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Scrutinizing Senate Bill 1757, the 'Building America's Trust Act'

By Dan Cadman

Foreword

Despite the fact that this analysis only examines selected highlights of S. 1757, and notwithstanding the author's best attempts at brevity, it is lengthy. That's because the bill itself is long and complex. In addition to explanations of the sections chosen for highlighting, the author's observations on those sections have also been offered where relevant.

Readers may choose to review the entire analysis or, if they have particular interests, may elect instead to take a look at the table of contents of the bill and then scroll within this analysis down to the section(s) of interest, as the sections that are discussed are laid out in the same numerical order that they are found in the bill.

Introduction

On August 4, Sen. John Cornyn (R-Texas) and several co-sponsors introduced a bill into the Senate, S. 1757, the "Building America's Trust Act", a measure that purports to establish better border security and provide sundry improvements to other immigration enforcement laws and policies already in place.

The text of the bill, which wasn't made publicly available for several weeks, forms the basis for this analysis of selected highlights of the provisions in the bill dealing with immigration and border security matters (although they are, of course, subject to change as a result of the amendments process).[1]

Key Findings:

- Much of S. 1757 is a patchwork quilt that incorporates, substantially or in large part, a number of other stand-alone bills that have been introduced, both in the past and/or recently, into the House of Representatives and the Senate. Unfortunately, they do not always mesh together well.

- The first half of Title I of this legislation (Sections 101 through 135) is nearly identical to that found in a bill introduced by Rep. Mike McCaul in the House of Representatives, H.R. 3548, the "Border Security for America Act of 2017". Because it is substantially the same, it contains precisely the same flaws embedded in McCaul's bill, including legislative micro-management of the equipment and material needs for each sector of the Border Patrol.

- Several sections of the bill either create, augment, or modify the conditions under which federal grants are made available to state, local, and tribal law enforcement agencies. Not one of these provisions contains language prohibiting sanctuary jurisdictions from receiving funds — although another portion of the bill would forbid various forms of community block grants from being given to sanctuary jurisdictions. It is difficult to understand how or why these different portions of the bill act in such stark contradiction to one another on such a key matter.

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- The provisions in the Cornyn bill authorizing expansion of officer resources are lopsided, and radically expand Customs and Border Protection Border Patrol and field inspector cadres while providing scant additional positions to interior enforcement agents, even though the greater percentage of aliens living in the United States reside in the interior. (Compare and contrast Sections 131 and 134 of the bill.) What's more, nearly half of the illegal population in the United States did not cross the border illegally, but overstayed after being admitted legally at U.S. ports of entry. This lopsided apportionment smacks of the typical reticence of legislators and political leaders to tackle the underlying reality of illegal immigration. They do this by catering to immediate border needs, which are less sensitive or politically controversial, while ignoring the larger and more fundamental problem of illegal aliens residing in communities all over the interior of our country.

- Several provisions of the Cornyn bill are valuable and noteworthy. To name just a few of the many examples:

  - Criminalization of the activity of "spotters" who watch and radio back to their confederates the locations and details of border agent activities;

  - Provision of sentencing enhancements against criminal violators of the immigration laws;

  - Establishment of enlarged statutes of limitations for the bringing of charges against criminal violators of the immigration laws, particularly when the underlying purpose is to further terrorism, drug trafficking, or other serious offenses; and

  - Significant prohibitions on court certifications of class-action suits against the government on immigration matters, and limitations on the issuance of injunctions and granting of prospective relief to alien litigants.

- Unfortunately, other interior enforcement provisions in the bill contain drafting language flaws or are not artfully phrased, which, in the present environment, will inevitably lead to costly litigation and encourage judicial activism in determining legislative intent — something that is not necessarily in the government's interest — or propose procedures that are so complex as to render them unworkable (one example being the process for removing unaccompanied minors outlined in Sections 321 and 322).

- Worse, in more than a few instances, the legislative amendments actually work *against* a regimen of immigration control and enforcement — for example, by expanding the criteria for state and local government eligibility to receive funding from the State Criminal Alien Assistance Program (SCAAP), while at the same time imposing no debarment of funds to sanctuary jurisdictions.

