ANALYSIS OF THE LEGALIZATION PROVISIONS OF THE SENATE "COMPROMISE" ON IMMIGRATION REFORM: A FLAWED, INADEQUATE, ANTI-WORKER PROPOSAL

A GUIDE FOR COMMUNITY-BASED ORGANIZATIONS, HOMETOWN ASSOCIATIONS, RELIGIOUS GROUPS, UNIONS, COALITIONS, AND OTHER ORGANIZATIONS CONCERNED WITH NATIONAL IMMIGRATION REFORM

Prepared by

Center for Human Rights and Constitutional Law
256 S. Occidental Blvd.
Los Angeles, Ca. 90057
Telephone: (213) 388-8693
Facsimile: (213) 386-9484
www.centerforhumanrights.org

The Center for Human Rights and Constitutional Law is a public interest legal services and advocacy organization that has represented over one million undocumented immigrants in major class action cases, currently represents several hundred thousand immigrants in class action cases, and provides technical support to hundreds of community-based organizations and legal services providers assisting immigrant communities throughout the United States. In 2004 the Center concluded settlements with the DHS and DOJ regarding the rights of over 150,000 immigrants under the amnesty program enacted in 1986. We recently prepared and distributed a critical analysis of the interior enforcement provisions of the Senate compromise immigration reform bill. We now have available a version of that analysis with detailed citations to the Hagel-Martinez compromise bill. To obtain PDF copies of our analysis of the interior enforcement provisions or this report on the legalization provisions of the Hagel-Martinez Senate compromise, or to share comments on these reports, please email pschey@centerforhumanrights.org

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I Introduction

In this report we consider whether the legalization provisions of the Hagel-Martinez Senate "compromise" bill offer a viable means to address the presence of several million undocumented persons who, as a practical matter, are in the United States to stay.

We first summarize the case for a permanent program of earned residency and outline the elements that we consider essential to a viable legalization model. We then analyze the Hagel-Martinez legalization provisions and consider their efficacy, and where appropriate suggest ways in which they might be improved.

In summary, we conclude that the Senate compromise legalization provisions are seriously flawed, would adversely impact on U.S. and immigrant workers, and leave millions of immigrants in undocumented status, likely forever.

II Essential elements of a viable legalization model.

Unauthorized immigration into the United States has historically been seen as harmful from diverse perspectives. Such immigration—indeed, immigration in general—will always draw opposition from fringe elements of nativists and xenophobes. But it also has proved controversial among persons who are reasonably concerned that unskilled or semi-skilled foreign laborers displace or place downward pressure on the wages of comparably skilled working men and women in the United States.

U.S. immigration policy nominally seeks to protect the U.S. labor market against the adverse impact of low-wage, immigrant labor flows primarily by way of physical border controls, and secondarily, through employer sanctions. Experience has shown, however, that employer sanctions and border policing are only partially successful in preventing the entry or employment of undocumented laborers.

Paradoxically, current law tends to exacerbate the impact of unauthorized immigration on domestic labor markets. It does so in two principal ways:

First, U.S. law has no statute of limitations on deportation. Therefore, immigrant workers remain low wage laborers long after their wage expectations would normally approach prevailing labor market rates were it not for their persistently precarious legal foothold in the United States.

Second, for however long this legal disadvantage persists, existing law permits employers to exploit undocumented employees with virtual impunity. For example, although an employer may be fined for *hiring* an unauthorized worker, there is no penalty for paying that worker less than a documented cohort performing the same or similar work, nor is there any unique penalty for

discriminating against an undocumented worker with respect to wages, benefits or health and safety standards.

In short, existing immigration policy maximizes whatever downward pressure immigrant labor may possibly place on domestic wages by prolonging undocumented workers' legal limbo and by permitting employers to exploit workers' precarious legal standing with impunity.

