

Victories on ACLU Priorities in S. 744

S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act, contains a number of provisions which, if enacted, would be significant advancements in civil rights and civil liberties. The ACLU's work on each of the gains below included the development of policy recommendations, drafting legislative text, developing fact sheets, summaries, and case examples, pitching media stories, as well as directly lobbying both Democrats and Republicans in support of key reforms, often in partnership with other leading human and civil rights organizations. The bill that emerged from the Senate would do the following:

I. Legalization

- *Provides a broad roadmap to earned citizenship, including an expedited process for DREAMers*

The passage of S.744 demonstrated strong bipartisan support for a broad, accessible path to citizenship to bring undocumented immigrants out of the shadows. Title II allows individuals to apply for Registered Provisional Immigrant (RPI) status (Sec. 2101), which grants work authorization and legal status, and after 10 years, an opportunity to adjust to permanent resident status (Sec. 2102) and apply for naturalization three years after that. It also includes a version of the DREAM Act that would make current beneficiaries of the administration's Deferred Action for Childhood Arrivals program (DACA) eligible for an expedited path to citizenship, lasting as few as five years, and would allow others who did not qualify under DACA to apply (Sec. 2103). Unlike DACA, it contains no upper age limit for applicants, allowing anyone who was under the age of 16 when they entered the U.S. to apply if they satisfy the education or military service requirements.

- *Ensures that DREAMers and other work-authorized immigrants have access to the licenses they need to fully participate in the workforce.*

Sec. 3015, as modified by Coons Amendment 10, prohibits the denial of a professional, commercial, or business license on the basis of immigration status to a person who is authorized for employment in the U.S. Access to such licenses allows work-authorized immigrants, including DREAMers, to meet the work and income requirements necessary to continue on the path to citizenship.

- *Strengthens the U.S. asylum system by eliminating the arbitrary and unfair one-year filing deadline.*

Sec. 3401 eliminates the one-year deadline for filing an asylum application. This arbitrary deadline unnecessarily bars many genuine refugees who have fled religious, political or other persecution in their home countries, leaving many refugees in legal limbo and too often dividing families. The filing deadline also undermines the efficiency of the asylum and immigration court adjudication system by clogging immigration courts, delaying adjudication, and diverting time and resources from the asylum and court systems.

II. Discretion

- *Restores some judicial discretion and gives DHS discretion to make more individualized decisions in immigration proceedings*

Sec. 2313 gives Immigration Judges discretion to terminate removal proceedings and DHS officers to waive certain grounds of removability or inadmissibility when 1) not doing so would be contrary to the public interest, 2) there would otherwise be hardship to the noncitizen's U.S. citizen or lawful permanent resident (LPR, who has a "green card") parent, spouse, or child, or 3) the noncitizen is eligible for naturalization.

- *Provides generous waivers to applicants for RPI status*

Sec. 2101 provides a waiver that would allow individuals to apply for RPI status for humanitarian purposes, to ensure family unity, or if it is otherwise in the public interest, even if they are deemed ineligible as a result of designated inadmissibility grounds or at least three misdemeanor convictions.

- *Gives families the opportunity to reunite following deportation*

Sec. 2101 also provides that certain individuals who have been deported—including DREAMers and parents, children or spouses of U.S. citizens or lawful permanent residents—may return to their families in the U.S. under a discretionary waiver.

III. Detention

- *Expands the use of cost-effective, proven alternatives to detention*

Sec. 3715 establishes secure alternatives to detention (ATD) programs in every field office to help ensure appearances at immigration proceedings. It directs DHS to contract with community-based organizations and other nongovernmental organizations to provide alternatives, and requires the Secretary to make individualized determinations, reviewed monthly, to determine level of supervision. It also clarifies that secure alternatives can be used to constitute custody for the purposes of 236(c) and detention for the purposes of 235(b), so that individuals subject to mandatory custody/detention can be considered for more cost-effective alternatives.

- *Requires greater oversight and accountability for immigration detention*

Sec. 3716 requires detention facilities to comply with applicable detention-conditions standards and strengthens the oversight and compliance mechanisms for immigration detention facilities, including by directing facility closure/contract termination for persistent and substantial noncompliance and making records relating to privately run facilities subject to FOIA. It also requires DHS to consult with NGOs regarding conditions in specific facilities, and requires DHS to report to Congress on their inspection and oversight activities.

- *Limits the use of solitary confinement in immigration detention*

Sec. 3717, as modified by Blumenthal Amendment 2, limits the use of solitary confinement, or the practice of placing a person in physical and social isolation for 22 to 24 hours a day with little or no human contact, to discrete situations and brief periods of time with the least restrictive conditions practicable. Generally, it limits time in solitary to 15 days and requires access to counsel, medical care, individualized assessments regarding placement in solitary, and channels for challenging that placement, as well as oversight of facility practices regarding the use of solitary. It also bars the use of

solitary confinement for children under 18 and those with serious mental illness (with limited exceptions).

