

# American Immigration Lawyers Association

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Chairman Specter began the markup by discussing how hard the Committee has worked over the last year, agreeing with Senator Leahy that this is perhaps the most important of all the issues with which the Committee has dealt to date. “Let’s turn the light back on in the Statue of Liberty,” urged Senator Leahy.

The following is a summary of today’s events:

A Sessions amendment (#6347) that would amend Title 18 of the US Code to increase penalties for evading inspection passed by voice vote.

The previously debated Durbin amendment to ameliorate the Mark’s smuggling provision so as not to criminalize humanitarian assistance (by expanding the narrow exception included in the Mark) was further debated. Durbin explained that his amendment would protect organizations and individuals that provide a variety of services beyond mere emergency assistance and would also protect organizations such as hospitals that charge a fee for such services. The Mark’s narrow humanitarian assistance exception would only have protected individuals who provide emergency assistance without compensation. Cornyn offered a 2<sup>nd</sup> degree, arguing that Durbin’s amendment was so broad that it would immunize smugglers and others. His amendment would require organizations that are in the business of providing humanitarian assistance to “register” with the government. Kyl also argued that the Durbin language would weaken existing law and could create a safe harbor for smugglers. He offered his own 2<sup>nd</sup> degree amendment that would make it a limited affirmative defense to provide such assistance rather than a safe harbor.

Kennedy opposed the Cornyn amendment, noting the impracticality of having everyone register and get certified by the DHS before they could provide humanitarian assistance. Durbin effectively shut down each of Kyl’s arguments but Kyl pressed on with his overly narrow affirmative defense. Durbin pointed out that the Kyl amendment would narrow the Specter amendment to emergent medical care only! Kyl then offered another, broader 2<sup>nd</sup> degree but Durbin noted the two 2<sup>nd</sup> degrees are in tension and pointed out that they still wouldn’t reach assistance to victims of domestic violence.

The Kyl 2<sup>nd</sup> degree amendment was defeated with both DeWine and Brownback voting against it. Durbin’s underlying amendment passed with the same lineup of votes.

A Feinstein amendment (#6490) that would provide for an increase in full-time border patrol agents passed on a voice vote.

A Feinstein amendment (#6461) that would criminalize the construction of cross-border tunnels was debated. Leahy opposed the amendment’s “recklessness” standard, believing that some innocent property owners could be penalized. He would prefer a “knowing” standard rather than recklessness. More discussion ensued and Kyl offered up compromise language that would have set the standard as “known or should have known.” Cornyn opposed that, so Specter finally

offered up a “reckless disregard” standard which passed on a voice vote, as did the underlying Feinstein amendment.

Chairman Specter closed out Title I of the bill and moves to Title II.

The Committee took up the Kennedy retroactivity amendment. Specter voiced his support, but Kyl said that the Supreme Court has ruled that the ex post facto clause does not apply to certain immigration proceedings. He argued in favor of retroactivity, as did Cornyn. Specter conceded the constitutional point. Cornyn added that the Chairman’s Mark correctly reverses *Zadvydas* and that the “longer indefinite detention” contemplated by the Mark would not apply to people who are currently in detention. Kennedy pointed out that the extreme hardship caused by the retroactivity provisions in the 1996 laws are the very things they are trying to address. Durbin drew a connection between the new criminalization provisions and the Mark’s retroactive aggravated felony implications. Kennedy acquiesced in striking the detention language. The Kennedy amendment, as modified, was approved on a voice vote.

A Sessions amendment (#6238) that would encourage the DHS to enter into at least one section 287(g) agreement per state passed by a voice vote. There was some confusion as to whether the amendment would require, or merely encourage, the DHS to enter into such agreements. Sessions claimed that it would merely be voluntary, given his acceptance last week of a Coburn 2nd degree amendment that would clarify: (1) that such agreements would be purely voluntary, and (2) that the §287(g) enforcement authority would not be limited to alien smuggling.

A Sessions amendment (#6239) that would increase federal detention space by 10,000 beds, using both new construction as well as existing military bases no longer in use, passed by a voice vote.

