

# ANALYSIS OF SENATE IMMIGRATION REFORM BILL

## Title I: Border Security

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**O**n April 16, 2013, Senators Menendez (D-NJ), Durbin (D-IL), Schumer (D-NY), Bennett (D-CO), Rubio (R-FL), Graham (R-SC), McCain (R-AZ), and Flake (R-AZ) introduced the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 (S.744) into the U.S. Senate. The bill is a comprehensive overhaul of much of our nation's immigration system and includes a road to citizenship for millions of currently unauthorized noncitizens. A general summary of the bill, as well as analyses of Title II (the "Immigrant Visas" title) and Title III (the "Interior Enforcement" title), are available at [www.nilc.org/irsenate2013.html](http://www.nilc.org/irsenate2013.html). The Senate Judiciary Committee considered, debated, and amended S. 744 during a markup process that culminated in the bill being voted out of the committee on a 13-5 vote on May 21. During that process, some significant changes were made to the bill, but the most dramatic changes have been proposed by Senators Corker (R-TN) and Hoeven (R-ND), who introduced an amendment during the Senate floor debate on June 21, 2013. The Corker-Hoeven amendment ramps up border militarization much more drastically than the bill's initial provisions would have. In particular, the amendment changes the initial funding allocated to border enforcement from \$6.5 billion to an astronomical \$46.3 billion. These border provisions will undoubtedly have a detrimental impact on people who live and work in communities along the border.

Title I of the bill calls for "triggers" that must be met before people may be processed for the registered provisional immigrant (RPI) status established in Title II and before those with RPI status may adjust to lawful permanent residence. Although our borders are more secure than at any time in history — apprehensions and crime rates have dropped, while deportations and worksite enforcement have increased — this title mandates an increase in unnecessary funding for border technology, fencing, and staffing. This summary incorporates key provisions that passed during the Senate Judiciary Committee markup as well as changes proposed by the this excessive, expensive, and extreme Corker-Hoeven amendment.

### SOUTHERN BORDER SECURITY GOAL & PLAN

➤ **Border security goal.** The bill establishes the following goal for border security: To "achieve and maintain effective control between and at the ports of entry in all border sectors along the Southern border." This will be done in two ways:

- Persistent surveillance in all sectors along the southern border.

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- A 90 percent “effectiveness rate” (the apprehension of 9 out of every 10 immigrants who attempt to enter the country without permission) in a fiscal year for all sectors along the southern border.<sup>1</sup>
- **Border plan.** The secretary of the U.S. Department of Homeland Security (DHS) must submit two plans to Congress 180 days after the enactment of the bill, before the registration period for RPIs may begin.
- The first, the Comprehensive Southern Border Security Strategy, is aimed at meeting the border security goal.
  - The second, the Southern Border Fencing Strategy, will identify areas along the southern border where 700 miles of fencing, infrastructure, and technology should be deployed.
- **Southern Border Security Commission.** The original bill provides that if the 90 percent effectiveness rate has not been reached for one fiscal year during the first 5 years after the bill’s enactment, a Southern Border Security Commission will be established. This commission will issue a report and recommendations on the personnel, technology, and resources necessary to achieve the 90 percent effectiveness rate, as well as convene at least one public hearing each year on border security. The bill appropriates up to \$2 billion to implement these recommendations.

However, the Corker-Hoeven amendment requires that the Southern Border Security Commission be established no later than one year after the bill’s enactment. The amendment also would add to the commission representatives from Nevada as well as landowners in the southern border area.

#### ANALYSIS

The goal and plan are unnecessary and out of touch with the reality at the border. Border crossings are at a historic low. In fiscal year 2012, the U.S. Border Patrol apprehended the lowest number of unauthorized migrants since 1970. Moreover, there are record-high levels of staffing at the border at a time when net unauthorized migration from Mexico has fallen to zero or below (more people are leaving the U.S. than entering)<sup>2</sup>

### SOUTHERN BORDER SECURITY TRIGGERS

The bill requires that a series of “triggers” in border enforcement be met before any person is processed for RPI status and before any person with RPI status is adjusted to lawful permanent residence.

- **Triggers for processing of RPI status.** Before any undocumented immigrant may be processed for RPI status, the DHS secretary must submit to Congress a “notice of

<sup>1</sup> This “Border security goal” section of the summary/analysis was revised on June 26, 2013.