- *Provides prompt custody determinations and bond hearings for all individuals who are detained.*

Sec. 3717 ensures that detainees receive prompt custody determinations and bond hearings. It requires that within 72 hours of a person being detained, DHS file a Notice to Appear (NTA) with an immigration court and make a custody determination specifying the reason for continued custody and the amount of any bond. It also requires a bond hearing before an IJ within 6 days of an individual being taken into custody. The IJ has de novo review at the initial custody hearing for all aliens except those "deportable" under 236A (national security) and 236(c) (crimes). The provision introduces an improved standard for bond determinations, bringing it in line with the standard for pretrial release in the criminal context, and addresses the problem of prolonged detention without periodic review by a neutral adjudicator by directing a de novo custody redetermination hearing before an IJ every 90 days.

- *Increases transparency by mandating that basic information about detained individuals be maintained, and that non-identifying data be reported to Congress regularly*

Sec. 3720, as modified by Coons Amendment 6, requires ICE, EOIR, CBP, and USCIS to better maintain basic data about detained immigrants, including authority for custodial detention; place of detention and apprehension; number of days in each detention location; immigration charges against the alien; the status of the alien's removal proceedings; internal custody determinations by ICE and the basis therefor; the reasons for ultimate release, if applicable; and whether the alien is represented by counsel. It also requires regular summary reports on this data to Congress.

IV. Counsel and Access to Justice

- *Ensures that individuals who are unable to represent themselves in removal proceedings are provided with appointed counsel*

Sec. 3502 provides that the Attorney General has general authority to appoint counsel in removal proceedings at his or her discretion, and requires the appointment of counsel, at the expense of the government if necessary, for "unaccompanied alien children" (UACs) and individuals with serious mental disabilities, as well as other "particularly vulnerable" immigrants.

- *Requires access to a Legal Orientation Program for all immigration detainees*

Sec. 3503 codifies the Office of Legal Access Programs at the Department of Justice's Executive Office for Immigration Review (EOIR), which administers the Legal Orientation Program (LOP), and requires that LOP be made available to all immigration detainees within five days of entering custody. It also requires LOP to identify UACs, individuals with serious mental disabilities, and other particularly vulnerable immigrants who may require appointed counsel. LOPs help make immigration proceedings more efficient and cost-effective by providing much-needed education to detainees on immigration court procedure.

- *Provides individuals in removal proceedings with better access to information about their cases by requiring DHS to turn over copies of the individuals' Alien Files (A-Files)*

Currently, many individuals facing removal are able to obtain the information in their A-files only, if at all, through the very slow and backlogged Freedom of Information Act (FOIA) process. FOIA requests place a heavy burden on individuals and on courts by slowing down the process and clogging already

overburdened dockets. Sec. 3502, as modified by Coons Amendment 5, requires DHS to provide the A-file and other relevant documents not protected by privilege to an individual at the beginning of his or her removal proceedings, and appropriates funds from the CIR Trust Fund as necessary.

- *Gives those whose application for RPI status has been denied or whose RPI status has been revoked the opportunity to seek administrative and judicial review.*

Sec. 2104 provides for thorough administrative and judicial review of RPI application denials or RPI status revocations. No removals of applicants could take place before administrative review is complete. Judicial review would take place in federal district court in the circuit where an applicant resides. Adverse determinations made in the district court could be appealed to the circuit court of appeals, and unlawful presence would not accrue during the review.

- *Improves immigration court efficiency – and access to due process - by increasing staffing levels for much-needed court personnel*

Sec. 3501 requires annual increases in personnel in the immigration court system, including Immigration Judges, staff attorneys, and other support staff. The immigration court system is currently severely overburdened and under-resourced, and faces an appalling backlog of cases – over 335,000 as of July 2013, with an average processing time of 504 days— forcing immigrants in proceedings to languish in legal limbo for months or years. Additional staffing is necessary to address this backlog and improve efficiency in the system.

V. Border Enforcement

- *Implements new oversight and accountability mechanisms for use of force at the border*

Sec. 1111 requires DHS to issue policies governing the use of force in consultation with the DOJ Civil Rights Division, and to establish procedures for investigating complaints, disciplining officers, and reviewing all incidents. It also requires reporting of each use of force. Sec. 1112 requires training for CBP officers, Border Patrol agents, and ICE officers and agents, to be developed in collaboration with the DOJ Civil Rights Division.