Background

In a recent survey, the Rasmussen polling organization determined that "45% [of respondents] believe the government is unlikely to secure the border and prevent illegal immigration even if a comprehensive immigration reform package is passed."[2]

There is reason for such skepticism given the history of our Congress in refusing to address the matter of immigration reform in an honest, straightforward way, relying instead on sleight-of-hand to present the facade of border security and interior enforcement while in reality achieving nothing. Witness, for instance, the abysmal Gang of Eight omnibus immigration legislation of 2013, which, like its predecessor, the 1986 Immigration Reform and Control Act, would have granted a broad-based and generous amnesty while paying lip-service to ensuring that there would be no future need for amnesties by providing for immigration enforcement measures with real teeth. Fortunately, the 2013 legislative effort failed in the House of Representatives, although it passed the Senate by a healthy margin.

Such efforts at omnibus legislation are again gaining steam, though, because of the Trump White House's decision to end the unconstitutional Deferred Action for Childhood Arrivals (DACA) program, while at the same time throwing down the gauntlet to challenge Congress to act by passing some sort of amnesty legislation for DACA beneficiaries. But the challenge was thrown in the least effective way possible, which is to say by giving away any leverage that the administration had to be

sure that the bill would be narrowly tailored to cure a specific problem. Worst of all is that it was the president who threw away the tactical advantage to open borders advocates.[3]

This throwaway virtually assured that any number of extreme measures will be put forward under the guise of tying together two diametrically opposed propositions: Giving DACA beneficiaries relief and at the same time purporting to enhance immigration enforcement and border security.[4] The strategic error that throwaway represented has since been ameliorated by the White House's October 9 announcement of the "Immigration Principles" it expects must accompany any DACA-related legislation presented to the president for signature by the Congress, although whether or not the new benchmarks come too late in the process remains to be seen, given the rising expectations established by the president's initial remarks.[5]

Sure enough, some kind of double-barreled solution of comingled border security and amnesty is coming closer to reality, as evidenced by remarks made by a number of senators and representatives. For example, *Politico* reports that House Speaker Paul Ryan is "huddling" with Democrat Nancy Pelosi, the House Minority Leader, to come up with "solutions" to the DACA issue.[6] Similarly, Bloomberg News is reporting that Sen. John Thune, the "number three Republican in the Senate" (who scores a weak "C-" immigration report card at NumbersUSA[7]) is suggesting that "A version of the Dream Act may be passed in 2017 if it's combined with more resources to secure [the] U.S.-Mexico border."[8] Likewise, Democratic Sen. Dick Durban is projecting that to obtain a legislative DACA reprieve, there will need to be a tie-in between a Dreamer amnesty and some kind of border security.[9]

But what would the vehicle for the "border security" half of such a bill be?

In the Senate, chances are reasonable that it might be the measure that Sen. John Cornyn (R-Texas) introduced into the Senate on August 3 with several co-sponsors. S. 1757, the "Building America's Trust Act", is a 464-page bill that purports to establish better border security while also providing sundry improvements to other immigration adjudication and enforcement laws already in place.

The text of the bill took more than six weeks to be made publicly available. But it has now been published on the Congress.gov website, and it forms the basis for this analysis of selected highlights of the bill's provisions (although of course they are subject to change as a result of the amendments process). An analysis of the bill reflects that it was rushed to publication without careful editing—there are many obvious drafting flaws in the publicly available text. A significant number, but not all, of the provisions are discussed; that is beyond the scope of this examination of the bill.

Title I. Border Security

Sections 101 through 135. Much of the first half of Title I in this legislation is nearly identical to that found in a bill introduced by Rep. Mike McCaul (R-Texas), the "Border Security for America Act of 2017".[10] Because it is a mirror image to McCaul's bill, it contains many of the same weaknesses.[11]

Section 102. This section relates to control of the border (including creation and maintenance of physical and other barriers) and legislatively defines terms such as "operational control" and "situational awareness" of the border. There is reason to reserve a certain healthy skepticism that defining such phrases can in and of itself result in the kind of security that is so important in our border regions and in the states and communities proximate to our physical frontiers. Absent the rigor of clearly measurable and objective metrics, such terms are inherently subjective and open to political manipulation — something we have seen before in several prior presidential administrations of both parties, all loudly proclaiming that the border is finally "under control" even as substantive evidence points to the contrary, and the population of illegal aliens in the country continues to grow.

