Center for Immigration Studies February 2020

The 'New Way Forward Act': A Roadmap for Immigration under Democratic Control

Legislation for those who don't think there are enough criminals in the United States already

By Andrew R. Arthur

- H.R. 5383, the "New Way Forward Act", which has 44 cosponsors, would effectively eviscerate immigration enforcement at the border and in the interior of the United States.
- It would all but eliminate detention for immigration purposes, and impose new burdens on our already overtaxed immigration courts.
- It would place onerous restrictions on ICE officers and Border Patrol agents in making immigration arrests — including in desolate areas of the border in the middle of the night.
- It would require those officers and agents to justify every arrest of an alien without a warrant before an immigration judge, straining to the point of elimination DHS's limited immigration-enforcement resources.
- It would create a "statute of limitations" of five years for the commencement of removal proceedings based on even the most serious criminal offenses.
- It would limit the criminal grounds of removal so significantly that only the most extreme offenses would render criminal aliens removable, and would also expand the relief available to the few aliens who would still be removable on criminal grounds.
- It would make the amendments to the criminal grounds of removal and relief retroactive, so that even criminal aliens who have been removed from the United States, but who would not have been removable had that law been in effect, could apply to have their cases reopened or reconsidered. Immigration judges and the Board of Immigration Appeals would have no discretion not to reopen or reconsider those cases.
- It would require DHS to pay to fly those criminal aliens who have been removed and who would be eligible for reopening or reconsideration thereunder back to the United States — which would result in dangerous criminal aliens being returned at taxpayer expense back to this country to commit more crimes.
- It would prevent state and local law enforcement from assisting ICE and CBP in immigration enforcement in any way, and bar the inclusion of immigration-related information into the NCIC database or its incorporated criminal history databases. This would essentially make every jurisdiction in the United States a "sanctuary jurisdiction". As a result, ICE officers would have to risk their own safety and the safety of the community as a whole to arrest dangerous criminal aliens at their homes or in public places.
- It would repeal the criminal grounds of illegal entry and reentry into the United States, encouraging fraud, enriching smugglers, traffickers, and criminal cartels, and endangering the national security and the community.

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On December 10, 2019, Rep. Jesus Garcia (D-Ill.) introduced H.R. 5383, the "New Way Forward Act", which now has 44 co-sponsors.[1] It is a roadmap for Democrats' plans to hobble immigration enforcement if they ever regain control of the White House and Congress, introduced by representatives who apparently believe that the current immigration laws are too harsh on criminal aliens in the United States, that immigration enforcement in the interior is currently too effective, and that there are not enough criminals in this country already. Regrettably, I am not exaggerating.

Detention

First, H.R. 5383 eviscerates immigration detention.

Detention is a key tool for U.S. Immigration and Customs Enforcement (ICE) in its enforcement of the immigration laws, not just in the interior, but also in assisting U.S. Customs and Border Protection (CBP) in enforcing those laws at the border.

As civil-rights icon Barbara Jordan, then-chairwoman of President Clinton's Commission on Immigration Reform, testified in February 1995: "Credibility in immigration policy can be summed up in one sentence: those who should get in, get in; those who should be kept out, are kept out; and those who should not be here will be required to leave."[2] By this standard, the current immigration-enforcement effort is a failure, and a lack of detention space is a main cause of that failure.

In its Enforcement and Removal Operations (ERO) report for FY 2019, ICE revealed that at the end of the fiscal year, there were 595,430 fugitive aliens in the United States; that is, aliens who have "failed to leave the United States based upon a final order of removal, deportation or exclusion, or who have failed to report to ICE after receiving notice to do so" — up more than 50,000 cases from just two years before.[3] Those were aliens who had never been in custody or who had been released — either on parole, bond, or their own recognizance — who had received due process, were ordered removed, and who failed to leave.

Not that this should be a surprise. Aliens who enter the United States illegally, or who overstay their visas, do so to live and (generally) work in the United States, (generally) indefinitely. They literally have no incentive to leave the United States if they are not detained and are ordered removed.

As a bipartisan panel of the Homeland Security Advisory Council (HSAC) found in an April 2019 report: "Even if the asylum hearing and appeals ultimately go against the migrant, he or she still has the practical option of simply remaining in the U.S. illegally, where the odds of being caught and removed remain very low."[4] How low? In FY 2019, the ICE ERO report stated that the agency had a non-detained docket of more than 3.2 million cases, and was detaining (at the end of FY 2019) 50,922 aliens, most (63 percent) of whom were recent apprehensions at the border.[5] If you are an alien on ICE's docket, your odds of being detained are just less than one in 63.

In contrast, due to the surge of aliens at the border in FY 2019, the agency only removed just over 143,000 aliens last year — 86 percent of whom had criminal convictions or pending criminal charges — down from 158,851 the year before. At that rate, it will take ICE more than four years to remove all of the alien absconders in the United States — assuming that every alien ordered subsequently removed during that period leaves voluntarily (which, as noted, they won't).