<sup>2</sup> Doris Meisner, et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Migration Policy Institute, 2013), [www.migrationpolicy.org/pubs/enforcementpillars.pdf](http://www.migrationpolicy.org/pubs/enforcementpillars.pdf), pp. 29, 47.

commencement” of both the Comprehensive Southern Border Security Strategy and the Southern Border Fencing Strategy.

- **Triggers for adjustment from RPI status to LPR status.** Except for certain people who entered the U.S. as children (DREAMers) and people granted agriculture-card status (described in Title II), people with RPI status shall not be eligible to adjust to lawful permanent resident (LPR) status until the DHS secretary, after first consulting with the attorney general, the secretary of defense, and the inspector general of DHS, in addition to the comptroller general, submits a written certification that each of the following measures has been achieved:

- **Substantial deployment and operationalization of the Comprehensive Southern Border Security Strategy.** The Corker-Hoeven amendment requires the Comprehensive Southern Border Security Strategy to deploy new technologies along the Yuma, Tucson, San Diego, El Centro, El Paso, Big Bend, Del Rio, Laredo, and Rio Grande Valley border sectors in order to enhance the capability of DHS to conduct manned or unmanned monitoring, sensing, or surveillance of 100 percent of the southern border and the immediate vicinity.

The Corker-Hoeven amendment also requires that the Comprehensive Southern Border Security Strategy be deployed and operational, where “operational” means that technology, infrastructure, and personnel has been procured, funded, and is in current use by DHS to achieve effective control, with exceptions for routine maintenance, minimal nondeployment, or natural disasters that would prevent the use of those assets.

- **Implementation and substantial completion of the Southern Border Fencing Strategy.** The Corker-Hoeven amendment requires that the Southern Border Fencing Strategy have been submitted to Congress and implemented, such that there are no fewer than a total of 700 miles of pedestrian fencing along the southern border, with pedestrian fencing replacing existing vehicle fencing where possible along all nontribal lands, and with the option of adding a second layer of pedestrian fencing where the DHS secretary deems it necessary or appropriate.
  - **EEVS.** Implementation of a mandate that all employers in the U.S. use an electronic employment eligibility verification system (EEVS; the federal government’s current EEVS is E-Verify).
  - **Electronic exit system.** Implementation of an electronic exit system at all international air and sea ports within the United States where U.S. Customs and Border Protection (CBP) is deployed, to collect visa or passport information from air and vessel carriers.
  - **Border Patrol agents.** The Corker-Hoeven amendment mandates that no fewer than 38,405 trained, full-time, active-duty U.S. Border Patrol agents be deployed along the southern border, effectively doubling the number of Border Patrol agents.
- **Exemptions.** If litigation or unforeseeable circumstances prevent implementation of one or more of these triggers *and* ten years have passed since the bill was enacted, then DHS will start processing adjustment applications for individuals with RPI status.

- **Waiver of legal requirements and judicial review.** The DHS secretary is authorized to waive all legal requirements that he or she determines to be necessary to ensure the expeditious construction of the physical border infrastructure. The bill provides for limited judicial review of the secretary's actions or determinations.

#### ANALYSIS

Given the tremendous amount of resources already earmarked for border security, there is no justification for delaying the processing of people for RPI status any longer than is necessary to produce the DHS secretary's two strategies. Nor should lawful permanent residence be conditioned on the implementation of programs that are rife with problems.

The Corker-Hoeven amendment's "triggers" threaten to impede the ability of people in RPI status from obtaining a green card and eventually becoming citizens, while at the same time throwing an exorbitant amount of money into new technology, additional miles of fencing, and additional agents along the southern border. Increased drone surveillance and excessive and unaccountable enforcement along the southern border also threatens the civil rights and liberties of border residents. Instead, the bill should include additional accountability and oversight mechanisms for the existing enforcement apparatus along the border and at points of entry.

Our concerns with a requirement that all employers use an electronic employment eligibility verification system are well documented.<sup>3</sup> We base those concerns on the facts that (1) the databases upon which E-Verify relies contain inaccuracies that deprive authorized workers of jobs, (2) employers have misused E-Verify, (3) mandated use of E-Verify is likely to result in discrimination against immigrant workers, (4) it will impose new costs on employers, and (5) it will make already vulnerable workers even more vulnerable and drive many deeper into the underground economy. And, according to DHS's own Office of the Inspector General, the current entry-exit system, US-VISIT, is riddled with errors and has been a colossal failure.<sup>4</sup>

## SOUTHERN BORDER FUNDING & RESOURCES

Rather than scaling back border enforcement, the bill assigns large amounts of money and resources to increase inefficient, costly, and deadly border enforcement policies.

