

ACLU Vote Recommendations

S. 744 (Title III) Senate Judiciary Committee Markup

Thursday, May 16, 2013

It is expected that the Senate Judiciary Committee will today begin to take up amendments to the Title III of S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act – provisions relating to border enforcement. The American Civil Liberties Union, the nation’s largest and oldest civil liberties organization, with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide, urges the members of the Senate Judiciary Committee to support or oppose amendments as noted below. In doing so, we urge members to preserve a bill that creates a welcoming roadmap to citizenship for aspiring Americans living in and contributing to the nation. Fundamental fairness as guaranteed by the Constitution requires that these individuals be brought within the legal embrace of U. S. citizenship. At the same time, the legislation must transform wasteful and abusive border enforcement practices and end state and local intrusions into federal immigration policy and enforcement. The positions we urge members to take on the following amendments are guided by these principles.

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SUPPORT

- **Sen. Blumenthal Amendment 2**
 - This amendment would establish a framework for the use of solitary confinement in housing immigration detainees, place presumptive limits on the use of such confinement in non-disciplinary settings, and require the Department of Homeland Security (“DHS”) to develop effective oversight mechanisms.
- **Sen. Blumenthal Amendments 3, 4, and 5**
 - These three amendments are necessary to prevent human trafficking and other abuses of internationally recruited workers. Amendment 3 improves protections by holding bad apple employers responsible for recruitment abuse under certain circumstances. Amendment 4 ensures the Department of Homeland Security issues regulations to implement the Act’s anti-trafficking and recruitment provisions in consultation with the Department of Labor. And Amendment 5 increases the transparency in the international recruitment of workers.
- **Sen. Blumenthal Amendment 8; Sen. Coons Amendment 13**
 - This amendment codifies limitations that currently exist in ICE and CBP policies regarding enforcement actions, including “raids”, by ICE and CBP at sensitive community locations. Off-limits locations include schools, hospitals and health clinics, places of worship, public religious ceremonies (Coons 13 only), community centers (Coons 13 only), public demonstrations (Coons 13 only), public gatherings attended by parents and children (Coons 13 only), organizations assisting crime victims (Coons 13 also includes organizations assisting children, pregnant women, or disabled individuals), and other locations that could reasonably viewed as sensitive (Blumenthal 8 requires other locations to be specified by the Secretary).

SUPPORT (CONT.)

- Sen. Blumenthal Amendment 13
 - As currently proposed, this amendment codifies vital current practices within and between the DHS and the Department of Labor which ensure that enforcement of our nation's immigration laws does not undermine enforcement of our national labor and employment laws.
- Sen. Blumenthal Amendment 14
 - This amendment restores integrity to the immigration removal process by attaching immigration consequences only to conduct that was a basis for removal at the time it was committed; deferring to the criminal justice process and imposing immigration penalties only when a criminal court judge has found someone guilty and has decided the conviction should remain on their record; providing due process protections; and ensuring that immigration penalties are proportionate to the seriousness of the criminal offense.
- Sen. Blumenthal Amendment 18
 - This amendment makes it an unfair immigration-related employment practice for employers to withhold employment records that are required under Federal, State, or local law from employees who request them. The amendment does not create a new obligation on employers, as they are already required to maintain these records. It simply requires employers to disclose their records to employees who request them.
- Sen. Coons Amendment 1
 - S. 744 currently provides that the Secretary may, but is not required, to develop protocols to alert a worker when an E-verify query has been made concerning him/her. The bill currently requires the Secretary to develop procedures for notifying the worker directly of further action notices, and confirmations/non-confirmations. This amendment makes the protocol to notify workers of queries mandatory, as well.
- Sen. Coons Amendment 5
 - This amendment requires the Department of Homeland Security to provide any immigrant placed in deportation proceedings with a copy of certain immigration records immediately.
- Sen. Franken Amendments 1, 2, 3, 4, 5, and 6
 - These amendments require increased accuracy standards in E-Verify and help workers and small businesses address errors in the system once they occur.
- Sen. Hirono Amendment 19
 - This amendment expands protections from racial profiling on the basis of national origin and religion.
- Sen. Hirono Amendment 22
 - This Amendment requires, among other things, that all unaccompanied minors be transported to the care of the Office of Refugee Resettlement no later than 72 hours after their initial detention, absent exigent circumstances, and that the minors are immediately informed of their rights – including their right to confer with counsel and family while in custody and to report any abuse or misconduct they experienced.