There are two obvious ways to improve upon this failed model: First, discrimination on the basis of immigration status in all respects other than hiring should be declared unlawful. Second, the United States should afford undocumented workers a realistic and ongoing (as opposed to "one-time") path toward earned legalization.

Legalization, of course, has been tried before. The 1986 Immigration Reform and Control Act (IRCA) afforded several million long-term undocumented residents—those who had resided unlawfully in the United States since before 1982—a "one-time" opportunity to apply for lawful residence. Unfortunately, fundamental design flaws combined with the inability or unwillingness of the former Immigration and Naturalization Service (INS) to implement the law effectively and fairly, undercut the IRCA legalization experiment: only 1.65 million undocumented residents legalized under the 245A legalization program, and by all estimates the permanent undocumented population today exceeds pre-IRCA levels. See U.S. Department of Justice, Immigration and Naturalization Service, "Immigration Reform and Control Act: Report on the Legalized Alien Population" Washington, 1992, Table 1

We accordingly believe that viable immigration reform must afford undocumented residents who, for all practical purposes are permanent members of the U.S. populace, more than a "one-time" opportunity to legalize: it must afford a path toward earned legalization—akin to a statute of limitations on deportation or removal—so as to prevent rebuilding a large unauthorized labor force.

Insofar as "one-time" legalization is concerned, the Center for Human Rights & Constitutional Law is uniquely positioned to anticipate certain shortcomings in design and implementation: for the past 19 years, the Center has represented an estimated 350,000 individuals in several class action cases who were statutorily eligible for 245A legalization under the IRCA, but who were denied lawful residence because they had briefly traveled outside the United States, because they had managed to obtain some sort of "lawful" status sometime between 1982 and the 1987-88 application year, or because the INS wrongfully insisted it did not know they were unlawfully present.

As a result of settlements we have finally reached in these legalization cases, nearly two decades after the close of the IRCA legalization application period, the INS's successor, the U.S. Citizenship and Immigration Services (CIS) is only now processing these individuals for legalization. We do not wish to see these mistakes repeated.

In our judgment a viable legalization program would have the following characteristics:

- Require a reasonable period of U.S. residency pegged to the probability that an unauthorized immigrant has as a practical matter become a permanent member of the U.S. workforce.

- Cover both wholly undocumented entrants as well as persons who enter or reside in the United States in a nominally lawful status such as temporary workers, exchange workers, etc.

- Posit simple, unambiguous eligibility standards satisfied by realistic evidentiary burdens.

- Afford applicants the right to prompt decisions on their legalization applications and the right to judicial review of adverse decisions.

- Afford the spouses and children of qualifying immigrants derivate lawful status.

- Entitle applicants whose applications disclose prima facie eligibility to prompt issuance of interim work and travel authorization.

- Afford applicants and recipients of legalization full rights and privileges under generally applicable labor laws.

Combined with vigorous enforcement of laws forbidding discrimination against undocumented workers in all respects save hiring, an earned legalization program would reduce the artificial incentives traditional approaches create for workers to undercut each other's wage demands, thus applying a partial brake on the "race to the bottom" in which wages equalize at the lowest possible level. The rising tide of the market economy would then have a better chance of lifting all boats— those of immigrants, as well as those of native workers. Such measures have proved workable in other advanced industrialized countries, and there is every reason to believe that such measures would work here as well.

III Summary of Hagel-Martinez legalization provisions.

Many advocates of comprehensive immigration reform have welcomed those provisions of the Hagel-Martinez Senate compromise that would afford certain members of the existing undocumented population a path to lawful status. Close analysis, however, reveals that the Hagel-Martinez legalization provisions are seriously flawed and would likely offer relatively few members of the undocumented population a viable means to legalize their status.

In brief, the Hagel-Martinez compromise would divide the undocumented population into three sub-groups, depending on the length of time they have been in the United States. The bill would afford each group different immigration benefits. These groups, the benefits Hagel-Martinez would grant them, and the requirements for obtaining those benefits are summarized as follows:

1) *Group 1: Individuals continuously present since April 6, 2001*.

