

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 9 Reentry into State by Certain Persons

**SPONSOR(S):** Civil Justice Subcommittee; Trujillo

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 118

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 4 N, As CS	Malcolm	Bond
2) Justice Appropriations Subcommittee	8 Y, 3 N	McAuliffe	Lloyd
3) Judiciary Committee			

### SUMMARY ANALYSIS

Federal immigration laws generally prohibit an alien who has been denied admission or removed from the United States, or has departed the United States while an order of removal is outstanding, from reentering the United States for a specified period of time. This prohibition does not apply if the Attorney General has consented to the alien reapplying for admission or advance consent for reapplying for admission is not required under prior immigration laws. An alien who violates this prohibition is subject to a fine and two years in prison.

The committee substitute creates a nearly identical prohibition in state law for individuals that reenter the state after being denied admission or removed from the United States or after departing the United States while an order of removal is outstanding. Like federal law, the prohibition in the committee substitute does not apply if the United States Attorney General has expressly consented to the person reapplying for admission or if advance consent for reapplying for admission is not required under prior federal law. A violation of the prohibition is a third-degree felony.

The Criminal Justice Impact Conference met January 5, 2016, and determined this committee substitute will have no impact on state prison beds. The committee substitute does not appear to have a fiscal impact on local governments.

The committee substitute has an effective date of October 1, 2016.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Removal Proceedings<sup>1</sup>

An alien<sup>2</sup> may be removed from the United States for a variety of reasons, such as entering the country unlawfully, overstaying a visa, or committing a crime.<sup>3</sup> Removal proceedings are administrative proceedings under the jurisdiction of the Executive Office for Immigration Review (EOIR), which is part of the Department of Justice.<sup>4</sup> Specifically, removal proceedings are held before the Immigration Courts and any administrative appeals go to the Board of Immigration Appeals.<sup>5</sup>

If the removal hearing results in an order to remove an alien from the country, the alien may seek administrative review of the removal order.<sup>6</sup> An alien may be eligible for relief from removal or protection while in removal proceedings. Examples of such relief or protection include adjustment to permanent resident status, waiver of inadmissibility, asylum, and withholding of removal.<sup>7</sup>

When a removal order becomes final, the alien must be removed from the United States within 90 days. This period is called the “removal period,” during which time the alien is usually detained.<sup>8</sup> If the alien is not removed within the removal period, the alien may be released subject to supervision.<sup>9</sup> However, “any alien subject to a final order of removal who willfully fails or refuses to depart from the U.S., make timely application in good faith for travel or other documents necessary for departure, or present for removal at the time and place required by the Attorney General” may be fined or imprisoned.<sup>10</sup>

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<sup>1</sup> “Beginning with proceedings commenced on April 1, 1997, deportation and exclusion proceedings have been replaced by removal proceedings.” United States Department of Justice, Executive Office for Immigration Review, *Immigration Court Practice Manual*, 109-110, available at [http://www.justice.gov/sites/default/files/pages/attachments/2015/05/20/practice\\_manual\\_review.pdf#page=11](http://www.justice.gov/sites/default/files/pages/attachments/2015/05/20/practice_manual_review.pdf#page=11) (last visited Oct. 26, 2015); see 8 C.F.R. §§ 1003.12 et seq., 1240.1 et seq. “However, Immigration Judges continue to conduct deportation and exclusion proceedings in certain cases that began before April 1, 1997. The procedures in deportation and exclusion proceedings are generally similar to the procedures in removal proceedings. However, deportation and exclusion proceedings are significantly different from removal proceedings in areas such as burden of proof, forms of relief available, and custody.” *Immigration Court Practice Manual*, supra note 1, at 2.

<sup>2</sup> “Alien” is defined as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101 (2014).

<sup>3</sup> 8 U.S.C. § 1229a(a)(2) (2006) (citing 8 U.S.C. §§ 1182(a) and 1227(a)).