Section 103. Requires DHS to ensure that Customs and Border Protection (CBP) Air and Marine Operations units accomplish 95,000 flight hours, and provides that the CBP "Commissioner shall contract for the unfulfilled identified air support mission critical hours, as identified by the Chief of the U.S. Border Patrol." Why contract with private entities for the additional hours? Why not negotiate a reimbursable agreement with military, National Guard, or Civil Air Patrol assets that need the flight training hours anyway? Note also that the language of the bill, which specifies that such assets be devoted to their primary mission, would render it incredibly difficult for CBP air and marine assets to be used in supporting the kind of humanitarian

search-and-rescue efforts recently expended during Hurricane Harvey in Houston and Hurricane Irma in Florida, since such efforts are clearly a diversion from their main mission of border control.[12]

Section 104. Like the parallel provision in McCaul's legislation, this section lays out in excruciating detail a micro-managed sector-by-sector enumeration of materiel and equipment to be provided to each and every sector of the Border Patrol. One has to question the value and utility of such micro-management; it smacks of "Christmas listing" created by the Patrol itself and provided on the Q-T to staffers who dutifully inserted the list into both the McCaul and Cornyn bills without the kind of objective analysis and scrutiny that such a list deserves.

While no one believes that the sectors should be deprived of the tools needed to do their jobs — patrol work, especially on the southern border, is hard and dangerous — neither should legislators be in the business of the kind of in-the-weeds decision-making and disbursal found in these bills. Legislators have neither the time nor staff to provide the kind of serious oversight and consideration required to attend to the specific and varying needs of each sector. The sector material acquisitions are so rigid that the DHS secretary is forbidden to alter them for tactical reasons until after formally notifying the relevant homeland security committees in the House and Senate. This seems both unwise and unworkable, especially should one sector or another confront an unanticipated influx of humans or contraband that requires immediate reaction.

Sections 105 and 106. Specifies that "The Secretary shall operate and maintain additional tactical or permanent checkpoints on roadways near the Northern border or the Southern border" and Section 106 requires that "The Chief, U.S. Border Patrol, shall direct agents of U.S. Border Patrol to patrol as close to the physical land border as possible, consistent with the accessibility to such areas." There is some reason to be concerned about the combined language of these sections, because together, they appear to limit the discretion of the DHS secretary and the Border Patrol chief in determining where patrols and checkpoints will be established. There are sometimes very good reasons to extend checkpoints and patrols to the furthest limit permissible by law. For instance, alien smuggling load pickups are frequently several miles beyond the immediate border, once the individuals have been guided across the border on foot. A "layered" border security strategy suggests that there should be patrols and checkpoints operating simultaneously at different distances from the physical frontier.

Section 108. This is a curiosity in that it requires the DHS secretary to establish planning and analytical life cycles for "major acquisition programs" involving border security technology. This is necessary and desirable, but what makes the provision curious is that it only kicks in when anticipated program costs are *at least $300 million*. One would think that this kind of planning, objectives measurement, and accountability life cycle should be a standard applied to projects and programs costing significantly less than a third of a billion dollars.

Section 112. Expresses a sense of the Congress that the Mérida Initiative must return to its origins and "focus on providing enhanced border security and judicial reform and support for Mexico's drug crop eradication efforts [and] return to its original focus and prioritize security, training, and acquisition of equipment for Mexican security forces involved in drug crop eradication efforts."[13]

This is important and has significant implications for the safety of our own southern border communities given the growing and increasingly violent presence of transnational crime groups and cartels smuggling narcotics, human beings, and other contraband across the international boundary. As the Congressional Research Service (CRS) noted in a June 2017 report, more than a return-to-basics is in order to be sure the Mérida Initiative (which so far has cost the United States nearly $3 billion in aid) is actually effective.[14] For instance, CRS points out that the Government Accountability Office has observed that some of the metrics being used to measure success of the Initiative are questionable:

> *For years, the GAO has urged U.S. agencies working in Mexico to adopt outcome-based measures, not just output measures. For example, rather than calculating the number of police trained, the GAO would urge the creation of a measure to see how U.S. training affected police performance.* (Citations omitted.)