The compromise bill would grant Group 1 members a long path to lawful permanent residence and perhaps 13 years later, citizenship. In addition to proving that they entered the United States prior to April 6, 2001, Group 1 members would have to prove the following by a preponderance of the evidence:

i) Continuous physical presence. Group 1 members must not have left the United States after April 6, 2001, except for "brief, casual, and innocent" departures.

ii) "Snapshot" unlawful presence. Group 1 members would have to prove that they were not legally present nonimmigrants (tourists, students, etc.) on a single day: April 5, 2006.

iii) Employment. Group 1 members who are 20 years or older would have to show that were employed in the United States for at least three years between April 2001 and April 2006. They would also have to prove they were employed for at least six years following enactment of Hagel-Martinez.

iv) Admissibility. Group 1 members would have to prove that they are admissible under a modified list of exclusionary grounds.

v) Income tax payments. Group 1 members must pay or arrange to pay all state and federal income taxes at the time they adjust status.

vi) English and civics. At the time they adjust status, Group 1 members must demonstrate knowledge of English and the history and government of the United States.

vii) Background checks. Group 1 members must complete security and law enforcement checks, at the time interim relief is granted and again at the time of adjustment to permanent resident status.

viii) Draft registration. Males of military age must register for military selective service.

ix) Fines. Group 1 applicants would have to pay a fine at the time of application "commensurate with levels charged… for other applications for adjustment of status," presumably $1,000. *See* 8 U.S.C. § 1255(i)(1). They would also have to pay an additional fine of $2,000 before their applications for permanent residence are adjudicated.

x) Waiting list. Hagel-Martinez would require that all applications for immigrant visas pending as of the date of enactment be adjudicated before any Group 1 member is actually granted permanent residence. Waits would not, however, exceed eight years, and there would be no limit on the number of individuals who could be granted lawful permanent residence as Group 1 members.

While they are waiting for all pending visa applications to clear and their applications for adjustment of status to be decided, anyone filing an application for Group 1 adjustment would be issued work and travel authorization and would not be subject to immediate deportation or removal.

2) *Group 2: Individuals continuously present since January 7, 2004.*

The Senate compromise bill would grant Group 2 members "deferred mandatory departure" (DMD): essentially, a work permit and temporary permission to remain in the United States for three years. Deferred mandatory departure amounts to a three-year grace period during which the immigrant would have to find some other way to legalize his or her status at a land port of entry, or else leave the country.

In addition to proving that they were physically present in the United States on or before January 7, 2004, DMD applicants would have to meet the following requirements:

i) Continuous physical presence. Group 2 members would have to prove that did not leave the United States after January 7, 2004, except for "brief, casual, and innocent" departures.

ii) "Snapshot" unlawful presence. Group 2 members would have to prove that they were not legally present nonimmigrants (temporary workers, exchange workers, visitors, etc.) on a single day: January 7, 2004.

iii) Employment. Group 2 members—regardless of age—would have to show that were employed in the United States at some time before January 7, 2004. They would also have to prove that they were continuously employed since that date— apparently through the date the application for deferred mandatory departure is adjudicated. Any interruption of more than 60 days would disqualify the applicant for DMD.

After applicants are granted DMD, any interruption in employment of more than 60 days renders them "ineligible for hire" until they leave and reenter the United States or obtain DHS's permission to accept new employment.

iv) Admissibility. Group 2 members would have to prove that they are admissible under a modified list of exclusionary grounds.

v) No prior proceedings. DMD would be unavailable to anyone previously excluded, removed, deported, or granted voluntary departure, or who fails to "comply with any request for information …"

vi) Medical examination. DMD applicants may be required to undergo medical examinations and answer questions regarding their health.

