

We are saying this limit should be 650,000. Now, why did we choose that? Because that is what the Congressional Research Service says they estimated would actually be happening under Chairman SPECTER's proposed mark to the Judiciary Committee when they started. To do something other than what we are proposing in this amendment is to leave it totally unknown as to how many people we are going to have coming in under this employment-based legal permanent residency program, how many green cards we are going to be giving out. It could be 500,000. It could be 1 million. It could be 1.5 million. This is every year I am talking about. That is not an acceptable arrangement.

Now, I want to make clear this one point, which I said before; that is, this amendment in no way limits the number of people who can come in and become legal permanent residents under the family preference. That is 480,000. It does not affect the number of people who can have their situation, their status changed under the undocumented earned legalization provisions. That is 11 or 12 million. It is left alone. It does not affect the 1.5 million blue card agricultural workers. It does not affect the shortage occupation groups and other high-skilled workers. It does not affect the 141,000 visas that we are bringing back from the last 5 years.

This amendment will improve the bill. It is not an effort to undermine the bill. It is an effort to improve the bill. I urge my colleagues to support the amendment.

The PRESIDING OFFICER. All time has expired.

Mr. SPECTER. Mr. President, I ask unanimous consent that the Feingold amendment and debate precede the Sessions amendment.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. SPECTER. Mr. President, so that our colleagues will know the schedule, Senator BYRD has asked to speak to the body following this vote on his 69th wedding anniversary. He will be recognized for that purpose.

I yield the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD. Mr. President, I thank the distinguished Senator. I want to do that at a time that will accommodate him and the Senate. So if the Senator would let me know right now, if he might, when might be the best time to accommodate him and the Senate.

Mr. SPECTER. Mr. President, I thank the distinguished Senator from West Virginia. We will see if we can find a more convenient time.

Mr. BYRD. I thank the Senator.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question is on agreeing to the Bingaman amendment.

Mr. SANTORUM. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The bill clerk called the roll.

Mr. McCONNELL. The following Senator was necessarily absent: the Senator from Wyoming (Mr. ENZI).

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. ROCKEFELLER) is necessarily absent.

The PRESIDING OFFICER (Mr. GRAHAM). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 51, nays 47, as follows:

[Rollcall Vote No. 152 Leg.]

YEAS—51

Alexander	Cornyn	Lincoln
Allard	Craig	Lott
Allen	Crapo	Mikulski
Baucus	DeMint	Nelson (FL)
Bayh	Dodd	Nelson (NE)
Biden	Dole	Pryor
Bingaman	Domenici	Reed
Bond	Dorgan	Roberts
Boxer	Ensign	Santorum
Bunning	Feinstein	Sessions
Burr	Grassley	Shelby
Byrd	Hutchison	Sununu
Carper	Inhofe	Talent
Chambless	Isakson	Thomas
Coburn	Jeffords	Thune
Cochran	Johnson	Vitter
Conrad	Kyl	Voinovich

NAYS—47

Akaka	Hagel	Menendez
Bennett	Harkin	Murkowski
Brownback	Hatch	Murray
Burns	Inouye	Obama
Cantwell	Kennedy	Reid
Chafee	Kerry	Salazar
Clinton	Kohl	Sarbanes
Coleman	Landrieu	Schumer
Collins	Lautenberg	Smith
Dayton	Leahy	Snowe
DeWine	Levin	Specter
Durbin	Lieberman	Stabenow
Feingold	Lugar	Stevens
Frist	Martinez	Warner
Graham	McCain	Wyden
Gregg	McConnell	

NOT VOTING—2

Enzi Rockefeller

The amendment (No. 4131) was agreed to.

Mr. KENNEDY. Mr. President, I move to reconsider the vote.

Mr. BINGAMAN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. KENNEDY. Mr. President, we are making progress. I see the Senator from Wisconsin on his feet. He has an amendment. We have two amendments following that. Then, hopefully, we will be ready for final passage. I understand we have an hour of time evenly divided.

Mr. FEINGOLD. Mr. President, I hope it will be shorter, but it depends on the response.

The PRESIDING OFFICER. The Senator from Wisconsin is recognized.