OPPOSE

- Sen. Graham Amendment 2
 - This amendment would require wasteful prioritization of immigration enforcement against all visa overstays without regard for their individual circumstances.

OPPOSE (CONT.)

- Sen. Grassley Amendments 26 and 27
 - These amendments would strip from the bill two important reforms to protect stateless persons and asylum-seekers, the latter from the fundamentally unfair one-year filing deadline. Amendment 27 would also impose an unreasonable barrier to legalization for aspiring citizens without examining their individual circumstances.
- Sen. Grassley Amendment 30
 - This Amendment requires the Secretaries of Homeland Security and Treasury and the Commissioner of the Social Security Administration to establish a program to share information among such agencies that may or could lead to the identification of unauthorized aliens including the use of no-match letters and earnings information. It undermines fundamental confidentiality protections, discourages reporting of earnings information and promotes work “off the books.” The amendment will reduce federal tax revenue at a critical time and erode longstanding federal laws protecting American’s privacy.
- Sen. Grassley Amendment 31
 - This amendment requires a weekly report from CIS to ICE with detailed information about every individual (and employer) who received a final non-confirmation in the E-Verify system. It also requires the Secretary to use this information to enforce compliance with immigration laws and thus represents an expansion of the E-Verify system and its accompanying inherent problems for privacy and mission creep.
- Sen. Grassley Amendment 34; Sen. Hatch Amendment 1
 - These amendments amend 18 USC 1028 by stating that the transfer, possession or use of identification “other than his or her own” with intent to commit a crime is a federal offense. It also makes identification document fraud a crime punishable by up to 20 years imprisonment if such offense is committed to facilitate or assist in harboring or hiring unauthorized workers. This amendment is overbroad and imposes disproportionate and excessive punishment for the possession or use of fraudulent documents in connection with the hiring or harboring of an unauthorized worker. An employer’s use of false documents to hire or harbor an unauthorized worker could lead to a sentence as long as 20 years.
- Sen. Grassley Amendment 37
 - S. 744 defines which documents can be used by workers to prove identity and work authorization (as part of the verification process). It also already significantly narrows the documents that workers can use to prove identity and work authorization compared with existing law and regulation. This amendment removes the Secretary of Homeland Security’s ability to determine that another document, or class of documents like those issued by a federally recognized Indian tribe, can be used to prove identity and work authorization. This amendment makes the burden of identification even more burdensome and would have a disproportionate impact on certain groups.
- Sen. Grassley Amendment 39
 - This amendment would deprive the immigration courts of much-needed additional resources (as does Grassley Amendment 48).
- Sen. Grassley Amendment 40
 - Sec. 3502 of S. 744 not only guarantees fundamental fairness in immigration proceedings, but also ensures that our new immigration system is more just and efficient – at a net savings for taxpayers. This amendment would nullify Sec. 3502’s provisions by making the appointment of counsel optional for unaccompanied children and people with significant mental disabilities even in cases where the proceedings would otherwise be fundamentally unfair.

OPPOSE (CONT.)