Happily, Section 112 does go beyond a mere "sense of the Congress", because it establishes legislative parameters that link continued availability of funds to mandated metrics and outcomes. This is the kind of rigor that ought to have been established at the outcome of the initiative, but apparently wasn't.

There is, however, an anomaly in the language of Section 112: It requires the secretaries of Homeland Security, State, and Defense to coordinate in providing assistance to Mexico under the Initiative, but there is no mention of the attorney general, who supervises both the Drug Enforcement Administration and the FBI, as well as other organs in the Department of Justice. How did he get left out?

Section 113. Mirrors Section 112 of the McCaul border security bill. It prohibits other federal agencies from preventing Border Patrol agents from physical access to lands, such as national parks, forests, and the like. (Yes, believe it or not, other federal agencies such as the Interior Department have refused to provide agents permission to patrol some their lands, arguing that they were too ecologically fragile, even though smugglers were routinely leading alien loads and trekking drugs through those same areas, and trashing them as they went. In fact, use of such lands for illegal purposes was actually driven in part by the fact that they had become official "no go" zones placed off-limits by the U.S. government to itself. What better place to do your drug or alien smuggling?)

Unfortunately, subsection (e) of that very same section then mitigates the importance of the new right to patrol public lands by asserting that "This section shall ... have no force or effect on State lands or private lands; and ... not provide authority on or access to State lands or private lands." In fact, it's important to understand that this subsection can easily be construed as actually diminishing existing legal authorities of agents who at present can enter all federal, state, and private lands for purposes of patrolling within 25 miles of the border. The draft language appears to vitiate that long-standing and important prerogative by establishing what appears to be a blanket prohibition for state or private lands without preserving the existing 25-mile patrol rights.

This needs to be redrafted to remove any doubt about continuing the long-standing right-of-access rule for purpose of patrol and enforcement.

Section 115. Another puzzling provision within the Cornyn bill. It states that:

> *Notwithstanding any other provision of law, and subject to appropriations, any owner of land located in the United States within 100 miles of the Southern border of the United States* ***may seek reimbursement from the Department of Homeland Security and the Secretary of Homeland Security shall pay for any adverse final tort judgment for negligence*** *(excluding attorneys' fees and costs) authorized under Federal or State tort law, arising directly from any border patrol action, such as apprehensions, tracking, and detention of aliens, that is conducted on privately-owned land.* (Emphasis added.)

There may be a legitimate basis for expecting DHS to reimburse landowners for actions taken against them when arising from federal enforcement activities on their property, but one is hard-pressed to discern exactly when that might be, after there has been a legal finding of negligence. Not even federal officers are exempt from tort actions arising from their duties when they are found negligent. Why should private landowners not only be exempt but expect any judgments against them to be paid by the U.S. government?

Section 118. Exempts executive agencies from complying with the provisions of law requiring "full and open competition through the use of competitive procedures" when they are implementing any provision in Title I, and further specifies that bid protests to the Comptroller General and the Court of Federal Claims will not be permitted. Given the broad scope encompassed by Title I, one questions the wisdom of such an exemption. Contractors in and around Washington, D.C., and the rest of the country have no doubt already taken careful note of this language and started initiating contact with Customs and Border Protection and other DHS agencies in the hopes of getting in on the action, because any appropriated monies to sustain the efforts outlined in Title I will be extremely significant. Such waivers will almost certainly not be in the public interest because they simply invite waste and abuse, and the strong possibility of ineffectual products since awards will be based on the best sell job, not necessarily the best output at the most reasonable cost.