AMENDMENT NO. 4083

Mr. FEINGOLD. Mr. President, I call up amendment No. 4083.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Wisconsin [Mr. FEINGOLD] proposes an amendment numbered 4083.

Mr. FEINGOLD. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To strike the provision prohibiting a court from staying the removal of an alien in certain circumstances)

On page 167, strike lines 17 through 20.

Mr. FEINGOLD. Mr. President, this amendment will ensure that asylum seekers, victims of trafficking, and other immigrants are able to secure meaningful judicial review of removal orders. It would strike from the bill a provision that would have the really absurd result of making it harder in many cases for an immigrant to get a temporary stay of removal pending appeal than to actually win on the merits of the case.

Before I go further, I thank Senator BROWBACK for cosponsoring this amendment. He has been tireless in his efforts to help asylum-seekers and trafficking victims, and I am very pleased that we could work together on a bipartisan basis on this effort.

Under section 227(c) of the bill, a court cannot grant a temporary stay of removal pending appeal to an asylum applicant or other individual unless the immigrant proves by clear and convincing evidence that the order is prohibited as a matter of law. That, as we all know, is an extremely difficult standard to satisfy, particularly in the preliminary stage of an appeal. It is so difficult that the Chicago Bar Association called this provision a "potentially devastating threat to due process."

This draconian provision could have a particularly harmful effect on asylum-seekers. It could effectively deny all judicial review to many asylum applicants who might otherwise have successful appeals by allowing them to be sent back to countries where they can face persecution or even death before a Federal court can even rule on their cases.

Section 227(c) would overturn the decisions of seven different courts of appeal that have determined that the Immigration and Nationality Act does not currently require immigrants to meet the very high "clear and convincing evidence" standard for temporary stays of removal pending appeal. I will explain in a bit more detail, as these courts already have, why this very stringent standard would be such bad policy.

First of all, as I have said, in many cases this provision would result in an immigrant having to meet a higher standard of review to get a temporary stay of removal than to prevail on the merits of it. Federal courts review legal issues in asylum and other immigration cases de novo, and they review issues, such as credibility questions in asylum cases, using a lower, "substantial evidence" standard. These standards are nowhere near as difficult to

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

federal courts. Section 227(c) poses grave risks to many immigrant women and children who, in the absence of a stay of removal, will be deported and delivered into the hands of human traffickers, batterers, and persecutors.

Why is preserving access to temporary judicial stays of removal critical for immigrant victims of violence or persecution? Because it is not uncommon for the federal courts to reverse illegal deportation/removal orders that were issued by immigration judges and subsequently affirmed by the Board of Immigration Appeals ("BIA"). For many immigrant women and children, the federal courts are the ultimate protectors of justice, and it is not until their case reaches the federal courts that they are given due process, as required by the Constitution. All immigrants, but especially victims of violence or persecution, need to have continued access to request judicial stays of removal/deportation while their cases are being reviewed by the federal courts. A temporary judicial stay of removal does not allow an immigrant to remain indefinitely in the U.S.; it merely prevents the Department of Homeland Security from deporting her while the federal court reviews her case.

Real-life immigrant women who obtained judicial stays of removal during the pendency of their appeals and were ultimately granted immigration relief by the federal courts:

Laura Luisa Hernandez endured years of brutal violence at the hands of her husband. He slammed her head against the wall, smashed a fan on her head, savagely beat her, attacked her with a knife, and denied her access to medical care for her injuries. Ms. Hernandez applied for VAWA suspension of deportation, a special form of relief for abused spouses and children that Congress created in VAWA 1994. An immigration judge denied Ms. Hernandez's VAWA suspension of deportation application and ordered her deported. The BIA affirmed the immigration judge's denial of VAWA suspension of application. Ms. Hernandez then appealed the BIA decision to the U.S. Court of Appeals and obtained a temporary stay of deportation while her appeal was being reviewed by the U.S. Court of Appeals. The U.S. Court of Appeals eventually reversed the BIA decision and concluded that she qualified for VAWA suspension of deportation. *See Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003).