- **Increased appropriations.** The original bill would have appropriated \$3 billion to implement the border security strategy and \$1.5 billion for the fencing strategy. The Corker-Hoeven amendment would increase this appropriation to \$4.5 billion and \$8 billion respectively and allocate an additional \$30 billion to fund the increase in the number of Border Patrol agents.
- **More equipment and technology.** This title creates a massive increase in the amount of equipment and technology that CBP will have available at the border, including additional

<sup>3</sup> See [www.nilc.org/employmentverification.html](http://www.nilc.org/employmentverification.html).

<sup>4</sup> See [www.oig.dhs.gov/assets/Mgmt/2012/OIG\\_12-111\\_Aug12.pdf](http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-111_Aug12.pdf).

mobile, video, and agent portable surveillance systems; Department of Defense border radar equipment; and unmanned aerial vehicles in the southwestern border region to provide 24-hour operation and surveillance along the border. The Corker-Hoeven amendment requires the deployment of even more additional technology along the border, including 685 ground sensors and 50 towers in Arizona.

- **More agents, officers and stations.** The bill originally would have provided funding for 3,500 additional CBP officers nationwide and for additional Border Patrol stations. The Corker-Hoeven amendment requires hiring and deploying at least 19,200 additional U.S. Border Patrol agents along the southern border by September 30, 2021, resulting in an almost doubling of the current number of agents to 38,405. The Corker-Hoeven amendment also requires the deployment of 160 CBP unmanned aircraft systems, including crew and personnel.

#### ANALYSIS

Doubling the size of the Border Patrol is unnecessary and unjustified. Resources assigned to militarization of the border should be shifted to improving the infrastructure at ports of entry and facilitating passage through ports of entry. Addressing the lengthy wait times for individuals and vehicles crossing the border legally would facilitate trade, decrease local air pollution and traffic congestion, and minimize costly delays.

- **Deployment of the National Guard.** The bill authorizes the deployment of the National Guard to the southern border to (1) construct fencing, including double-layer and triple-layer fencing; (2) increase ground-based mobile surveillance systems; (3) deploy aerial systems and aircraft to maintain continuous surveillance of the southern border; (4) construct checkpoints along the southern border; and (5) engage in other tasks. The Corker-Hoeven amendment would establish a program to actively recruit (through incentives such as bonuses) former members of the armed forces to serve in CBP and U.S. Immigrations and Customs Enforcement (ICE).

#### ANALYSIS

Deploying the National Guard and other members of the military to the border would further exacerbate and entrench the problem of militarization in border communities. The border is home to many people who aim to live peacefully in local communities rather than as if they were under siege. Members of border communities, particularly Latinos, are subject to stops and interrogations on a daily basis as they drive to work or the store or drop off children at school. Unnecessarily adding personnel trained to work in war zones would only exacerbate these violations of civil rights.

- **Criminal prosecution of border-crossers.** The bill allocates increased funding for the criminal prosecution of people crossing the border in the Tucson, Arizona, sector. Currently, prosecutions of 70 people per day take place in the Arizona federal district court under a program called Operation Streamline. The bill provides funding for up to 210 prosecutions per day, a three-fold increase from current levels.

## ANALYSIS

Immigrants currently face up to 2 years in federal prison for entering the U.S. without permission, and this penalty will be increased more than seven-fold to a maximum of 15 years under Title III of the bill. Mass criminal prosecutions targeting nonviolent border-crossers through Operation Streamline should be prohibited. In addition to violating due process, Operation Streamline redirects scarce judicial resources to the prosecution of migrants and away from prosecution of serious crimes. The profile of border-crossers has changed from first-time crossers to people who have crossed before and are trying to rejoin families in the U.S. Immigration policies should prevent or limit family separation and facilitate the reunion of deported family members with their loved ones.

- **SCAAP.** The bill reauthorizes the State Criminal Alien Assistance Program (SCAAP) to reimburse state and local law enforcement for the cost of incarcerating immigrants who have committed crimes. The Senate Judiciary Committee passed an amendment expanding the State Criminal Alien Assistance Program to reimburse local governments for costs incurred in dealing with noncitizens who are charged with crimes, as opposed to the current practice of reimbursing for those who are convicted of crimes.
- **Operation Stonegarden.** The bill provides increased funding for Operation Stonegarden, a program in which local law enforcement collaborates with federal enforcement agencies in immigration enforcement along the U.S.'s borders.