A Sessions amendment (#6251) concerning the type of evidence admissible in cases concerning the sexual abuse of a minor (relating to extrinsic evidence) passed by a voice vote.

A Sessions amendment (#6240) requiring a determination of the immigration status of individuals charged with a federal offense passed by a voice vote.

A Feinstein amendment (**#6491**) providing a carve-out for refugees and asylees from the Mark’s passport fraud provisions (section 208) passed on a voice vote on March 9, with an agreement that her staff would work with Kyl’s staff to tighten the language. She noted that her staff worked with Kyl’s to come up with some compromise language. Kyl offered a 2nd degree amendment that would provide for specific prosecutorial guidance consistent with Article 31 of the Geneva Convention. The amendment with Kyl’s addition passed by a voice vote, “subject to further review” by Feinstein of the Kyl language.

Chairman Specter then closed out Title II and moved to Title VI. Sessions noted that he has 12 amendments to Title III and 18 to Title IV. Specter said that he plans to get to everything. There was a quick digression on the status of Title III negotiations. Discussions will apparently continue with the Finance Committee to reach a consensus.

## Title VI

Senator Feinstein introduced an agricultural worker (AgJobs) amendment (#6493) that would be capped at 1.5 million participants over 5 years and would sunset at the end of the 5-year period. Senator Craig, the primary sponsor of AgJobs was present during the markup. Kennedy spoke in favor of the Feinstein amendment, adding a bit of historical perspective dating back to Bracero program. He also noted that agricultural business concerns and farmworkers have come together to reach an extraordinary consensus agreement on this topic that none thought possible previously. He also drew the earned legalization parallels between AgJobs and the amendments that will come up shortly vis a vis the current undocumented population. Brownback was also supportive. Leahy noted his support for the amendment's "dairy carve-out."

Kyl opposed the AgJobs amendment, arguing that it would reward lawbreakers. His concern was that the amendment is focused not on guestworkers but rather on a path to citizenship. He said he doesn't understand how this relates to willing workers getting matched to willing employers. Moreover, he believes that many of these Ag workers don't want permanent residence, so why should we provide it? They want to live in Mexico and travel across the border to work, so all they really need is a work permit. He also believes we should avoid an "industry specific" program. He thinks his bill is better.

Feinstein disputes Kyl's assertions that these workers return home between jobs (or would even like to)—"this meets the test of reality," she said. She added that it makes sense to have it industry specific simply because Ag work is so tough that if we open the program up to all industries, the current Ag workforce will be tempted to move to an easier industry. She also noted that reform of the current H-2A temporary agricultural work program is a component of her amendment, responding to Kyl's argument that there should be a temporary Ag worker program.

Cornyn also opposed an industry specific fix, adding that his constituents will interpret this amendment as an amnesty. He also believes it will set up a "caste-type" society of second class citizens, and will fail to encourage circular migration. Cornyn was also worried about the concept of enacting legislation based merely upon our acquiescence of the fact that individuals present in this country without authorization won't return home.

Graham was worried about the potential effect of this amendment on Senator Chambliss's Ag proposal, and wants to consult with him prior to voting.

Sessions expressed concern that the Committee was progressing too fast on *all* of the big issues. Specter responded by noting that they're working under pressure because of Frist's deadline and he intends to report out a bill. Feinstein was also upset at the pace, stating, "I really object to this 'forced march' on our bill, and I intend to vote against Senator Frist's Motion to Report his bill! This is a huge and controversial issue and to work on a forced march basis is really not in the best interests of the U.S. Senate. We're supposed to be the deliberative body. I have a 'profound objection to what's going on. We ought to give all of the proposals out there due deference. This idea of working around the clock to meet some arbitrary deadline doesn't move me one wit!" Chairman Specter, in jest, immediately directed the court reporter to send Feinstein's

comments to the Majority Leader as soon as possible, after which the committee recessed for a one-hour lunch break.