Lioudmila Krotova and her children Anastasia and Aleksandra fled Russia after they were assaulted by skinheads and their synagogue was stormed. Ms. Krotova reported both attacks to the police, but the police failed to take any meaningful action. After the Krotovas fled Russia, skinheads beat a close family friend to death, and also beat the Krotovas' relative so brutally that they broke his hip. After entering the U.S., Ms. Krotova applied for asylum. An immigration judge denied her application, and the BIA affirmed the judge's decision. Ms. Krotova then appealed to the U.S. Court of Appeals and obtained a temporary stay of removal. The U.S. Court of Appeals eventually reversed the BIA decision and concluded that the harassment, discrimination, and violence experienced by Ms. Krotova on account of her being Jewish compelled the finding that she suffered past persecution. *See Krotova v. Gonzales*, 416 F.3d 1080 (9th Cir. 2005).

Ralitsa Nedkova, a Roma (gypsy) woman from Bulgaria, was brutalized by the police for many years. She was repeatedly arrested, detained, beaten, and threatened with rape by the police for doing nothing wrong other than being Roma. She suffered numerous injuries including cracked ribs as a result of police brutality. She was also brutalized by her ethnic Bulgarian husband who savagely

beat her while screaming "Whore! Gypsy!" When she was pregnant, he beat and kicked her in the stomach yelling, "Gypsies don't have a right to have children!" He beat her so violently that she miscarried in her second trimester. Ms. Nedkova eventually fled for her life and attempted to enter the U.S. She was arrested by immigration authorities and remained in detention for years. While in detention, she applied for withholding of removal. An immigration judge denied her application, and the BIA affirmed the decision. Ms. Nedkova appealed her case to the U.S. Court of Appeals and obtained a temporary stay of removal during the pendency of her appeal. The U.S. Court of Appeals reversed the BIA decision, and Ms. Nedkova was eventually granted withholding of removal. *See Nedkova v. Ashcroft*, 83 Fed. Appx. 909 (9th Cir. 2003).

Juanita Saucedo was ordered removed by an immigration court while her husband was fighting in the Middle East with the Texas National Guard. Together they have several U.S. citizen children. Ms. Saucedo was ordered removed, despite the fact that she was eligible to immigrate based on her husband's petition as well as her mother's petition. Ms. Saucedo appealed her removal order to the BIA which affirmed the immigration court's decision. She then appealed her case to the U.S. Court of Appeals for the Fifth Circuit and obtained a judicial stay of removal during the pendency of her appeal. Because she was granted a stay of removal, she was able to continue caring for her U.S. citizen children while their father fought in the Middle East. If she had been denied a judicial stay of removal, she would have been deported during the pendency of her appeal, and her U.S. citizen children would have been abandoned in the U.S., with no parent to care for them. *See Saucedo v. Gonzales* (5th Cir. 2005).

These real-life cases illustrate why all immigrant women and children, especially victims of violence or persecution, need to have continued access to judicial stays of removal while their cases are being reviewed by federal courts. We, therefore, respectfully urge you to support Feingold Amendment 4083 which would preserve access to judicial stays of removal, thereby ensuring that victims are not illegally deported into the hands of human traffickers, batterers, and rapists.

Sincerely,

JOANNE LIN,  
*Legal Momentum Immigrant Women Program.*

GAIL PENDLETON,  
*ASISTA.*

LENI MARIN,  
*Family Violence Prevention Fund.*

Mr. FEINGOLD. Mr. President, I would like to read from this letter to give my colleagues a better understanding of whom this provision of the bill will affect. According to this letter:

Section 227(c) poses grave risks to many immigrant women and children who, in the absence of a stay of removal, will be deported and delivered into the hands of human traffickers, batterers, and persecutors.

Let me read one example the National Network provided in its letter of a case in which the availability of a stay of removal was essential. Let me tell you about Lioudmila, Anastasia, and Aleksandra Krotova. According to the letter:

Lioudmila Krotova and her children Anastasia and Aleksandra fled Russia after

they were assaulted by skinheads and their synagogue was stormed. Ms. Krotova reported both attacks to the police, but the police failed to take any meaningful action. After the Krotovas fled Russia, skinheads beat a close family friend to death and also beat the Krotovas' relative so brutally that they broke his hip.