<sup>4</sup> See 8 U.S.C. § 1101(b)(4). The Department of Homeland Security enforces federal immigration laws, but the Immigration Courts and the Board of Immigration Appeals are responsible for independently adjudicating cases under the immigration laws. *Immigration Court Practice Manual*, supra note 1, at 2.

<sup>5</sup> United States Department of Justice, Executive Office for Immigration Review Organization Chart, <http://www.justice.gov/eoir/eoir-organization-chart#9,196> (last visited Oct. 26, 2015).

<sup>6</sup> 8 U.S.C. § 1252 (2005). Federal law provides an expedited removal process for certain aliens arriving at a port of entry. Administrative and judicial review of these proceedings is limited. See *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1081 (9th Cir. 2011) (citing 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 1235.3(b)(2)(i)).

<sup>7</sup> 8 CFR § 1240.11(a), (c), and (d).

<sup>8</sup> 8 U.S.C. § 1231 (2006). The removal period begins on the latest of the following: the date the order of removal becomes administratively final; if the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order; or if the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement. *Id.*

<sup>9</sup> *Id.* at (a)(3).

<sup>10</sup> 8 U.S.C. ss. 1253, 1324d.

## Removal Statistics

In fiscal year 2014, United States Immigration and Customs Enforcement (ICE) conducted 315,943 removals, of which 102,224 were of aliens apprehended in the interior of the United States.<sup>11</sup> 85 percent of all interior removals involved aliens previously convicted of a crime.<sup>12</sup> Although ICE's interior enforcement operations focus on aliens with criminal convictions, these operations have been negatively impacted by a number of factors such as local and state jurisdictions declining to honor ICE detainers, recent court rulings requiring bond hearings in certain immigration cases<sup>13</sup>, and lack of cooperation from foreign governments.<sup>14</sup>

## Application for Consent to Reapply for Admission by Removed Aliens

After an alien has been removed from the United States, he or she is inadmissible to the United States unless he or she has remained outside of the United States for five consecutive years after removal. If convicted of an aggravated felony, the alien must remain outside of the United States for twenty consecutive years before he or she is eligible to re-enter the United States. After the alien has spent the required time outside the United States, he or she may apply for admission to the United States but must present evidence that he or she has remained outside the United States.<sup>15</sup> An alien who does not present proof of absence from the United States or who seeks to enter the United States prior to the the required absence must apply to the Attorney General for permission to reapply for admission to the United States.<sup>16</sup> Permission to reapply for admission is at the discretion of the Attorney General.<sup>17</sup>

## Reentry of Removed Aliens

Federal law prohibits an alien “who has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding” from reentering the United States.<sup>18</sup> This prohibition does not apply to an alien who “prior to his or her reembarkation at a place outside the United States or application for admission . . . the Attorney General has expressly consented to such alien's reapplying for admission.”<sup>19</sup> An alien previously excluded and deported may establish instead that he or she was not required to obtain the advance consent for reapplying for admission under any prior immigration law.<sup>20</sup> An alien who violates this provision may be subject to a fine and up to 2 years in prison.<sup>21</sup>

## Effect of Proposed Changes

The committee substitute creates s. 877.28, F.S., to make it a third-degree felony<sup>22</sup> for a person who has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, to enter or at any time be found in the state. This section does not apply to a person who “prior to his or her reembarkation at a place outside the United States or his or her application for admission from foreign contiguous territory, the United

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<sup>11</sup> United States Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report, Fiscal Year 2014*, 7 (Dec. 19, 2014) available at <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf> (last visited Oct. 26, 2015).

<sup>12</sup> *Id.*

<sup>13</sup> *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013).

<sup>14</sup> “ICE often cannot repatriate individuals within the legally prescribed time limits because their countries of origin or nationality fail to issue required travel documents in a timely manner. [. . .] In these cases, ICE is generally required by law to release individuals from custody.” *ICE Enforcement and Removal Operations Report*, *supra* note 11, at 6.

