Web Memo
Published by The Heritage Foundation

No. 1083
May 17, 2006

# Courting Chaos: Senate Proposal Undermines Immigration Law

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Once again, the Senate Judiciary Committee has rolled out a massive amnesty for more than 11 million illegal aliens. Rewarding aliens who have violated federal law is bad enough. However, the Comprehensive Immigration Reform Act (CIRA, S.2611) does much more than that. Buried deep inside the bill—beginning at page 540—are provisions that would radically alter our immigration courts, making them far less likely to enforce and implement the law faithfully. Not surprisingly, these items have not caught the attention of many senators.

**Purging the Immigration Courts**

Presently, the U.S. has a talented and experienced group of immigration judges. With few exceptions, they are dedicated to enforcing the law and perform a difficult job well. Most serve for life.

The Committee's bill would change all of that. After seven years, all immigration judges—including the current ones—would step down. And it seems (the provision is very poorly drafted) that their replacements would have to be attorneys with at least three years' experience practicing immigration law. Who meets that requirement? The same immigration attorneys who currently represent aliens in the immigration courts. These attorneys are considered by many to be the most liberal lawyers in America. And they are not fond of enforcing immigration laws.

Regardless of how that particular clause is interpreted, the bill ensures as a practical matter that only immigration attorneys will become immigration judges. Because of the seven-year term, only immigration attorneys would want the job. It would be offer a seven-year break from defending illegal aliens, after which the attorney could return to private immigration-law practice with a nice credential on his or her resume.

The experienced ICE attorneys on the enforcement side would face no similar incentive to become immigration judges. ICE attorneys are career civil servants. Like other federal employees, they earn a retirement package after 30 years of federal service. Why would experienced ICE attorneys want give up their current positions and benefits for a job that expires after seven years?

**Removing Attorney General Review**

The Committee's bill also strips from the Attorney General the power to overrule bad decisions by the Board of Immigration Appeals (BIA). Members of the BIA are executive branch officials whose decisions ultimately speak for the Department of Justice. Accordingly, the Attorney General has

always had the power to overrule BIA decisions that deviate from the executive branch's interpretation of immigration law.

According to Department of Justice statistics, in the last fifteen years the Attorney General has personally reviewed only 25 out of 422,000 cases—many of which were sent to the Attorney General by the BIA itself. Attorney General review is an infrequently used tool. But its existence is critical to immigration law enforcement and to maintaining a consistent interpretation of the Immigration and Nationality Act.

For example, in 2002 Attorney General Ashcroft reversed a BIA decision that held that an aggravated drug trafficking felony did not constitute a "particularly serious crime" under the Immigration and Nationality Act. This BIA decision had plainly distorted the law, to the benefit of illegal alien criminals. By intervening and overruling the BIA, the Attorney General helped bring BIA decisionmaking into line with the intent of Congress.

Without Attorney General review, the BIA would be free to wander from the road of enforcing and applying the law fairly to pursue a path that is decidedly more political.

Just when the rest of the country is waking up to the threat of unchecked judges who pursue a radical political agenda, the Judiciary Committee's bill would turn similar forces loose in our immigration court system.

**Bringing Back the Backlog**

During the years that Janet Reno was Attorney General, the nation witnessed the emergence of a massive backlog of cases at the BIA. Presumably in an effort to deal with this problem, she more than quadrupled the size of the BIA. In a series of incremental steps, she increased the number of BIA members from 5 to 23. But as the number of BIA members increased, the backlog of undecided cases only grew larger.

By the beginning of the Bush Administration, the backlog had reached crisis proportions—over 50,000 cases. Both a cause and a consequence of this backlog was the fact that the Board was adjudicating cases extremely slowly. Justice was not only delayed, it was derailed. More than 10,000 of the pending cases were over three years old.

In 2002, Attorney General Ashcroft introduced comprehensive reforms of the BIA to rationalize the way it decided cases and to cope with backlog—which had climbed to more than 56,000 cases.

The Ashcroft reforms imported several aspects of the federal court system into the immigration courts. The reforms restricted the BIA to the review of *legal* issues and left to the immigration judges the finding of facts. Reading a cold transcript long after the facts have been presented, appellate courts are too removed from the evidence to accurately evaluate them. A judge needs to see a witness's face and hear his testimony firsthand in order to assess his credibility.

The Ashcroft reforms also implemented a system of screening cases to separate groundless appeals from truly difficult cases. Single BIA members were authorized to decide baseless appeals, and three-member panels were reserved for cases that required elevated scrutiny. In this way, the resources and time of three-member panels were no longer being squandered.

In addition, the Ashcroft reforms reduced size of the BIA to 11 members—making the body more manageable and encouraging consistency of decisionmaking. The Attorney General recognized that the backlog was not a personnel problem; it was a procedure problem.

The results were impressive. By January of 2006, the backlog of cases had been reduced to 28,000. The reforms had been sustained against legal

challenges in the Circuit Courts, and BIA was operating much more effectively.

The Judiciary Committee's bill would undo many of these reforms. It would restrict the use of single-member review to decide groundless appeals (although it could still occur in limited circumstances). It would also return the BIA to a bloated 23 members.

The delay that the Committee's bill would add to the time it takes to resolve immigration cases is difficult to predict. But there is no doubt that it would increase delays—and as a result, increase the case backlogs. That is bad news for immigration enforcement but good news for the immigration attorneys.

Delays have a pernicious influence in the immigration court system. Unscrupulous immigration attorneys have an incentive to appeal every case to the BIA because a delayed system is a good system from their perspective—if a case is pending at the BIA for years, their client gets more time in the United States. As the Supreme Court recognized in the 1992 case of *INS v. Doherty*, "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States."

Delay also works to the advantage of the immigration attorneys. The longer the case remains pending, the more opportunities the attorney will have to bill his client.

These buried provisions will have truly pervasive and destructive impact on the enforcement of immigration laws. The immigration courts must be the foundation of any effort to restore the rule of law to immigration. Improvements in the immigration laws and in the enforcement capacity of ICE will be in vain if the immigration courts become derailed and lose their focus on interpreting immigration law as Congress intended it.

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This paper, in its entirety, can be found at:
http://www.heritage.org/Research/Immigration/wm1083.cfm

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
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