vii) Waiver of due process rights. As a condition of receiving DMD, applicants must agree to waive their right to a removal hearing (formerly called a deportation hearing), to judicial review, and to contest deportation except on the basis of an application for political asylum or for relief under the Torture Convention. In addition, the applicant must execute an acknowledgment that he or she is present in the United States unlawfully and surrender any Social Security card and fraudulent immigration documents. The acknowledgment and surrender could not be used in a criminal prosecution.

viii) Background checks. Group 2 members must complete security and law enforcement checks.

ix) Mandatory departure. Individuals granted DMD would have to depart the United States to receive any immigrant or nonimmigrant visa for which they may later qualify. However, they would be entitled to reenter immediately through designed land ports of entry. The departure requirement could be waived upon a showing that it would impose a "substantial hardship."

x) Graduated fines. Applicants granted DMD would not be subject to fines if they depart within one year; if they remain longer than one year, but less than two, they must pay a fine of $2,000; if they stay longer than two years, the fine escalates to $3,000.

xi) Six-month application period. Applications for DMD will be accepted for 6 months only.

xii) Waiting list. Hagel-Martinez would require that all applications for immigrant visas pending as of the date of enactment be adjudicated before any DMD recipient is actually granted lawful permanent residence. Waits would not, however, exceed eight years.

The effect of this provision is unclear. On the one hand, it implies that DMD recipients may not be subject to the numerical limitations applied against other visa applicants. On the other hand, the assumption underlying DMD status is that the applicant would in three years find some other basis to immigrate. This suggests that DMD recipients would not be eligible to immigrate until all pending applications are processed even though a visa becomes available earlier to immigrants from the applicant's sending country.

xiii) No judicial review. Denials of DMD would not be subject to judicial review of any type.

3) *Group 3: Individuals who entered after January 7, 2004.*

Hagel-Martinez would confer no immigration benefit on individuals who entered the United States after January 7, 2004, though it would apparently waive the 3- and 10-year bars for those who depart immediately and thereafter apply to reenter as guest workers.

IV Critique of Hagel-Martinez Senate compromise legalization provisions

Although Hagel-Martinez embraces some elements we think essential to a viable legalization model, in others it repeats failed policies of the past. Among the most serious shortcomings in the bill are the following:

1) *Unrealistically long period of U.S. residency and related requirements*.

As we have stated, a salutary legalization program should be based upon the probability that an undocumented individual has become a permanent participant in the U.S. labor market. Once an individual's permanent presence in the U.S. has become a fait accompli, then it is a matter of enlightened self-interest to afford him or her a way to earn legal status.

In our experience representing hundreds of thousands of undocumented immigrant workers, after an individual has lived in the United States continuously for more than three years, the probability that he or she will leave and remain abroad becomes negligible. A viable, beneficial legalization program would therefore offer a path to earned legalization to persons who have remained in the United States for three years.

Hagel-Martinez would not require the issuance of implementing regulations until four months after enactment. Delays in implementation of the legislation would therefore add between six months and a year to the five-year residence period specified in the bill.

Based on our experience with the IRCA legalization program, we doubt that more than about 3 million undocumented workers would qualify for eventual permanent resident status under the Hagel-Martinez compromise bill. About 9 million will not qualify because they have not resided here "continuously" for more than five years, or have taken trips abroad that the CIS will not deem "brief, innocent, and casual," or they will fail to fulfill the mandatory employment periods, or they were here in "lawful" non-immigrant status on April 5, 2006, or they will be deemed inadmissible because of relatively minor criminal offenses.

Hagel-Martinez's DMD program for persons with two years' U.S. residence tacitly acknowledges that a sizable portion of the existing undocumented population will not benefit from the bill's legalization provisions and, *a fortiori*, that those provisions impose an unrealistically long period of required residence for legalization.

Nor does the DMD program offer a meaningful benefit to permanent immigrants who have been in the United States for fewer than five to six years. The program's exceedingly short application period, failure to guarantee participants any form of permanent legalization, complex eligibility standards, employment requirements, and subjecting applicants to the complete mercy of DHS functionaries with no judicial review, combine to make this program more of a sham than effective immigration reform. In truth, only a very small percentage of these immigrant workers will have an alternative means to legalize their status, a basic requirement of the DMD proposal.

