

**Basic Information about the
Injunction Stripping Provisions of
S. 2611, the Comprehensive Immigration Reform Act of 2006**

What it does:

Subtitle B of S. 2611, the Comprehensive Immigration Reform Act of 2006, would place arbitrary and absurdly short deadlines on courts deciding what relief to provide in immigration cases. Specifically, it would limit all preliminary injunctions to 90 days regardless of the complexity of the case and provide an automatic stay of relief previously ordered by a court unless the court denies a government motion to modify or dissolve the order within 15 days of the date the government files such a motion.

If Subtitle B is enacted, there would—as a practical matter—often be no remedy when the government violates constitutionally guaranteed rights or the requirements of immigration laws, not because any given case lacks merit, but because the courts will not have time to make a considered determination. Plaintiffs are rarely the cause of lengthy court proceedings, but under Subtitle B they would bear the entire burden of a court's inability to meet the new deadlines. Subtitle B would also work to the detriment of other pressing civil cases, some of which would have to be pushed back to accommodate immigration cases with arbitrary new deadlines and unnecessary extra court dates.

Background:

Currently injunctive relief is granted only when a court finds that the plaintiffs will suffer irreparable harm if relief is not granted. Preliminary injunctions are only granted where the court finds that the plaintiffs are likely to prevail, that the potential harms to the plaintiffs outweigh any potential burdens to the government from an injunction, and that the injunction is in the public interest. Subtitle B would impose an arbitrary 90-day deadline on preliminary injunctions, meaning that courts would have to decide whether to order a permanent injunction within 3 months regardless of whether sufficient information has been developed for the court to make the correct final determination. The same requirements would be imposed on all consent decrees voluntarily entered into between the government and plaintiffs.

Similarly, Subtitle B would require entry of an automatic stay of relief that a court has ordered 15 days after a government motion to change or terminate the relief is filed. Adoption of this provision would only give a court 15 days to resolve the case before a stay is lifted, regardless of the complexity or merits of the case and regardless of the costs or hardships that such a stay would impose on the plaintiffs. Plaintiffs would not be given any similar ability to obtain changes without court review.

If these changes are made, courts will feel compelled to act hastily on immigration cases, greatly compromising their ability to come to accurate and correct decisions in complex- or even medium-complex cases. Some courts may not even be able to entertain important constitutional issues in immigration cases because they have to turn their attention to criminal cases whose deadlines take precedence. Others might be forced to bump other pressing and important civil cases to meet the tight deadlines. And judicial economy will be frustrated because settlement will be discouraged by the drastic limitations on the enforceability of a consent decree.

Punishes Blameless Plaintiffs

These changes would strongly favor the government in immigration litigation because delay would result in the lifting of court-ordered relief regardless of the merits of the case or the balance of hardships. The time a case takes to come to judgment might be a result of government delay, a full court docket, or the sheer complexity of a case, but plaintiffs with little or no control over the pace of litigation would bear the full burden of delay regardless of the cause. The government would have a strong incentive to procrastinate because doing so, without more, could be rewarded by the expiration of a preliminary injunction or an automatic stay of permanent relief previously granted by the court.

Interference with Article III Court Responsibilities

Subtitle B would interfere with Article III courts' ability to properly fashion injunctions based on the specific factual findings of a case. Injunctions are not issued lightly and the amendment would require courts to act much more quickly than is reasonable or lose the ability to maintain relief pending full consideration of the issues.

Subtitle B's provision causing preliminary injunctions to expire automatically within 90 days unless the court grants permanent injunctive relief would vitiate the purpose of a preliminary injunction, which is to prevent irreparable harm during the period of time needed to bring a case to final judgment. The current, long-established standard for preliminary injunctive relief already ensures that the court carefully consider any burden that an injunction may cause to the government, as well as the public interest.