H.R. 5383 would make ICE's efforts to enforce the laws in the interior and at the border next to impossible by ending mandatory detention for terrorist and criminal aliens (more on that later), creating a "rebuttable presumption that the alien should be released from custody" (which places an impossible burden on ICE attorneys, who represent the government in bond proceedings), and requiring that the "least restrictive conditions" of detention and supervision be imposed on aliens (including criminal aliens) in removal proceedings and under removal orders.

Further, it requires immigration judges (IJs) to review those conditions "on a monthly basis", imposing a significant burden on already strained immigration court dockets (the nation's 466 IJs were handling 1,066,563 cases as of December 31, 2019 — 2,289 cases per IJ).[6]

That bill would also shorten the time that ICE may detain an alien under a final order from 90 days to 60 days,[7] which would require the release of large numbers of aliens from so-called "recalcitrant countries"[8] — those "that systematically refuse or delay the repatriation of their citizens." In addition, H.R. 5383 would provide those aliens with a mechanism to seek release during even that shortened period (those aliens, and in particular aliens removable on terrorist and criminal grounds, are currently subject to mandatory detention).

Restrictions on Immigration Arrests

Not only would the bill add those restrictions to ICE's detention of aliens, it would also impose significant burdens on that agency and CBP to simply arrest aliens.

Current law (logically) gives DHS officers significant latitude in questioning aliens or suspected aliens, and in arresting (without a warrant) aliens who are entering the United States illegally, as well as aliens who the officer believes are in this country illegally and who are likely to escape before the officer can obtain a warrant.[9] The only restriction on this authority is that the alien must be presented "without unnecessary delay" to an officer for questioning as to that alien's "right to enter or remain in" this country.

H.R. 5383 would place incredible impediments on both the authority of DHS officers to question aliens, and on those officers' authority to arrest.

Specifically, under that bill, ICE officers could not interrogate any alien if that interrogation is "based on the person's race, ethnicity, national origin, religion, sexual orientation, color, spoken language, or English proficiency."

It has been my experience that ICE officers generally question suspected aliens based upon a "totality of the circumstances", which may include some of the factors above (I am unaware of any arrest that has ever been premised in whole or in part on religion or sexual orientation), but also other, additional factors that would indicate that the individual is a removable alien.[10] If you have ever been to the border, for example, race, ethnicity, color, and English proficiency in and of themselves would not suggest that an individual is a removable alien, but they may be if the individual is in the back of a trailer that fled from an interior checkpoint.[11]

Categorically removing these factors from that "totality of the circumstances" analysis would make the task facing ICE officers who suspect an individual of being a removable alien next to impossible, short of the alien blurting out that he or she is in such a status. The restrictions imposed by H.R. 5383 would give even removable aliens no shortage of avenues for escaping (metaphorically) removal by asserting that an "improper" factor was considered. ICE officers would spend all day in immigration court defending the few arrests that they are able to make at "probable cause" hearings — which are also mandated by the bill, within 48 hours of the alien's arrest without warrant, as explained below.

If the impediments on ICE officers in the interior are burdensome, the ones on Border Patrol agents are downright bizarre and ill-informed.

Specifically, under the bill, those agents could only arrest aliens whom they see entering the United States illegally if: they have probable cause to believe that the alien is in this country in violation of law and "is likely to escape before" the agent can obtain an arrest warrant; if the agent "has reason to believe" that the alien "would knowingly and willfully fail to appear in immigration court" pursuant to a Notice to Appear ("NTA", the charging document in removal proceedings); and if the alien is presented before an IJ within 48 hours of arrest "to determine whether there is probable cause as" required therein, "including probable cause to believe that" the alien "would have knowingly and willfully failed to appear" — a hearing at which the government would bear the burden of proof.

This provision shows an almost complete lack of understanding as to how the Border Patrol does its job. Aliens are often apprehended in remote portions of the border, far away from Border Patrol stations — making it next to impossible for agents to drive hours to obtain a warrant of arrest. In addition, it is difficult to imagine how an agent could make a determination in the middle of the night whether any given alien (who had entered illegally) would appear before an IJ.

The probable-cause hearing requirement, again, would pull a significant number of Border Patrol agents off of the line almost daily to travel to far-away immigration courts to explain why they made numerous and sundry arrests.

To explain: As of January 2019, CBP employed roughly 20,000 Border Patrol agents,[12] most of whom are assigned to the Southwest border, which is about 1,954 miles long.[13] Those agents work 50-hour shifts per week, meaning that at any given time (assuming there are 18,000 agents along the border with Mexico) there are approximately 5,357 agents at that border. If CBP had to pull hundreds of them off of the line at any given time, it would create a vacuum that would be exploited by smugglers and traffickers, who would move migrants, drugs, and contraband through the places where agents aren't stationed.