## ANALYSIS

Collaboration programs such as Operation Stonegarden, in which local law enforcement works with federal immigration authorities to enforce immigration laws, should be ended. Since its inception, Operation Stonegarden has been rife with problems, including funds not actually being used to enhance border security (an investigation found that program funds were used to compensate officer time for activities such as issuing routine traffic citations and attending a funeral), charges that local law enforcers committed abuses, and lack of accountability and oversight.<sup>5</sup>

## MONITORING & ACCOUNTABILITY

The bill provides for a number of policy and training requirements to help protect the integrity of the system and to protect individuals and communities along the border. The bill also establishes a DHS Border Oversight Task Force that will work with DHS to recommend policies, strategies, and programs that consider the impact of border enforcement on border communities.

- **Use-of-force policy.** Within 180 days of the bill's enactment, the DHS secretary, in consultation with the Civil Rights Division of the U.S. Department of Justice, shall issue policies governing the "use of force" by all DHS personnel. The policies will require all DHS

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<sup>5</sup> *Fact Sheet: Operation Stonegarden* (National Immigration Forum, Feb. 2010), [www.immigrationforum.org/images/uploads/2010/operationstonegardenfactsheet.pdf](http://www.immigrationforum.org/images/uploads/2010/operationstonegardenfactsheet.pdf).

personnel to report each use of force and establish procedures for investigating complaints, disciplining personnel who violate DHS's use-of-force policies, and reviewing all uses of force to determine whether the use of force complies with DHS policy or demonstrates the need for policy changes, training, or equipment.

- **Training.** DHS personnel will be trained on the new use-of-force policy and the appropriate use of force; on people's civil, constitutional, human, and privacy rights; on screening and identifying particularly vulnerable populations, including children, refugees, and survivors of crime and human trafficking; on social and cultural sensitivity to border communities; and on the impact of border operations on border communities and to the environment. DHS must establish standards for children in CBP custody to ensure that children receive humane treatment in detention. In addition, DHS entities at the border are required to inquire about the family status of immigrants they are detaining and whether the person is traveling with a spouse or child. CBP officers must be trained in child welfare and family law, and must consider the best interests of the child and family unity when deciding whether to repatriate or prosecute migrants.
- **Border Oversight Taskforce.** The bill establishes an independent 26-member Border Oversight Task Force to conduct hearings, take testimony, receive evidence, and administer oaths in order to review and recommend changes to existing border policies. The Corker-Hoeven amendment raises the number of taskforce members to 33.
 

Taskforce members will be from the northern and southern border regions. Members will include elected government officials, local law enforcement officials, civil rights advocates, business representatives, and representatives from higher education, the faith community, and the Border Patrol. The Corker-Hoeven amendment adds 4 members from tribal communities.

The task force will recommend ways in which the Border Communities Liaison Offices can strengthen relationships and collaboration between border communities and federal agencies. The task force will also evaluate how policies, strategies, and programs along the southern and northern borders protect the due process, civil, and human rights of border residents, visitors, and migrants. The task force will also evaluate and make recommendations regarding the training of border enforcement personnel. The DHS secretary shall issue a response to the task force's findings and recommendations no later than 180 days after receiving those findings.
- **DHS ombudsman.** The current duties of the U.S. Citizenship and Immigration Services Ombudsman's Office will be expanded to encompass all DHS immigration functions, including ICE and CBP. An amendment introduced by Sen. Hirono (D-HI) and passed by the Senate Judiciary Committee would require the ombudsman to address complaints, inspect facilities, and issue recommendations regarding enforcement policies and strategies. An amendment introduced by Sen. Sessions (R-AL), also passed by the Senate Judiciary Committee, would require the ombudsman to help families that have been victims of crimes committed by noncitizens or crimes at the border.

## ANALYSIS

The Senate bill, as introduced, takes some important steps towards addressing human rights violations at the border. It remains to be seen, however, how effectively these procedures will be implemented. The development of policies on the use of force is a welcome and much-needed protection against the human rights abuses that have accompanied the increase in enforcement resources at and militarization of the border. In order for the policies to be effective, Border Patrol agents should be held accountable through transparent investigations of civil and human rights violations. Training in the civil, constitutional, human, and privacy rights of individuals, along with better identification of vulnerable populations, will help to mitigate human rights abuses and ensure that dialogue between border communities and federal agencies is taking place. Amendments that protect the wellbeing of children and the families of detained migrants are important additions to the bill.