#### Post-lunch:

Since a voting quorum was not present, Senator Feinstein asked to spend a few moments discussing the reforms to the H-2A program included in her AgJobs amendment. Among the changes, she explained that her amendment would: streamline the program's administrative procedures; replace the current controversial H-2A labor certification process with an attestation process; reform the process for employers, including an immediate reduction and gradual elimination of the AEWR; overhaul the framework for handling disputes; and streamline the current admission process. A worker could be employed within 28 days of initiating the application process, she said. Currently it takes 60 days or more.

Specter decided not to bring the Feinstein amendment to a vote until after discussion had occurred on the undocumented population.

Specter next proposed to outline the essentials of a possible compromise that had been worked on by staff over the weekend. Feinstein asked for a vote on her AgJobs amendment. Specter overruled her request and moved to the discussion on the undocumented population. He says staff worked extensively to try and reach a compromise, the broad outlines of which are as follows:

- all 11 million would be able to remain in the U.S. for 6 years on a "Gold Card";
- at the end of the 6-year period, they'd have to return home, but could choose to do a "touch back" in their home country and return to the U.S. for an additional 6 years (in 3-year increments) under a temporary worker program;
- some individuals could seek permanent residence through family- or employment-based sponsorship, through self-employment sponsorship, or through a cancellation of removal program. The details of the latter option had not been worked out.

Brownback, noting that he's a cosponsor of the McCain/Kennedy legislation, expressed hope that a majority could come together in agreement on the issue. He had 3 areas of questions: (1) where does the alien wait on his/her status—in the U.S. or the home country? He thinks some sort of "touch base" and then wait here is ok. (2) the total number of people that will be allowed and the amount of time people have had to wait in the past. He believes there will be a very long waiting period still—he stressed the need to process these cases in a reasonable amount of time. (3) Workability of the program vis a vis the DHS. He thinks, overall, it could be a workable arrangement, assuming the details are worked out correctly.

Kennedy said it was the first he'd seen of the new proposal, although he was briefed by staff on the broad outlines last night. "It appears to be a temporary solution to a permanent problem and fails to meet what is the overarching, overriding issue," he said. How many does this proposal cover (of the 11 million)? How many does it leave out? Kennedy raises the issue of implementation, noting that the DHS says the proposal is effectively unworkable. Kennedy also noted that Doris Meissner was present at the markup and might be able to shed some light.

Kennedy calls for precise answers before thinking this new approach might work and doesn't understand why the Committee is starting with this whole new concept.

Specter basically had no answers. “We’re struggling to find an accommodation here...and doing the best we can.” He asked Kyl if he thought there was a way to structure some sort of compromise between the 3 bills. “Theoretically,” responded Kyl, noting that he thinks there’s a threshold question. Namely, is there a way to accommodate the 11 million without putting them on a path to citizenship? If not, he continued, “we might as well vote now—that’s amnesty. It will never pass, I’ll vote against it and the House will never conference it. Is there some other way to accommodate these people in some other status? Is there a way to say that some folks can stay here but others cannot? That’s a reasonable way to approach the issue.” He asserted that over 60 percent of Americans agree that it’s ok to have temporary workers, but not provide these people permanent status.

Specter agreed that they must take politics into account, adding that they need a bill that can get conferenced, one that will prevent a filibuster in the Senate and one which will garner public support.

Durbin—wants to understand the compromise. Does it include the DREAM Act? Is criminalization still a part of this? Will those that don’t sign up or don’t follow through be treated as criminals? He noted that there are many uncertainties with the compromise approach, adding that McCain/Kennedy is much more straightforward and would still achieve our security goals. Specter replied by stating that “looking for something simple and straightforward is not what I had in mind.” He confirmed that the DREAM Act is included in the compromise.

Cornyn disagreed with Durbin that the return requirement is “trivial.” His proposal would require a return but is not designed to strand people out of country. It’s designed to deal with charges of amnesty.

Feinstein worried about the manner in which they were taking this up—i.e., with no bill language, no details. She also expressed concern about criminal aliens, asking if they would benefit under the proposal. She said she has no confidence that the agency would be able to deal with all the possible ramifications of this program. “We shouldn’t vote on a concept that we don’t fully understand,” she added.

