

satisfy as a “clear and convincing evidence” standard that the decision “prohibited as a matter of law.” Indeed, courts of appeal have pointed out that the only individuals who could satisfy such a high standard would be U.S. citizens and individuals who hold visas of “unquestioned validity.”

I will read a quick passage from a decision of the First Circuit Court of Appeals that I think goes right to the heart of the issue:

Perhaps most important, we recognize that extending [the] stringent clear and convincing evidence standard to stays pending appeal . . . would result in a peculiar situation in which adjudicating a stay request would necessitate full deliberation on the merits of the underlying case and, in the bargain, require the alien to carry a burden of proof higher than she would have to carry on the merits. This Kafkaesque design is counterintuitive.

Let’s pause for a moment to consider that—“this Kafkaesque design is counterintuitive.” A panel of the First Circuit Court of Appeals, in a decision written by a judge appointed by President Reagan, has called the very provision that is in the bill “Kafkaesque.” Surely, the Senate does not want to include such an extreme provision in this bill.

Even in situations where the issue on appeal is subject to a very deferential standard of review, it makes no sense to require an immigrant to meet the stringent “clear and convincing evidence” standard of review at such a preliminary stage of the case. As one court has pointed out, the appellant may not even have obtained a copy of the administrative record that early in the case. How can appellants prove by clear and convincing evidence that they will win their appeal when they may not even have a copy of the administrative record?

Kafkaesque, indeed.

This standard would also be out of line with analogous situations in other civil cases. Typically, when an appellant seeks temporary relief at the beginning of a case, the goal, as many of us know, is to preserve the factual situation for the duration of the appeal, and the goal of that is to ensure that the ultimate relief, if granted, will still be meaningful. That is why many courts of appeals reviewing removal orders rely on the same standard of review that applies to requests for temporary restraining orders in civil litigation. That test is well known to so many who have studied the law. They apply a four-part test that evaluates the likelihood of success on the merits: whether there will be irreparable injury if a stay is denied; whether there will be a substantial injury to the party opposing a stay if one is issued; and the fourth criterion, the public interest. This flexible standard allows a court to assess whether a stay is needed early in the case without having to delve into the detail required to determine the final outcome.

But if this provision were to become law, the entire case would have to be

litigated in full twice—once to meet the requirements for a stay of removal and then again on the merits. At least in some courts of appeals, that would mean the case would first have to be presented to a motions panel on the stay application and then again before the merits panel. As the American Bar Association has argued in urging the Senate to reject this provision, such a duplicative process would be a significant waste of resources, particularly at a time when the immigration caseload of the Federal courts is growing.

I wish to speak for a moment about the individuals who would most likely be harmed by this new provision, and they are, of course, asylum seekers.

As one Federal court has explained, imposing this new stringent standard “would mean that ‘thousands of asylum seekers who fled their native lands based on well-founded fears of persecution will be forced to return to that danger under the fiction that they will be safe while waiting the slow wheels of American justice to grind to a halt.’”

Similarly, Judge Easterbrook of the Seventh Circuit noted that stays pending appeal “remain vital when the alien seeks asylum or contends he would be subject to torture if returned. The ability to come back to the United States would not be worth much if the alien has been maimed or murdered in the interim. Yet under [the clear and convincing evidence standard] . . . an alien who is likely to prevail in this court, and likely to face serious injury or death if removed, is not entitled to remain in this Nation while the court resolves the dispute.” Just to give that example.

The stakes are high. This provision has the potential to be devastating for asylum seekers; so devastating, in fact, that the provision was rejected by Congress just last year when it was taken out of the REAL ID Act in the conference process, and it is not even included in the current House bill. I hope the Senate will support my amendment to strike this troubling provision from the bill.

Let me put a personal face on this debate. I received earlier this week a letter from the National Network to End Violence Against Immigrant Women. This is a very compelling letter, and I ask unanimous consent that it be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

MAY 22, 2006.

Re Comprehensive Immigration Reform Act of 2006 [Hagel-Martinez compromise] (S. 2611), Biden Amendment 4077 (amends section 403(a)(1)), and Feingold Amendment 4083 (amends section 227(c)).

DEAR SENATOR: On behalf of the National Network to End Violence Against Immigrant Women, we write to urge you to preserve access to longstanding, life-saving legal protections embodied in the Violence Against Women Act (“VAWA”) for immigrant victims of domestic abuse, sexual assault, or human trafficking. The National Network to End Violence Against Immigrant Women is

comprised of over 3,000 professionals nationwide including police, sheriffs, district attorneys, probation officers, prosecutors, health providers, churches, rape crisis centers, domestic violence shelters, mental health professionals, child protective services workers, and immigrant rights’ groups. The Network’s members are all joined by a common purpose—working towards the eradication of all forms of violence perpetrated against immigrant women and children including domestic abuse, sexual assault, human trafficking, and stalking.

The National Network to End Violence Against Immigrant Women urges you to support:

(1) Biden Amendment 4077 [amends section 403 (a)(1)]: preserves access to VAWA cancellation of removal (family violence), T visas (trafficking), and U visas (violent crimes); and

(2) Feingold Amendment 4083 [amends section 227(c)]: preserves access to judicial stays of removal for immigrants, including victims of violence or persecution, who are appealing their cases to the federal courts.

I. S. 2611, section 403(a)(1) endangers thousands of immigrant women and children by cutting off victims of domestic abuse, sexual assault, or human trafficking from the VAWA immigration remedies created by Congress in 1994 and 2000.

S. 2611, section 403(a)(1) adds a new subsection to the Immigration and Nationality Act (“INA”), 218A(i), which would bar individuals who enter or remain in the U.S. without authorization from obtaining cancellation of removal, voluntary departure, or nonimmigrant status for 10 years. Section 218A(i) does not contain an exception for victims of domestic abuse, sexual assault, or human trafficking who qualify for VAWA cancellation of removal (family violence), T visas (human trafficking), or V visas (violent crimes). Without a specific amendment to exempt these victims, section 403(a)(1) will undo over a decade of progress in fighting domestic abuse, sexual assault, and human trafficking started with the enactment of the Violence Against Women Act (“VAWA”) in 1994.

Since passing VAWA 1994, Congress has continually reaffirmed the nation’s commitment to granting special humanitarian relief to immigrant victims of domestic abuse, sexual assault, or human trafficking. In 2000 Congress created the T visa and V visa in the Victims of Trafficking and Violence Protection Act. As recently as last December, Congress expanded VAWA and trafficking immigration relief in the VAWA Reauthorization Act of 2005. If the Senate does not now carve out a limited exception to S. 2611, section 403(a)(1), it will be undercutting the very protections created by Congress in VAWA 1994 and 2000.

We, therefore, respectfully urge you to support Biden Amendment 4077 which would carve out a limited exception for victims of family violence, sexual assault, or human trafficking from S. 2611, section 403(a)(1) to ensure they have continued access to VAWA cancellation of removal, T visas, and U visas.

II. S. 2611, section 227(c) endangers immigrant women and children who will be deported into the hands of human traffickers, batterers, and persecutors, thereby facing certain harm and possible death.

S. 2611, section 227(c) would bar federal courts from staying the deportation of any immigrant with a final removal order unless she shows by “clear and convincing evidence” that deportation is prohibited as a matter of law. This heightened standard would make it virtually impossible for most victims of domestic abuse, sexual assault, or human trafficking to obtain stays of deportation while their cases are on appeal to the