

Senators Cornyn and Kyl Introduce the Comprehensive Enforcement and Immigration Control Act

July 21, 2005

Senators John Cornyn (R-TX) and Jon Kyl (R-AZ) on July 19 announced long-anticipated legislation intended to comprehensively reform our nation's immigration laws. The text of the new proposal is not yet available, so what follows is based on summaries they have provided supplemented by discussions with their staff.

■ Overview

The new bill contrasts starkly with the bipartisan Secure America and Orderly Immigration Act (SAOIA) introduced in May by Senators McCain (R-AZ) and Kennedy (D-MS), together with Representatives Kolbe (R-AZ), Flake (R-AZ) and Gutierrez (D-IL). Unlike the SAOIA, the Cornyn-Kyl bill would provide no path to permanent status for undocumented immigrants currently living and working in the U.S. And it would do little to relieve the unacceptable backlogs that plague family immigration.

Instead, it would provide a 5-year temporary status for undocumented immigrants who would only be permitted to work for government-approved employers. After the 5-year period, they would be required to leave. It also would establish a new temporary worker program for people outside the U.S., but not one that would permit participants to remain even after years of working here legally in compliance with our laws. Finally, in the name of enforcement, the bill would impose new immigration restrictions and establish a national ID system composed of new Social Security cards and mandatory federally regulated state IDs and driver's licenses.

This substantial and important bill represents a missed opportunity because it fails to match the understanding of the problem that Sen. Cornyn frequently demonstrates when he talks about immigration. It is substantial due to the time and effort that obviously have been devoted to crafting its provisions, and it is important because Sens. Cornyn and Kyl are two border state Republicans who are, respectively, the chair and an influential member of the Immigration Subcommittee of the Senate Judiciary Committee. It is critical to understand their views as the debate about comprehensive immigration reform proceeds.

But this proposal fails to meet their stated desire to stake out a middle ground in the immigration debate. It is possible that the senators do not realize how far from the middle their proposal really is. No comprehensive proposal can plausibly claim to occupy the middle unless it makes a realistic effort to resolve the status of undocumented immigrants, fixes our family immigration system, establishes a mechanism to regulate the future flow of immigrants, protects U.S. and foreign-born workers, and makes the changes necessary to restore compliance with our immigration laws.



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Significantly, no Democrats have thus far joined in support of this proposal that has been in development for several months. No major immigration legislation stands a chance of enactment in this session of Congress without bipartisan support, and any bill that fails to substantially resolve the status of our undocumented immigrant population or to relieve the family visa backlog is likely to be a nonstarter for most Democrats and a consequential number of Republicans.

It is unclear what the next steps will be for comprehensive immigration reform. Senator Cornyn had previously indicated his intention to take the issue up in his committee this month, but that seems very unlikely now. Congress will leave town for all of August and return in September to wrap up the budget, with a targeted adjournment date of Sept. 30 (which nearly always slips a little, and sometimes for months).

■ Major Features

Mandatory Departure Program: No Path to Permanent Legal Status for Undocumented Immigrants

The Cornyn-Kyl bill does not include a path to permanent legal status for the approximately 11 million non-U.S. citizen workers who currently reside in the U.S. Instead, it would enable those who have been in the U.S. continuously and unlawfully since July 19, 2004, and who are currently employed to apply for a new status called “mandatory departure.” Under mandatory departure, a noncitizen worker would be granted permission to remain in the U.S. — and travel in and out of the country — for up to 5 years. It appears that the person’s spouse and children would be able to accompany the person during the 5-year period. During this time, the person would be permitted to work, but only for employers participating in a new temporary worker program set up by the bill.

At the end of the 5-year period, the mandatory departure status would expire and the worker would become undocumented again. For this reason, the National Immigration Forum has accurately described mandatory departure as a “report and deport” requirement. During the 5-year period, the noncitizen worker could apply for a permanent visa, but only if one is available based on grounds independent from his or her mandatory departure status, and only after leaving the U.S. and paying a penalty that would escalate from \$0 the first year to \$2,000 the next, with substantial increases each year thereafter.