Of course, immigration courts are not 24-hour-a-day affairs, so it is unclear how, exactly, an alien apprehended on a Friday could be presented before an IJ 48 hours later on Sunday (or Saturday, for that matter).

This provision would essentially require Border Patrol agents to issue NTAs to all aliens apprehended entering illegally in lieu of arresting those aliens. This would, in turn, encourage massive numbers of aliens to enter the United States illegally, overwhelming limited DHS resources even more.

It would also prevent Border Patrol from identifying wanted criminals, gang members, traffickers, and even terrorists in that flood of migrants over the border. Notably, the April report from the bipartisan HSAC panel (referenced above) specifically stated: "By far, the major 'pull factor' [driving family units to the Southwest border] is the current practice of releasing with a NTA most illegal migrants who bring a child with them."[14] The bill would exacerbate that problem exponentially, and expand this loophole to single adults entering illegally.

Statute of Limitations on Removal Proceedings for Criminal Aliens

The bill would also create a "statute of limitations" for removal proceedings, requiring that ICE place any alien charged with a criminal-based ground of removability into proceedings within five years of the alien becoming amenable to removal (usually, the date of conviction). Often, ICE is unable to locate aliens who have criminal convictions right away, or fails to realize that an individual with a conviction is an alien for several years.

This provision would give those aliens not a "get out of jail free card," but rather a "remain in the United States unremovable" card. And, it would do so *retroactively*, so criminal aliens who were placed into removal proceedings more than five years after their convictions, and subsequently ordered removed, would no longer be removable — regardless of the severity of their criminal offenses.

And, as I will explain below, it would also allow those criminal aliens who have been removed to have their cases reopened and terminated, and to be returned to the United States at taxpayers' expense.

Limitation on Criminal Removal Grounds

H.R. 5383 would also eviscerate the criminal grounds of inadmissibility[15] and deportability under a provision specifically titled "Limit Criminal-System-to-Removal Pipeline" (suggesting that the authors do not want a "pipeline" between prisons and removal for dangerous criminal aliens).

It would eliminate removability for aliens convicted of crimes involving moral turpitude (CIMTs), which are generally characterized as crimes of vileness, baseness, or depravity, as well as crimes that violate moral standards (*malum in se*, as we say in the law, "wrong in itself" by its very nature).[16] Included on this list are crimes that involve fraud, bribery, sex-related offenses (including solicitation of prostitution and incest), willful infliction of injury to a spouse, theft, robbery, knowing possession of child pornography, and communication with a minor for immoral purposes — to name a few. Significantly, aliens convicted of these offenses would not only no longer be deportable if they were here, they would *no longer be inadmissible to the United States* if they are not.

In addition, the bill would eliminate removability for criminal violations relating to controlled substances other than drug-trafficking offenses (with a significant caveat relating to deportability based on a conviction for an aggravated felony, below), again meaning that applicants for admission would not be barred from entering the United States as a result of such convictions.

H.R. 5383 would also significantly narrow the definition of "aggravated felony" in section 101(a)(43) of the INA, a category of crimes that renders aliens in the United States deportable.[17] That list includes murder, rape, sexual abuse of a minor, illicit trafficking in a controlled substance, illicit trafficking in firearms, crimes of violence, theft and burglary, demand for or receipt of ransom, child pornography, racketeer influenced corrupt organization offenses, peonage, slavery, trafficking in persons, gathering or transmitting national defense information, sabotage, offenses involving fraud or deceit in which the loss was $10,000 or more, alien smuggling, and attempts and conspiracies to commit such offenses (as well as many others — this list is not exhaustive).

Currently, an offense does not need to qualify as a "felony" under state or federal law to qualify as an aggravated felony for purposes of deportability. This recognizes the fact that "immigration" is a federal issue, and that a state's characterization of an offense as a "misdemeanor" or a "felony" has no effect on how that offense should be treated for purposes of removability.

The bill would redefine the term "aggravated felony" for purposes of the INA as "a felony, for which a term of imprisonment of not less than 5 years was imposed." This is a bad amendment, for at least two reasons.

First, it excludes many offenses that would fall under the federal definition of "felony", which includes any crime for which the maximum term of imprisonment authorized is a sentence of more than a year.[18] Even if you don't believe that crimes that are not "felonies" should not count as "aggravated felonies" for immigration purposes, crimes with punishments that would qualify as "felonies" under federal law certainly should.

Second, and worse, it would allow many aliens who are currently removable for significant criminal offenses to remain in the United States and commit additional crimes. As my colleague Jessica Vaughan[19] noted in 2011 in summarizing a Government Accountability Office report on alien incarcerations, arrests, and costs: "The average incarcerated alien had seven arrests, and committed an average of 12 offenses."[20] Simply put, criminals commit crimes, and convicted criminals usually commit numerous ones.