<sup>15</sup> 8 C.F.R. § 1212.2 (2015).

<sup>16</sup> *Id.*

<sup>17</sup> 8 U.S.C. § 1182(h)(2) (2013).

<sup>18</sup> 8 U.S.C. § 1326(a)(1) (2015).

<sup>19</sup> *Id.* at (a)(2)(A).

<sup>20</sup> 3A C.J.S. Aliens § 1540 (citing 8 U.S.C. § 1326(a)(2)(B)).

<sup>21</sup> 8 U.S.C. § 1326(a). The criminal penalties for reentry after removal may be up to 20 years in prison if the removal follows certain criminal convictions and acts. *See id.* at (b).

<sup>22</sup> A third-degree felony is punishable by up to five years in prison and a \$5,000 fine. Multiple felony convictions may result in enhanced or mandatory minimum sentences. ss. 775.082, 775.083, and 775.084 F.S.

States Attorney General has expressly consented to such person's reapplying for admission." Nor does this section apply to a person previously denied admission and removed if he or she establishes that he or she was not required to obtain such advance consent to reapply for admission from the Attorney General under federal law.

This provision is nearly identical to federal law that prohibits reentry of removed aliens into the United States.<sup>23</sup>

The committee substitute provides an effective date of October 1, 2016.

**B. SECTION DIRECTORY:**

Section 1 creates s. 877.28, F.S., related to reentry into the state after removal.

Section 2 provides an effective date of October 1, 2016.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The committee substitute does not appear to have any impact on state revenues.

2. Expenditures:

The committee substitute creates a new third-degree felony for persons who reenter the state after being removed pursuant to federal immigration laws. The Criminal Justice Impact Conference met January 5, 2016, and determined this committee substitute will have no impact on state prison beds. In Fiscal Year 2014-15, the incarceration rate for an unranked, third degree felony was 9.9%.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The committee substitute does not appear to have any impact on local government revenues.

2. Expenditures:

The committee substitute does not appear to have any impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The committee substitute does not appear to have any direct economic impact on the private sector.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The committee substitute does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise

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<sup>23</sup> See "Reentry of Removed Aliens" discussed above.  
**STORAGE NAME:** h0009b.JUAS  
**DATE:** 1/13/2016

revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

## 2. Other:

In 2012, the United States Supreme Court in *Arizona v. U.S.* struck down portions of an Arizona immigration statute on federal preemption grounds.<sup>24</sup> Specifically, Section 3 of the Arizona law created a new misdemeanor for the willful failure to complete or carry an alien registration document in violation of federal law. The Court held that because of the existing comprehensive federal statutory framework related to alien registration, the federal government occupied the field of alien registration and explained that

Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders. If § 3 . . . were valid, every State could give itself independent authority to prosecute federal registration violations, “diminish[ing] the [Federal Government]’s control over enforcement” and “detract[ing] from the ‘integrated scheme of regulation’ created by Congress.” Even if a State may make violation of federal law a crime in some instances, it cannot do so in a field (like the field of alien registration) that has been occupied by federal law.<sup>25</sup>

The Court concluded, “Were [Section] 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials . . . determine that prosecution would frustrate federal policies.”<sup>26</sup> Consequently, Section 3 was preempted.

## B. RULE-MAKING AUTHORITY:

The committee substitute does not appear to create a need for rulemaking or rulemaking authority.

## C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 18, 2015, the Civil Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by:

- Changing the offense from requiring mere presence in the state to requiring re-entry after lawful deportation;
- Providing a lawful re-entry defense if re-entry into the United States was authorized by the United States government; and
- Changing the offense level from a first degree felony to a third degree felony.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

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<sup>24</sup> 132 S. Ct. 2492.

<sup>25</sup> *Id.* at 2502 (quoting *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 288–289 (1986)).

<sup>26</sup> *Id.* at 2492.