2*)* *Labor market distortions*.

Among the most disturbing features of the Hagel-Martinez Senate compromise are the mandatory employment requirements. Although we agree in principle that immigration policy should reward productive labor, forward-looking employment requirements will only worsen the disadvantages immigrant workers experience in the labor market and raise whatever downward pressure on wages undocumented labor may cause.

In addition to proving three years' employment prior to April 2006, Hagel-Martinez would require that a legalization applicant prove he or she was employed for at least six years after enactment. Applicants for DMD would have to show that they were "continuously" employed from January 7, 2004, forward except for "brief periods of unemployment lasting not longer than 60 days."

Between 1979 and 2003, average periods of unemployment ranged from a low of about 87 days to a high of over 160 days, depending on the state of the U.S. economy. See http://www.epinet.org/content.cfm/webfeatures_snapshots_archive_05282003. Accordingly, for example, a DMD applicant whose employer demands wage or other concessions the worker would otherwise be unwilling to make, would face long odds of maintaining eligibility for DMD status even in the best of economic times. In recessionary periods, an applicant's losing his or her job would almost certainly mean loss of that immigration benefit entirely.

As we read it, Hagel-Martinez would not permit unscrupulous employers to threaten an employee's eligibility for Group 1 legalization entirely. But in the aggregate, the bill would empower employers to delay an applicants' legalization for periods roughly corresponding to the current average period of unemployment. In both expansion and recession, the bill would introduce unneeded distortions into the labor market. In short, a legalizing worker would face substantial delay in attaining lawful permanent resident status should he or she refuse an employer's demands for wage or other concessions affecting the employment relationship and be terminated therefor. The Senate compromise will therefore strongly discourage immigrant workers from organizing, unionizing, or otherwise attempting to exercise the minimal labor rights they possess. This approach may be welcomed by the country's corporate interests, but clearly is not in the best interests of immigrant or U.S. workers.

Placing legalizing immigrant workers under even greater labor market disadvantages is the precise opposite of what a coherent immigration reform should seek to accomplish. We

accordingly oppose the prospective employment requirements of the Hagel-Martinez Senate compromise bill.

3) *Unworkable "unlawful" presence requirement*.

Hagel-Martinez excludes from Group 1 legalization individuals who were lawfully present nonimmigrants on April 5, 2006, notwithstanding that they meet all other eligibility criteria. This makes no sense. As we have emphasized, what is important is the applicant's relationship to the United States, particularly its labor market. Whether he or she held a valid nonimmigrant visa on one arbitrary date has no relationship to any valid public purpose we can imagine.

Further, past experience has shown that deciding whether someone was actually, and not just nominally, lawfully present would entangle immigration authorities in needless complexity. Differing interpretations as to whether some 150,000 IRCA legalization applicants were here lawfully or not resulted in nearly 18 years of litigation, and the C.I.S. is only now processing class members' legalization applications pursuant to a class-wide settlement we reached in *Newman v. CIS* and a similar settlement we are still negotiating in *Immigrant Assistance Project v. CIS*. There is no good reason to repeat that mistake, and we accordingly oppose Hagel-Martinez's unlawful presence requirement.

4) *Prolonged delay in granting permanent residence*.

The Hagel-Martinez compromise would also require Group 1 legalization applicants to remain in the United States between six and eight years in an amorphous twilight legal status. This is a function of both the prospective employment requirement and the bill's provisions proscribing Group 1 adjustment of status until after all existing visa applications clear.

In effect, these provisions extend the period of required residence for legalization to 12 or more years. Again, this prolonged delay has no relationship to the reality that an undocumented person who lives in the United States for more than three years is, for all intents and purposes, here to stay. We accordingly oppose prolonged delays in granting qualifying applicants lawful permanent residence.