Specter stated that it had become apparent to him that the hope of structuring an accommodation, if not a consensus, on the 11 million was not going to come to fruition. He proposed turning the debate to the guest worker program, then to the Feinstein AgJobs amendment, then to McCain/Kennedy, and finally to Cornyn /Kyl. He wants to vote to see what the will of the Committee is.

#### Title IV—Guestworkers:

Specter asked Kyl to speak on his guestworker amendments to the Mark. Kyl explained why it’s important to have a temporary worker program. “Sometimes we need them, sometimes we don’t.” With a worker program we try to calibrate the needs of the workplace to the number of

permits we grant, he continued. Similar to the H-1B program. We'd want to get it a lot closer with regard to the low-skilled worker program. Kyl offered an amendment (#6465) that would ensure that if unemployment were high in a particular category of job, in a particular metropolitan statistical area (one in which unemployment exceeded 11 %) the granting of visas to temporary workers would be precluded.

Sessions said that Kyl is correct in calibrating the number of immigrants to market needs. He believes, however, that the 11% unemployment level seems awfully high. He thinks it should be lower.

The Kyl amendment passed on voice vote.

Specter suggested taking up the entire Cornyn/Kyl guestworker program as an amendment to the Mark.

Feinstein was still upset that they weren't voting on her AgJobs amendment. Kyl stands up for her, noting that Ag work is different enough that it may be appropriate to deal with Ag and a more comprehensive approach within the context of the same bill.

Specter agrees to vote on the Feinstein AgJobs amendment, which passed on a roll call vote of 11 to 5.

Kyl next described the details of his and Cornyn's temporary worker (future flows) program. Cornyn spoke on the importance of the principle of circular migration, which he believes their bill would encourage.

Kennedy then described the details of the McCain/Kennedy temporary worker program and offered it up as an amendment to the Mark. The amendment passed on a roll call vote of 11 to 6. Surprisingly, Senator Feinstein voted in favor of the amendment.

Cornyn next introduced an amendment to Title IV of the Mark concerning the ongoing *Orentas* litigation and the continuing injunction in that case. Kennedy opposed the amendment on the grounds that it would interfere with the courts' decision-making policy. The amendment passed on a party-line vote of 8 to 7.

Grassley offered an amendment (#6351) on H-1B numbers. He said the cap is an inaccurate figure—not transparent to the public. His amendment would do away with the current categories that are exempt from the cap, increase the fee from \$1,500 to \$2,000, decouple the Chilean and Singapore free trade numbers, and set a flat annual numerical limit of 200,000 (with no exemptions). Feinstein thinks that Specter's Mark figure of 115,000 is ample. Grassley replied that Specter's number would still include all the confusing exemptions. They delayed the vote until staff can gather additional statistics in the program.

Brownback offered an amendment (#6134) that would amend the S-2 visa program to allow 1,000 S-2 visas annually for people that have important information on the activities of foreign governments that could affect our national security. Currently, people are eligible for an S-2 visa

only if their information can be used in connection with a prosecution. Brownback wants to let them in if they have useful information, even if it's not linked to a prosecution. He noted that it's in our national security interest. The amendment passed on voice vote.

Kyl offered an amendment (#6466) that was to have applied to the Mark and now would apply to the substituted Kennedy/McCain temporary worker program. The amendment would require that if the temporary worker self-petitions for permanent status after 4 years, as permitted under the McCain/Kennedy language, he must go home and wait in line with people already in the pipeline. Kennedy opposed the amendment, asking why we would want to disrupt their lives and their jobs by sending them back? Also, why should we treat them different from H-1Bs, he asked? The Kyl amendment failed on a roll call vote of 11-5.