- **Sen. Grassley Amendment 41**
 - This amendment would eliminate S. 744's expansion of the Department of Justice's Legal Orientation Program (LOP) to all detained migrants and the requirement that these programs screen for individuals who need appointed counsel. With approximately 84% of detained immigrants appearing before the courts without an attorney, immigration judges regularly preside over cases presented by respondents who are ill-informed and unprepared to make educated decisions about their cases, which adds to the already immense backlog in the immigration courts. These respondents include asylum-seekers, torture survivors and long-term residents of the United States. The LOP informs participants about their legal rights and responsibilities and decreases length of detention by preparing detainees to represent themselves and make more informed decisions about whether to pursue their cases or accept removal.
- **Sen. Grassley Amendment 43**
 - This amendment creates a new definition of criminal gang that is unworkably broad and includes such minor crimes as obstruction of justice. Moreover, the amendment shifts the burden to individuals to prove that they could not reasonably have known they were in a gang that committed qualifying offenses. The amendment would also sweep in individuals who have never been convicted of a crime and are merely suspected of being in a gang. This kind of dragnet approach targets the wrong people and risks deporting, and separating from their families, individuals who are not gang members.
- **Sen. Grassley Amendment 44**
 - This amendment adds a new aggravated felony based on a third DUI conviction regardless of the State in which the convictions occurred or whether the offenses are classified as misdemeanors or felonies under Federal or State law. Attaching new penalties to past acts is contrary to fundamental fairness. The aggravated felony designation applies retroactively, meaning that someone who pleaded guilty to an offense long ago, without knowing that Congress would later label the offense an "aggravated felony," still suffers the same immigration consequences. Aggravated felonies deprive immigration judges of discretion to consider a case's individual facts and should not, contrary to this amendment, be applied retroactively to completed conduct.
- **Sen. Grassley Amendment 45**
 - S. 744 substantially increases the maximum penalties for illegal entry and illegal reentry. This amendment would make these criminal statutes even harsher and remove elements of certain subsections of those statutes, including requirements that multiple predicate convictions have been imposed on different dates, and lowering the required sentence. In short, it imposes harsher terms of imprisonment for less serious predicate conduct. The amendment would also eliminate one significant reform in S. 744, maintaining a 20-year maximum sentence when a defendant has a conviction for any crime deemed aggravated felony under the current extremely broad definition, regardless of circumstances. The amendment exacerbates the wasteful and excessive imprisonment of individuals for what is essentially a status offense.

OPPOSE (CONT.)

- **Sen. Grassley Amendment 46**
 - This amendment adds domestic violence, stalking, child abuse, child neglect and child abandonment to the grounds of inadmissibility without regard to whether the person was imprisoned for the crime. This amendment also eliminates the language in S.744 that would require one of the listed crimes to arise out of a single scheme and provides that a person who violates portions of an order of protection (even though the violation does not constitute criminal contempt) is inadmissible. Making a person inadmissible for as little as one misdemeanor conviction is extremely unfair and will narrow the pathway to citizenship significantly. Many misdemeanor offense are so minor that they are not in the category of the “the most serious” offenses that should make a person inadmissible.
- **Sen. Grassley Amendment 47**
 - This amendment would strip language in S. 744 that requires prompt bond hearings for immigrants, ensures that immigrants are not locked up for prolonged periods without a hearing, limits detention to circumstances where no secure alternatives are available to achieve law enforcement goals, and requires immigration judges to oversee a person’s consent to be deported from the United States to ensure that such consent is truly voluntary and informed.
- **Sen. Grassley Amendment 49**
 - This amendment narrows the bill’s ban on federal law enforcement profiling on the basis of national origin.
- **Sen. Grassley Amendment 50**
 - Current law permits revocation of visas by consular officers or the Secretary of State, and generally prohibits judicial review of those revocations, with an exception in removal cases where the revocation of the visa is the only ground for the removal case. In such cases there currently is judicial review, not for review of legitimate exercises of discretion, but for accuracy and legal abuses. This amendment eliminates that exception, and thus in effect prevents judicial review of removal orders based on visa revocations, which affects students, business people, and tourists.
- **Sen. Grassley Amendment 51**
 - This amendment strikes section 3715, which would require that DHS expand secure alternatives to detention (ATDs) and individualized assessments over custodial determinations, mandate a monthly review of an individual’s level of supervision, and clarify that ATDs constitute custody. ATDs have repeatedly been found to accomplish law enforcement goals, promote efficiency and be cost-effective, and should be available nationwide as proposed in S. 744. Moreover, a robust system of ATDs would also better protect against the arbitrary detention of migrants and asylum-seekers.
- **Sen. Grassley Amendment 53**
 - This amendment perpetuates the indefinite—or potentially lifelong—detention of immigrants who cannot be deported, limits alternatives to detention in S. 744, reverses court decisions that require bond hearings for prolonged detention, and decreases the authority of immigration judges over bond hearings or to order someone to be enrolled in alternatives to detention programs. This amendment violates our fundamental commitments to due process and human rights. All individuals held in detention should receive individualized assessments to ensure that their detention is necessary, reasonable and proportionate. Prolonged and indefinite detention also results in significant costs to U.S. taxpayers and the federal government.

OPPOSE (CONT.)