The bill as currently written provides no special relief to students who were brought to the U.S. years ago as children, but Sen. Cornyn’s staff says that this has more to do with the fact that staff members ran out of time than with the willingness of Sens. Kyl and Cornyn to address the particular equities and needs of these students.

Legal Immigration Reform: Minimal Family Backlog Reduction

For most currently undocumented people living in the U.S., there would be scant hope of qualifying for an immigrant visa within the Cornyn-Kyl bill’s 5-year mandatory departure period. It is the unavailability of such visas that has led to the current high number of undocumented immigrants in the first place.

Unlike the McCain-Kennedy bill, the Cornyn-Kyl proposal makes only the most modest effort to address this problem: it would permit rollover to the next year of family visas that are unused due to processing delays, and it would do away with the diversity (lottery) visa program

and reallocate its visa numbers to other visa categories. These changes would have only a very small impact on the family immigration backlogs that often keep close family members apart for decades. The Cornyn-Kyl bill also contains no provisions that would permit migrants who enter the U.S. under the new temporary worker program to remain even if they establish deep roots here.

New Temporary Worker Category

The temporary worker program proposed by Sens. Cornyn and Kyle would establish a new “W” nonimmigrant visa category with no numerical limitations, at least in the initial years. Other than the need for a background check, the requirements for obtaining such a visa are not spelled out in the information provided by the bill’s authors. People who were granted mandatory departure and who departed within the 5-year mandatory departure period would be eligible for the new “W” visas.

Unfortunately, once granted, “W” visas would be valid only for 2 years and thereafter would not be available again to the migrants to whom they were issued until they had left the U.S. and resided continuously in their home country for at least a year. There also would be a lifetime cap preventing admission under a “W” visa for more than a total of 6 years, and family members would not be permitted to accompany “W” visa-holders to the U.S. (they would, however, be allowed to visit for up to 30 days).

A “W” worker — like a formerly undocumented mandatory departure immigrant — would be allowed to work only for authorized employers with available “W” visa slots. To become authorized for one or more slots, an employer would be required to conduct a labor market test, offer the job(s) to any qualified, willing U.S. worker, and make various attestations. The attestation with respect to wages would require payment of only the minimum wage rather than the prevailing wage, and there would appear to be no requirement, attestation or otherwise, to preclude authorization of “W” worker slots during a labor dispute.

New Enforcement Provisions

The Cornyn-Kyl bill provides for an increase in border enforcement without new civil liberties or human rights protections, adds detention authority and detention beds, adds interior enforcement personnel, and further restricts judicial review of immigration decisions. It would also authorize and “encourage” state and local law enforcement agencies to perform an immigration function, a provision opposed by many police departments because it would corrode the trust between noncitizens and local law enforcement personnel that is central to effective law enforcement.

Beyond immigration, the bill would radically transform the relationship between the U.S. government and the governed by establishing a new national ID and imposing new requirements on all businesses.

Specifically, the Cornyn-Kyl bill would expand an existing voluntary electronic employment eligibility verification system known as the Basic Pilot into a massive new federal mandate. Last year, the Basic Pilot system was utilized (with numerous problems) by only about 2,300 U.S. employers (0.04 percent of the total number of U.S. employers). Under the Cornyn-Kyl bill, within a year of the bill’s enactment, all 5.6 million employers would be required to participate in the Basic Pilot.

The Cornyn-Kyl bill also would obligate all workers to obtain a new Social Security card that would be required as a national ID to prove employment eligibility. At the time of hire, all workers in the U.S. would have to present the new Social Security card, plus either a federal ID or a state ID or driver's license that complied with federal standards. Thus, for the first time every worker would be required to obtain one of these forms of federal or state ID in addition to the new Social Security card.

■ Conclusion

The Comprehensive Enforcement and Immigration Control Act is a serious effort to comprehensively address the flaws of our immigration system, but it falls considerably short of the ambitions set by its sponsors. It remains to be seen whether its introduction will undercut or give renewed impetus to the McCain-Kennedy legislation, which is still the only comprehensive and bipartisan proposal on the table.