A Grassley amendment (#6194) on the L visa program. If an alien is coming to open a new office in the U.S., the initial L visa would only be valid for 9 months, after which the alien would have to submit evidence supporting the viability of the office. Assuming, the evidence is sufficient, the alien could then apply for an extension of L status. The amendment also would do away with the work authorization for spouses of L visa holders when the visa holder is here to open a new branch office in the U.S. (It wouldn't affect other spouses.) These spouses would only get work authorization once the L visa holder seeks an extension of status after the 9-month initial period has passed and the evidence of the new office's viability is accepted. The amendment also would require DHS and State to work together to verify information presented on L applications. Specter asked if Grassley would be willing to accept a one-year time frame instead of a 9-month initial period on new office cases. Grassley agreed. The Grassley amendment passed on a voice vote, as amended by Specter.

Specter noted that the Committee still had lots of work to get done and asked that amendments go directly to the floor if they're not critical to committee action. He mentioned Title VII, noting that because they're making such fundamental changes there, he would like to report the bill out of Committee without Title VII and have a hearing on Title VII next week.

Feinstein offered an amendment on Title IV on the Mark's new F-4 student visa provisions. She's worried about the numbers. She notes that the number of foreign students we admitted between 1995 and 2000 doubled. She asks if the new F-4 category was capped and Specter said it was not. He noted, however, that this provision is similar to S. 2198 which has 59 cosponsors, one of which is Feinstein herself! Specter noted that the provision would deal with a highly desirable group of students. Feinstein would like to raise the amount of the application fee from \$1,000 to \$2,000. Specter agreed and the amendment passed on a voice vote.

Sessions offered an amendment that would delay implementation of any legislation they pass for 90 days, after which a report would be prepared. The Committee could then make changes if Members decided they'd made errors in this rushed process. The amendment failed on a voice vote, after which Sessions asked for a roll call. The amendment was agreed to on a roll call vote.

Sessions offered an amendment that would require that the exit controls of the U.S. Visit program be functional before any new temporary worker program is implemented. The amendment was defeated by a 10-5 vote.

Chairman Specter closed out Title IV and moved to Title V.

Title V:

Brownback offered an amendment (#6293) on which he and Kennedy had worked out a compromise agreement that would sunset the amendment after 7 years. It passed on a voice vote

A Brownback amendment (#6316) on widows and orphans, modeled on S. 644, the Widows and Orphans Act of 2005, also passed on a voice vote.

Title V was closed out.

Title VI:

Graham discussed his amendment that would substitute the McCain/Kennedy earned legalization program for the provisions in the Mark dealing with the undocumented population. He noted that the House had spoken. The President had spoken. “What has he said? That he wants to debate to be civil and I think we have been. The President is different from the House with regard to a guestworker program. The question really is: sending them home. What do you mean by home? There’s domicile, legal residence and for some who’ve been here for so long, they can’t imagine going anywhere else. Their home is here, where they’ve raised their kids and lived their lives. We’ve allowed—rightly or wrongly—for that home to be established. (he read definition of amnesty from the dictionary.) What was Ronald Reagan’s solution—one of the greatest conservative of all time? His solution was amnesty and it didn’t work. Some of us want political amnesty—we want to vote on this and not have people oppose us. Well that’s not going to happen. We have differences, but our heart is right when it comes to the issue. This is a complex problem. I’ve tried to come up with a solution that respects our values. The law is about justice—how do we render legal justice? I would argue that if you’re breaking up families and sending people home after 30 years, that’s not justice. There is no guaranteed outcome in any of these bills. For 6 years you have to work, and if you stop, you’re no longer eligible. You have to pay a \$1000 fine. Pass a background check. You have to pay another \$1000 dollars if you want a green card, pay back taxes, prove you learned English. These are not low hurdles! This is not a blanket card like Reagan gave people. You have to work for it.”

Feinstein asked him to explain the work requirements. Graham responded that we need to bring people out of the shadows. If we break up their families and send them home, we’re providing a disincentive for them to participate in the program.

Kennedy thanked Graham for his statement of the issue. He added that while there are differences within the Committee as to how we should deal with these individuals, we all understand the issue. Who are these people, he asked? They are our neighbors, shopkeepers, the people in our churches. He then offered a 2nd degree amendment which would provide\_“Sense of Senate” language that these individuals should not be granted status until the people in the current family- and employment-based backlogs who were in the backlogs on the date of enactment have been processed through the system.