After entering the U.S., Ms. Krotova applied for asylum. An immigration judge denied her application, and the [Board of Immigration Appeals] affirmed the judge's decision. Ms. Krotova then appealed to the U.S. Court of Appeals and obtained a temporary stay of removal. The U.S. Court of Appeals eventually reversed the BIA decision and concluded that the harassment, discrimination and violence experienced by Ms. Krotova on account of her being Jewish compelled the finding that she suffered past persecution.

This is just one example.

The letter also talks about a woman who was ordered removed while her husband was serving overseas in the Texas National Guard and whose deportation would have left her U.S. citizen children no parent to care for them. And there are others.

If my amendment is not adopted, these are the types of people who will be affected, who will be sent back to countries where they could be killed or torn from their families.

I assume those who support this provision want to ensure immigrants cannot file frivolous appeals in order to delay their deportation, and I wholeheartedly agree with that goal. But this provision is not necessary to accomplish that worthy goal. The Federal courts do not grant stays of removal when immigrants have little likelihood of success. In fact, several of the appellate decisions that have rejected the clear and convincing evidence standard at issue here have gone on to apply the four-part test I discussed earlier and denied stays of removal pending appeals. Nonetheless, they have denied these stays in some cases because the immigrants had little likelihood of success or because the immigrant could safely return to their home countries and await the outcome. So this provision is really just a solution in search of a problem.

This amendment is about basic due process and fairness. It is about giving individuals who have been turned down at the administrative level the opportunity to seek meaningful judicial review. And it is about making sure that those who seek asylum in this country and who have meritorious claims are not returned to persecution or even murder in their home countries before they can present their case to a Federal court.

That is why a long list of organizations have come out in support of this amendment, including the U.S. Conference of Catholic Bishops, World Relief, the Leadership Conference on Civil Rights, the National Council of La Raza, and more than 50 others.

Mr. President, I ask unanimous consent that a full list of the organizations that support this amendment be printed in the RECORD immediately following my statement.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. FEINGOLD. Mr. President, everybody in this Chamber, I hope, will consider supporting this amendment. I urge its adoption.

I reserve the remainder of my time.

EXHIBIT 1

LIST OF ORGANIZATIONS THAT SUPPORT  
FEINGOLD-BROWNBACK AMENDMENT NO. 4083

American Bar Association  
American Civil Liberties Union  
American Immigration Lawyers Association  
American Jewish Committee  
Amnesty International  
Asian American Justice Center  
Asian Pacific American Legal Center, Los Angeles, CA  
Bernardo Kohler Center, Inc., Austin, Texas  
Casa de Esperanza, Bound Brook, New Jersey  
Catholic Charities USA  
Center for Gender and Refugee Studies, Univ. of California, Hastings College of the Law  
Center for National Security Studies  
Chicago Bar Association  
Church World Service Immigration and Refugee Program  
Episcopal Church  
Episcopal Migration Ministries  
Families for Freedom, Brooklyn, NY  
Hebrew Immigrant Aid Society  
Hispanic National Bar Association  
Human Rights First  
Human Rights Watch  
Immigrant Law Center, St. Paul, MN  
Immigrant Legal Advocacy Project, Portland, ME  
Immigrant Legal Resource Center  
Immigration Unit of Greater Boston Legal Services  
Institute of the Sisters of Mercy of America  
Jubilee Campaign USA, Inc.  
Leadership Conference on Civil Rights  
Legal Momentum  
Mexican American Legal Defense and Education Fund  
National Advocacy Center of the Sisters of the Good Shepherd  
National Council of La Raza  
National Immigration Forum  
National Immigration Law Center  
National Immigration Project  
National Network to End Violence Against Immigrant Women  
New York State Defenders Association Immigrant Defense Project  
Open Society Policy Center  
Opening Doors Immigration Services, Denton, TX  
Presbyterian Church (USA), Washington Office  
Refugee Resource Project  
Service Employees International Union  
Sisters of Mercy of the Americas  
Sikh American Legal Defense and Education Fund  
Sikh Coalition  
South Asian American Leaders of Tomorrow  
Tahirih Justice Center  
Union for Reform Judaism  
United Methodist Church, General Board of Church and Society  
Unitarian Universalist Service Committee  
U.S. Committee for Refugees and Immigrants  
U.S. Conference of Catholic Bishops  
Washington Defenders Association Immigrant Defense Project, Seattle, WA  
World Relief, the humanitarian arm of the National Association of Evangelicals USA

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I have been advised that the objection to setting aside amendments has been withdrawn, so we will be able to stack the votes on the remainder of the amendments.