5) *Regeneration of permanent undocumented population*.

Perhaps the most serious shortcoming in Hagel-Martinez is that its legalization program offers NO permanent long-lasting solution to the presence of a large undocumented population. As the IRCA legalization program demonstrated, a "one-time" legalization program may reduce the undocumented population temporarily, but absent a continuing path toward earned legalization, in time that population will regenerate. This is especially true given that the interior enforcement provisions discussed in our previous analysis cut off many traditional avenues to legalization of status used by immigrants to end their undocumented status. True immigration reform requires a different approach.

We appreciate the argument that the availability of earned legalization could encourage even greater unauthorized immigration. We are aware of no data supporting the prediction that the possibility of earning lawful status would cause a significant number of persons who were not predisposed to come here to enter the United States unlawfully. Similar arguments have been

made with respect to providing the children of undocumented immigrants with public elementary education, and we are aware of no data showing that education to be a significant "pull" factor.

Rather, the evidence is that the vast majority of undocumented entrants come to the United States to escape dire poverty and to work in order to support themselves and their immediate family members. Some, of course, come to escape civil strife and persecution. As the current size of the undocumented population clearly shows, immigrants will come WHETHER OR NOT offered an opportunity to legalize their immigration status. We accordingly see no reason to believe that the speculative possibility of gaining lawful U.S. residence would encourage additional undocumented immigration.

In any event, whatever increase in unauthorized entries might result from affording long-term residents a path to earned legalization would almost certainly be offset by the benefits of reducing the permanent undocumented population to acceptable levels.

As a matter of public policy, the laws of this and most other nations include statutes of limitations applied in a wide range of circumstances. Other than for crimes such as murder, public policy is served by statutes of limitation on almost all violations of criminal and civil laws. Crimes involving the sale of drugs, armed robbery, rape, manslaughter, theft, etc. all have applicable statutes of limitations. Civil violations of law, including fraud, causing personal injury, breach of contracts, etc., also all have statutes of limitation. Arguments that such statutes of limitations may "encourage" crime or civil wrongs have always been overcome by arguments in favor of applying statutes of limitation to stale violations of law. We see no reason why otherwise law-abiding undocumented immigrants who contribute their labor to the United States and avoid criminal conduct should also not benefit from a statute of limitations permitting them to eventually legalize their immigration status. Indeed, along with a realistic policy on the issuance of visas based on demand rather than per country quotas, this is likely the only realistic way in which to minimize the size of the undocumented population in the United States.

Given the proposed flawed legalization program, combined with interior enforcement proposals that will increasingly make it impossible for undocumented immigrants to ever legalize their status, one is left to wonder whether many members of Congress really seek to reduce the number of undocumented immigrants at all, or simply pretend that is their goal while supporting laws that they know will ultimately maintain the stream of foreign workers available to U.S. employers. This approach both appeals to the fear of large segments of the voting middle class that understandably worries about job security and the lack of a living wage, while at the same time satisfying the corporate world's appetite for cheap foreign labor. This approach may win elections, but it is not a rational and humane approach to national immigration reform.

[In a subsequent analysis, we will address the ineffectiveness of border controls as the primary tool to reduce the size of the undocumented population. Advocates of the "sealed border" approach have for many years succeeded in vastly increasing the militarization and criminalization of the border. Despite these efforts, today we have as many as 12 million undocumented immigrants in the country, far more than before we moved to seal the borders. The number of deaths at the border have also increased dramatically, border communities have been virtually destroyed, and the old-time "cayotes" who used to guide immigrants across the border in relatively safety have now been replaced by violent and ruthless criminals, the only ones willing to risk the hazards and extreme criminal penalties associated with irregular border crossing today. Centuries of experience has shown that walls, unless mounted every few hundred feet with machine guns, do not stop people from crossing borders without authorization when their survival is at stake.]