indefinite detention of immigrants including failed asylum seekers, and would force the relitigation, this time

on constitutional grounds, of the questions the Supreme Court previously decided on statutory grounds in the Zadvydas and Benitez cases.