While the aggravated felonies listed above are serious offenses, as a result of plea bargains or the misguided efforts of lenient sentencing judges, the sentences for those offenses can be relatively light. This is especially true in cases involving rape and sexual abuse of a minor, where prosecutors may attempt to protect the victim from having to testify by striking a deal with the defendant.

H.R. 5383 would shelter the criminals convicted of those offenses from removability, in essence allowing them to remain in the United States and prey again upon the community, *unless* they received a term of imprisonment of an arbitrary five years or more.

Restrictions on What Constitutes a "Conviction" for Immigration Purposes

Worse, that bill would significantly trim down the formal findings of criminal guilt that would qualify as a "conviction" for purposes of removability, as well as eligibility for immigration relief in section 101(a)(48) of the INA.[21]

It is important to note that criminal convictions have two consequences under immigration law. First, they can render an alien inadmissible or removable under sections 212(a)(2)[22] and 237(a)(2)[23] of the INA, respectively. Second, they can render a removable alien ineligible for relief from removal, such as for asylum (sections 208(b)(2)(A)(ii) and (iii) and sections 208(b)(2)(B)(i) and (ii) of the INA),[24] cancellation of removal for permanent residents ("42A cancellation", section 240A(a)(3) of the INA[25]), and cancellation of removal and adjustment of status for certain nonpermanent residents ("42B cancellation", section 240A(b)(1)(C) of the INA).

H.R. 5383 would amend the definition of "conviction" for purposes of the INA to exclude:

> *An adjudication or judgment of guilt that has been dismissed, expunged, sealed, deferred, annulled, invalidated, withheld, or vacated, or where a court has issued a judicial recommendation against removal [JRAD], or an order of probation without entry of judgment or any similar disposition.*

This amendment would allow a criminal who has been convicted, *and* sentenced, *and* who has served time for an offense to avoid removal by going to a sympathetic judge (or overworked prosecutor) to have that conviction dismissed, expunged, sealed, annulled, invalidated, or vacated, *without consideration of whether the criminal actually committed that offense*.

As Criminal Defense Lawyer explains:

> *Many states allow you to expunge, seal or otherwise "hide" or "destroy" your criminal record. Generally, if a criminal record is expunged or sealed, it's as though the crime never occurred and you can legally say (to a potential employer, for example) that you were never charged or convicted of a crime.*[26]

Or, a "potential IJ". Therefore, an alien who has committed a serious criminal offense can avoid the immigration consequences of his or her actions by going to court, in instances well after the fact, to "hide" or "destroy" their criminal record for immigration purposes.

With respect to JRADs, as my colleague Dan Cadman has explained, while they previously existed in immigration law, Congress expressly repealed that procedure 30 years ago:

> *Before repeal, a JRAD was binding on immigration authorities, including immigration judges, although it could not be used for certain offenses or where the sentence exceeded a year of imprisonment.*
>
> *Next let's note that JRADs were primarily used in cases involving resident aliens in which mitigating factors existed; the JRAD acted to bar deportation and thus left the alien's legal ability to remain in the United States intact.*[27]

The JRAD proposed in H.R. 5383 would apply to all aliens, not just lawful permanent resident aliens, and would include foreign nationals who have never been to the United States seeking admission. And Congress repealed that relief for good reason, as I have previously stated: "Elimination of that limited authority made it clear that *state-court judges had no power to affect the immigration consequences of criminal convictions*."[28] (Emphasis added.)

H.R. 5383 would in fact give state-court judges almost unbridled discretion to interfere in the exclusively federal domain of immigration. Further, it would almost definitely lead to disparate and subjective outcomes, as some jurisdictions (and individual judges) would be more lenient and others stricter were it to come to applying these new powers, if they were conveyed by Congress.

Worse (and yes, it gets much, much worse), the bill would repeal a subparagraph in section 101(a)(48) of the INA that explicitly states that:

> *Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.*[29]

Instead, under that provision as amended by H.R. 5383, the phrase "term of imprisonment or sentence" for purposes of the INA would include *only* the "period of incarceration ordered by a court of law", excluding "confinement" (logically referencing "house arrest") as well as "any suspension or imposition or execution of that imprisonment or sentence in whole or in part". The number of criminal aliens who would escape removal under this amendment is incalculable, but that is only the beginning.

Retroactivity of Amendments

That is because the bill would make these amendments *explicitly retroactive*, applicable not only to convictions and sentences entered before the date of enactment, but also to "admissions and conduct" *occurring* before the date of enactment. It would provide a map for criminals seeking through the plea process to avoid removal and reoffend, as often as they wanted, until they ran afoul of what would be left of the criminal grounds of removal. And allow them to reopen cases that had long been closed, even if they had already been deported.