Graham asked Kennedy if it is true that the Chamber of Commerce supports this. Kennedy responded “as the official spokesperson for the U.S. Chamber” that yes they do.

Leahy observed that we’re not going to deport this entire group of people. How do we suffer from giving them an earned path to permanence? From a humanitarian point of view, it’s the right amendment. From a pragmatic view, it’s the only amendment, he stated.

Specter asked Kennedy if he’d be amenable to making his Sense of the Senate language mandatory. Kennedy agreed.

They set aside the Graham amendment to vote on the Grassley H-1B amendment, as Grassley had to leave. The amendment failed on a roll call vote of 4-7.

Back to the Graham amendment. Kyl argued that the “back of the line” should not be inside the U.S.--it’s the country from whence the alien came, he said. Kennedy really isn’t making them go to the back of the line, he continued, if they’re allowed to wait in the U.S. Moreover, he said, it’s no big penalty to say you have to continue to work, since that’s what they came here to do. H reiterated his old argument that most alien workers don’t come here to get citizenship status—they come to work. “If you want to be practical, why wouldn’t you want to grant people a temporary right to be in the US to work when the work is here?,” he asked Why create permanent status for what may end up being a temporary job, if the economy takes a nosedive?

The Kennedy 2nd degree language passed on a voice vote.

A Kyl 2nd degree requiring the undocumented to leave the country before being granted any kind of permanent status failed by a vote of 3-12.

Brownback reminded Members that this isn’t going to be the final product today and hopes that people will work diligently while legislation is on the floor. Specter associated himself with Brownback’s remarks.

Kyl offered an amendment (#6451) that would replace the legalization provisions of McCain/Kennedy (i.e., the Graham amendment) with the Cornyn/Kyl deferred mandatory departure program and reentry in the temporary worker program. The amendment failed on a voice vote and Kyl did not request a roll call.

Kyl offered another amendment (#6452) that would limit the period of conditional nonimmigrant work authorization to 5 years instead of the 6. The amendment failed on a vote of 2-13.

Specter returned to Durbin’s amendment that would strike the Mark’s criminalization of status provisions. Durbin noted one more time that existing penalties are already quite serious—they simply don’t rise to level of criminalization. Feinstein stated that she doesn’t want to criminalize the undocumented who are here working and contributing, but thinks that visas “should mean something”—we have a real problem with visa overstays, she said, and they should be penalized.

Durbin repeated that there are sufficient penalties in the law to deal with overstays. He doesn't disagree—he thinks overstays will be dealt with. He just believes that criminalization is too harsh. Feinstein decided not to offer her amendment that would have provided a 60-day grace period for overstays before the criminal penalties would have kicked in.

The Durbin amendment passed on a vote of 11-6.

Kyl discussed a potential amendment that would have provided some exceptions to the requirement that everyone must go home. He's unclear now with Graham pending whether it even makes sense to offer. He wanted to show that it doesn't have to be all or nothing. Is it possible to identify groups of people for whom it would be very difficult to return home, he asked? Specter asked whether it makes sense to reserve this for the floor. Kyl said that Specter knows that, once we cast our votes, the lines in the sand are going to be drawn and we know what the public reaction is going to be. Specter acknowledged that Kyl was raising an important issue and noted that the failure to get it done here doesn't mean that we can't get it done on the floor.

The Graham amendment (providing for the McCain/Kennedy legalization architecture) passed on a 12-5 vote.

Durbin next offered the DREAM Act as an amendment. It passed on a voice vote.

Specter called for a vote on final passage of the bill. The legislation was reported out of Committee on a vote of 12-6.

Specter stated that they'll take up Title III on the Senate floor because that matter has not been resolved by the Finance Committee. Title VII will also be left to the floor because of the number of concerns raised and the degree of the changes proposed. As previously noted, there will be a hearing on the matter next week.

Specter concluded by stating his understanding that Majority Leader Frist would substitute the Judiciary Committee's bill for the Frist bill and take up the former on the floor tomorrow. He gavelled the hearing to a close at 6 pm.

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