- **Sen. Hatch Amendment 2**
 - This amendment establishes a new aggravated penalty of cultivating marijuana on federal lands and mandates that it be served consecutively to any term of imprisonment for the underlying offense of manufacturing and distribution of a controlled substance (21 USC 841). This provision directs the United States Sentencing Commission to implement a two level sentence enhancement for certain special offense characteristics. In its October 2011 report on mandatory minimum sentences, the US Sentencing Commission USSC recognized that mandatory minimum sentences as well as the increase in immigration cases have contributed to BOP overcrowding. The Commission's report recommends that Congress reconsider so-called "stacking" (i.e. sentencing a person to consecutive mandatory sentences) of mandatory minimum penalties for some federal firearms crimes, because these penalties can be excessively severe and unjust.
- **Sen. Hatch Amendment 18; Sen. Lee Amendment 15**
 - These amendments change the bill to prohibit only intentional employment discrimination based on national origin or citizenship. This makes changes to the new 8 USC 1324b provision which would otherwise expand the current general prohibition on national origin and citizenship status discrimination in employment. It would remove disparate impact causes of action, by limiting discrimination to only intentional claims. It also amends the prohibition on employers' requiring additional or different documents so that it only prohibits such verification practices if they are done with intent to discriminate. And it amends the prohibition on certain E-Verify-related abuses so that such abuses would only be prohibited if done with intent to discriminate. In S. 744, the prohibition on the enumerated E-Verify abuses is absolute (and not framed in terms of discrimination at all).
- **Sen. Lee Amendment 16**
 - S.744, as proposed, strikes an existing provision of law, 18 USC §1546(b), which criminalizes the knowing use of a false identity document to prove employment eligibility. In its place, S.744 includes a new Social Security fraud provision that reaches more broadly than 18 USC §1546(b) to criminalize the knowing misuse of a Social Security number or Social Security card for any reason. The amendment would not only leave the new Social Security fraud provision in place, but would also retain 18 USC §1546(b).
- **Sen. Lee Amendment 17**
 - This amendment would unnecessarily criminalize attempted misuse of a passport, sweeping over broadly to place in legal jeopardy many for whom criminal prosecution is a disproportionate response to their actions. These include asylum-seekers who come to this country using the only documents they can find to escape persecution.
- **Sen. Sessions Amendment 5**
 - This amendment creates a 60 day mandatory minimum sentence for a person who overstays their visa unless the person can be removed within 90 days. Mandatory minimum sentences defeat the purposes of sentencing by taking discretion away from judges and giving it to prosecutors who use the threat of these punishments to frustrate defendants asserting their constitutional rights. This amendment could put hundreds of thousands of people annually in legal jeopardy even for inadvertence.

OPPOSE (CONT.)

- Sen. Sessions Amendment 12
 - This amendment mandates bond levels of no less than \$5,000 for nationals of non-contiguous countries, who have not been admitted or paroled, and who are apprehended within 100 miles of the border or present a flight risk as determined by ICE. This amendment will lead to significant across the board increases in bond levels, thus increasing unnecessary detention of people who pose no threat to public safety at added taxpayer cost. Setting arbitrary minimum bond amounts that are not tailored to the flight risk posed by the individual presents serious due process concerns.
- Sen. Sessions Amendment 14
 - This amendment provides inadequate oversight for DHS inadmissibility determinations.
- Sen. Sessions Amendments 32, 34, and 35
 - These amendments would overrule the Supreme Court's decision in *Arizona v. United States* by authorizing state and local law enforcement to carry out immigration investigations and arrests without federal cooperation or oversight and create new state immigration crimes. This could create a patchwork of inconsistent and in some cases discriminatory enforcement practices across the country.
- Sen. Sessions Amendment 33
 - This amendment threatens to withhold Community Oriented Policing Services Program (COPS) funding from jurisdictions that have adopted certain community policing or confidentiality policies to suit their local policing needs and promote trust of law enforcement by victims and witnesses of crime.
- Sen. Sessions Amendment 39
 - This Amendment removes the language from the racial profiling section of the bill that says that officers can only consider race or ethnicity in specific investigations to the extent that it is "relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme or organization. This standard applies even where the use of race or ethnicity might be lawful." In so doing, the amendment narrows the restrictions on racial profiling, making sanctioned discrimination more likely.