While I have recognition, I would like to comment briefly in support of the amendment offered by the Senator from Wisconsin. The standard of clear and convincing evidence, unless prohibited as a matter of law, is a very tough standard and I don't think ought to be imposed here. It is preferable to use the regular four-part standard, which includes a requirement that the petitioner is likely to succeed on the merits.

This particular matter has been commented on by a number of very distinguished jurists. Judge Frank Easterbrook, appointed by President Reagan, said that the interpretation in the current bill—the interpretation that this amendment is designed to change—could require removal of an alien who was both likely to prevail in court and likely to face serious injury or death if deported.

Judge Bruce Selya from the First Circuit, appointed by President Reagan, said that the very situation the current bill would create is, in his words, “absurd” and “Kafkaesque.”

Judge Jerry Smith, another Reagan appointee on the Fifth Circuit Court of Appeals, said that the situation the bill would create is “peculiar, at best.”

I believe the interest of justice would be promoted by allowing the courts to utilize the current standards for granting stays and not imposing this extraordinary standard.

I yield the floor.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I am deeply grateful to the chairman, especially for his support of this amendment but also for his leadership on this legislation. It is extremely important to this country. I know he worked so hard in committee to come up with a good package that I am able to support. I particularly thank him for his support of the amendment.

I yield such time as the Senator from Kansas requires. I thank him for his tremendous help on this amendment.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. BROWNBACK. Mr. President, I thank my colleague from Wisconsin for bringing forward this amendment and for highlighting the issue. I hope we can get a strong vote from all of our colleagues on the amendment.

We heard about the issue of clear and convincing evidence that one has to meet to keep from being sent home even though the standard is lower for one to actually win the case. I don't know anywhere else in the law where one has to meet a higher standard at that point in the system than one would on final adjudication. This is really backward in that particular situation.

I don't want to talk about that in particular, as I do the specific situations that can arise and we can see easily enough happen. I have been to one of the detention facilities in New York, a place called Wackenhut—an incredible name for a detention facility. I have been to detention facilities on the border. I met with people who sought asylum.

I recognize the problem a number of people are targeting on this issue—and I think it is a legitimate concern to raise—that too many people are claiming asylum status who are not legitimate asylees, and they are not going to win in the system and are flooding the system with requests. That is a legitimate concern. One can go into some of these detention facilities and find a lot of people who are saying they are seeking asylum and asylum status, and on its face one can question whether it is a legitimate case. That is a proper issue to raise, and I think the people who put forward this amendment are targeting a correct issue.

Having said that, I have also worked with a number of people who, if you take them in this situation and say: You can't meet clear and convincing on the initial status, you are going home and wait there before you can come here for asylum status, and we send them home, they are going to prison or they are likely to disappear. They are likely to disappear in that situation. I say disappear as in being killed in those host countries to which they would go back. We can think of some pretty easy ones. I had six refugees from North Korea in my office last week. If they go home, they are in the Gulag and probably will not survive.

What about Iran? What happens if someone from Iran comes to this country and seeks asylum status, and we say it doesn't look clear and convincing to us? How about Zimbabwe under Mugabe? That could happen in this situation. If you are in a family that has been opposed to his leadership in that country, and we say: Well, I don't know, and you are saying it is an uncle who caused a situation about which Mugabe is concerned, and we say: I don't know, did the uncle do much; we don't have a factual record on this—he doesn't have a factual record at all because they didn't let him leave with any factual record; you are going on his testimony, and he has to meet clear and convincing evidence—it would be very logical for a judge to say: You don't meet clear and convincing evidence. It is your word on this. We don't have a factual record. We can't get to a factual record. You are going back to Zimbabwe. And if he goes back to Zimbabwe, it is highly likely he will disappear, as in being killed. This guy isn't going to make it, isn't going to survive.

In that situation, we should have the standard the same on the stay as on the final injunction, particularly at this early stage in the process and particularly when somebody's physical life is in jeopardy.