- *Limits search and seizure without a warrant along the northern border*

Sec. 1116 limits immigration officers' warrantless search and seizure of vehicles to within 25 air miles of the northern border, extending up to 100 miles only if the DHS Secretary certifies it is necessary. It also limits the ability to enter private lands to within 10 miles of the northern border, or 25 miles if the DHS Secretary certifies it is necessary. This provision was included as part of the Corker-Hoeven border package. While ACLU supported a more expansive amendment offered by Senator Leahy (Amendment 1410) that would have put the same limits in place at the southern border, this still represents a significant step forward for communities near the northern border.

- *Reduces the likelihood of migrant deaths along the border with distress beacons*

Sec. 1107 provides for the deployment of up to 1,000 movable distress beacons along both the northern and southern borders, in areas where CBP has determined that migrant deaths are likely to occur due to climate and environmental conditions. Beacons have been a priority for border community coalitions which include ACLU border affiliates.

- *Limits dangerous deportation practices along the Southern border*

Sec. 1122, as modified by a second degree amendment to Coons Amendment 2, limits DHS's use of dangerous deportation practices that make migrants more vulnerable to violence and exploitation. It requires DHS to certify to Congress that it will only remove people through a Southern border entry or exit point during daylight hours, unless justified by a compelling government interest or a local repatriation agreement, or if the individual is not an unaccompanied minor and is either 1) deported or removed through the same sector as where he or she was apprehended or 2) agrees to be removed in such a manner. It also prohibits the confiscation of lawful, nonperishable belongings, specifying that such property be returned to migrants prior to their removal, to the extent practicable. While these provisions represent significant safety improvements for migrants, ACLU supported even stronger protections in Senator Coons' original amendment, which included fewer exceptions to the prohibition on deportations after dark and required the return of property in all cases, not only "to the extent practicable."

VI. Other Enforcement

- *Creates significant due process and privacy protections in employment verification*

The ACLU opposes the creation of a mandatory system requiring all employers to check government databases before hiring workers (known as E-Verify) because errors in the system create barriers to work and because E-Verify may become a national ID database. While we were not able to strike E-Verify from the Senate bill, we were able, in Sec. 3101, to gain strong protections for workers and some limits on the use of the system. We also supported successful amendments to grant notice to workers when they are denied a job, require better accuracy in the system and create an ombudsman's office to help workers navigate the system.

- *Places important restrictions on immigration enforcement in sensitive locations*

Sec. 3721, as modified by Blumenthal Amendment 8, codifies existing limitations on enforcement activities in sensitive locations, with exceptions for exigent circumstances and properly approved operations. Raids and other immigration enforcement actions at sensitive locations, including schools, hospitals, and places of worship, create fear around critical and often life-saving services, putting children and other particularly vulnerable individuals at risk. Limiting enforcement actions in these areas will ensure that children can go to school, families can attend religious services, and that individuals can seek crucial medical treatment without the threat of apprehension and detention by ICE or CBP.

- *Creates the first-ever statutory ban on the use of racial profiling in immigration enforcement*

Sec. 3305 prohibits federal law enforcement officers from using race or ethnicity in making law enforcement decisions unless a specific suspect description exists, trustworthy information connects a specific race or ethnicity to a specific crime, criminal organization or scheme, or is authorized by U.S. law including the Constitution in the context of national security and border security. It also requires DHS to collect data, study, and issue regulations regarding the use of race, ethnicity and other suspect classes by its officers. While the ACLU advocated for broader restrictions on racial profiling, to include religion and national origin in addition to race and ethnicity, and to eliminate current border and national security exceptions, the bill nonetheless represents a major step forward.

- *Provides important protections for immigrant workers*

Sec 3101 remedies the Supreme Court's harmful 2002 decision in *Hoffman Plastic Compound, Inc. v. NLRB* by establishing a legislative fix for the Hoffman case that would allow remedies for employment discrimination suffered by undocumented workers. This provision would prohibit the denial of back pay or any other damages on the basis of the employee's immigration status.

- *Limits border-prosecution reimbursements from the federal government to jurisdictions where law enforcement officers have behaved unlawfully in making immigration apprehensions to ensure that those jurisdictions are not rewarded for discriminatory policing and civil rights abuses*

The Southwest Border Region Prosecution Initiative (SWPI) is a DOJ program that reimburses state and local governments for the prosecution and detention of individuals in state court in cases initiated by the federal government. Sec. 1108, which directs DOJ to reimburse jurisdictions for costs incurred due to prosecution and pre-trial services and detention, clerical support, and public defenders' services associated with the prosecution costs of federally initiated immigration-related criminal cases declined by local offices of the U.S. Attorneys, includes an important exception, added in Blumenthal Amendment 10, indicating that reimbursement can be withheld from jurisdictions that the Attorney General has reason to believe have engaged in "unlawful conduct in connection with immigration-related apprehensions."