Independent oversight over CBP and ICE, including drastically reduced reliance on private contractors, is needed to promote true border security. Current border enforcement policies have been implemented without input from border residents, which in turn has resulted in mistrust and tension between border communities and federal law enforcement agencies. The Border Oversight Task Force is a welcome addition that will allow border residents to make findings and provide input and specific recommendations to DHS, while also ensuring that federal agency policies protect the civil and human rights of border residents and migrants. The addition of members from tribal communities also ensures that crucial residents of the border region have a seat at the table. The expansion of the Ombudsman to all DHS subagencies is an important measure to ensure compliance with policies that respect human and civil rights. Further measures should be developed to enhance the oversight and accountability of CBP, to guard against abuses of authority, racial profiling, and other civil rights violations.

## NORTHERN BORDER

The Corker-Hoeven amendment adds several new provisions to the Senate immigration bill:

- **DHS powers at the northern border.** The Corker-Hoeven amendment limits DHS's authority to board, without a warrant, any vessels, vehicles, or other forms of transportation within 25 miles from the northern border (to be extended to 100 miles if certified as necessary by the DHS secretary) and to have access, without a warrant, to private lands within 10 miles from the northern border (to be extended to 25 miles if certified as necessary by the DHS secretary).

## ANALYSIS

Currently, CBP agents operate with impunity within 100 miles of the northern and southern borders of the U.S. The 25-mile and 10-mile limitations are reasonable and should also be applicable to the southern border. Southern border residents should have the same access to freedom from stops and interrogations by roving Border Patrol agents that their neighbors to the north would receive under this legislation.



## VISA OVERSTAYS

- **Removal of new entrants who overstay their visas.** Within 180 days of the bill's enactment, DHS is required to take action against 90 percent of people who were admitted as nonimmigrants after the bill's enactment and who have overstayed their visas by more than 180 days. For each case, DHS must initiate removal proceedings, confirm that the person has applied for or has been granted relief, or close the case. The DHS secretary is required to report to Congress every 6 months on the total number of nonimmigrants who have overstayed after the bill's date of enactment and the number of removal proceedings initiated.
- **Visa overstay pilot program.** One year after enactment, the DHS secretary is required to establish a pilot program to explore the feasibility of notifying individuals that the terms of their admission to the U.S. States are about to expire.

### ANALYSIS

There are more than 150 visa categories allowing those who enter the U.S. to remain for varying periods of time. Some visas are renewable, while others allow individuals to switch between categories. Thus, determining whether a person has overstayed a visa is a complex and difficult task that would require an enormous amount of resources devoted to fulfilling this requirement. In addition, commencing deportation against presumed visa overstayers will add more strain on an already overburdened immigration system. It is doubtful that the costs of implementing such a system, particularly the consequences for those innocently targeted, would justify the limited benefits.

## MIGRANT DEATHS

- **Preventing and reporting migrant deaths.** This provision requires the commissioner of CBP to identify areas near the northern and southern borders where migrant deaths are occurring due to environmental conditions and to deploy 1,000 beacon stations in those areas so that migrants can signal their location and access emergency personnel. The DHS secretary is also required to report the number of migrant deaths occurring near the northern and southern borders and the efforts that DHS has undertaken to mitigate deaths.

### ANALYSIS

Preventing migrant deaths along the northern and southern borders should be one of the top priorities for CBP. The beacon stations will help to mitigate the amount of migrant deaths, but only if deploying them is coupled with decreased militarization of the border, which has routed migrants into the most treacherous landscape.

## EXTRATERRITORIAL CONTROLS

- **Sealing Mexico's southern border.** DHS must develop a strategy to address the migration of Central Americans who travel through Mexico on their way to the U.S. This includes increased trainings, technology, and resources for Mexican and Central American

law enforcement and border officials. The DHS secretary, in conjunction with the U.S. secretary of state, would be required to produce an educational campaign and disseminate information to discourage migrants from Mexico and Central American countries to journey across Mexico to the U.S.

#### ANALYSIS

This strategy does not address the root causes for migration from Central America or the abuses that occur during migrants' journey to the U.S. Central American migrants traveling through Mexico are routinely subject to abuse, rape, theft, and even death, often at the hands of Mexican security forces. Increased trainings must include information on people's due process and civil rights, otherwise the potential for civil rights violations and abuses will increase. Oversight mechanisms should ensure that equipment and resources provided to foreign security forces are not used to further threaten or harass migrants.