Even in cases that can be resolved on summary judgment, some discovery is usually required, and briefing and resolution of the issues generally requires significantly longer than 90 days. In cases where factual disputes must be resolved, much more time is needed for the court to reach a final judgment. This section would deprive the federal courts of the ability to prevent irreparable harm from occurring during this time.

Waste of judicial resources

The provision making a government motion to dissolve a permanent injunction automatically stay the injunction after 15 days of filing would put pressure on district courts to hear any such motion prior to other pending civil matters, without regard to the urgency of the particular motion, and would increase the burdens on the court, without providing any final resolution to such cases. As an example of how this provision could be abused, it would permit the government to return to court just 2 weeks after a 2-year trial and obtain an automatic stay unless the court acts within 15 days. The provision causing preliminary injunctions to expire automatically within 90 days is unnecessary and would force the parties to re-contest the merits of such injunctions multiple times, an utterly unnecessary use of judicial resources.

Discouragement of settlement

422(c)'s limitation on the duration of the courts' ability to enforce a consent degree would discourage settlement of immigration litigation, despite the fact that settlements have resolved many kinds of problems and may require a substantial period of time to implement, as in:

- *American Baptist Churches v. Reno* – a nationwide class action challenging discrimination in the adjudication of asylum claims of Guatemalans and Salvadorans. Under a 1991 settlement that is still being implemented, the government agreed to afford class members asylum interviews conducted under improved procedures.
- *Barahona-Gomez v. Reno* – a class action challenging directives issued by EOIR officials prohibiting immigration judges and the BIA from granting suspension of deportation cases. The court certified a class and issued a preliminary injunction, which was upheld in the court of appeals, and the government then agreed to a 2002 settlement, which is still being implemented, affording new adjudications to class members.

Interference with pending litigation

This subtitle is openly designed to unduly interfere with a specific pending case (*Orantes-Hernandez v. Gonzalez*) in which arguments are pending on the government's motion to dissolve a permanent injunction in district court.

Section by Section Summary

Section 421 provides that the subtitle may be cited as the Fairness in Immigration Litigation Act

Section 422(a) places the following limitations on the prospective relief a court may grant in any civil action pertaining to the enforcement or administration of immigration law. It must:

- (a) Be the minimum relief necessary to correct the violation
- (b) Be the least intrusive means to correct the violation
- (c) Minimize the impact on national security, border security, immigration administration and enforcement and public safety; and
- (d) Expire on the earliest specific date necessary for the government to effect the remedy

These requirements must be explained in writing in sufficient detail to be reviewed by another court. In addition, any preliminary injunction in an immigration case shall expire in 90 days unless made permanent. Finally, in addition to prospective relief, the above rules also govern an order denying the government's motion to vacate, modify, dissolve or otherwise terminate prospective relief that had been previously granted

Section 422(b) provides an automatic stay without court action 15 days after the government files a motion to vacate, modify, dissolve, or otherwise terminate an order granting prospective relief in a civil immigration action. The automatic stay continues until the court acts on the motion. The court may postpone the automatic stay for up to 15 days for good cause. Other than such a postponement, any order staying, suspending, delaying or otherwise barring the effective date of the automatic stay is immediately appealable.

Section 422(c) requires any consent decree subject to court enforcement to meet the requirements of section 422(a) above.

Section 422(d) defines "consent decree", "good cause", "government", "permanent relief", "private settlement agreement" and "prospective relief" for purposes of section 422.

Section 423 provides the effective dates for the provisions of the subtitle. The requirements of the subtitle apply to all orders granting prospective relief regardless of when the relief was ordered. A motion to vacate, modify, dissolve, or otherwise terminate relief that is pending on the date of enactment shall be treated as if filed on the date of enactment. If such a motion was pending for 45 days before the date of enactment, it shall take effect without court action 10 days after the date of enactment. Such an automatic stay shall remain in effect until the court acts, and any court order staying, suspending, delaying, or otherwise barring the effective date of the automatic stay shall be immediately appealable.

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