Section 119. Amends the Immigration and Nationality Act (INA) to criminalize behavior known to be used by drug and alien smuggling cartels: the use of "spotters" to identify and radio back to their co-conspirators all indicators of enforcement and patrol activities at the border. The language applies when spotters are being used to "further a Federal crime relating to United States immigration, customs, controlled substances, agriculture, monetary instruments, or other border controls". The provision is a very welcome addition to the federal enforcement tool belt. One wonders, though, why weapons trafficking

was not specifically mentioned among the other crimes, although one presumes it could reasonably be lumped into the phrase "other border controls".

Section 119 additionally criminalizes attempts or conspiracies to vandalize, destroy, or circumvent physical and technological border controls, including through use of tunnels. Those who use firearms during the commission of this crime face enhanced penalties. Finally, it also amends the federal criminal code relating to unlawful use of weapons to encompass use or brandishing of firearms during the offense of alien smuggling.

The second half of Title I deals with personnel issues in those DHS agencies dealing with immigration enforcement: primarily CBP (which includes Border Patrol agents and port of entry inspectors), and Immigration and Customs Enforcement (ICE) agents and officers.

Section 131. Authorizes and directs (but does not appropriate funds for) substantial increases in CBP personnel: Border Patrol agents, Field Operations port inspectors, Air and Marine Operations officers, K-9 units, search and rescue units, horseback patrols, tunnel detection specialists, and even agricultural inspectors at ports of entry. The section directs that by September 30, 2021, there should be 26,370 Border Patrol agents, and 27,750 officers assigned as field operations inspectors at ports of entry, plus sundry support personnel as well, on top of which are increases to the other specialist positions mentioned above.

Section 132. Delves into pay incentives to retain trained "covered" CBP personnel (basically, all of the types of employees already mentioned immediately above). The language of this section is nearly identical to that found in McCaul's bill (also at Section 132 of that bill) — and therefore, from the author's point of view, shares the same flaws:

The section permits the commissioner of CBP to offer a bonus of up to $10,000 over and above the recipient's ordinary pay if, without the incentive, the covered CBP officer would "likely leave the Federal service ... *or transfer to, or be hired into, a different position within the Department (other than another position in CBP*)." (Emphasis added.)

What this means is that if, for instance, a Border Patrol agent were to be offered a job as an agent in Immigration and Customs Enforcement then the Patrol could lure that agent to stay with the $10,000 bonus. Sounds simple enough, right? But what about the time, money, and effort that ICE is going to expend getting that potential new (and experienced) employee right up to the point of hiring, only to have the rug pulled out from under them? To my ears, this sounds shockingly counterproductive to good governance.

Thinking cynically, there may even be some Border Patrol agents who might consider filing for such jobs solely for the purpose of ensuring that they get the bonus while having no real intention to transfer to other organizations within DHS — certainly it would be a temptation. While the Patrol's interest in hiring and retaining trained agents is understandable, schemes like this one serve no good purpose as drafted.

Section 134. Calls for a modest increase of Immigration and Customs Enforcement (ICE) agents to police the interior of the United States. The bill calls for 8,500 onboard agents in Enforcement and Removals Operations (ERO), which is an increase of a mere 1,800 over existing resources, and an additional 1,500 for Homeland Security Investigations (HSI), the other division of ICE, of which 100 are required to work in Border Enforcement Security Task Forces in areas closely proximate to the border.

Perhaps it is inevitable that Cornyn, being from a border state, focuses so heavily on adding Border Patrol resources and not ICE, but it is indefensible. DHS estimates that nearly half of the 11 or 12 million aliens who are in the United States illegally at present didn't cross the border unlawfully — they were admitted under visa or visa-waiver programs and then simply overstayed. But even considering that portion who did enter without inspection, collectively, where do these 11 or 12 million illegal aliens reside? For all intents and purposes, in the interior.

Yet where are the additional 10,000 interior enforcement agents that President Trump called for in his executive orders, all of whom are desperately needed to bring their officer corps levels up to a par with those of the Border Patrol, and whose geographic and demographic areas of responsibility are vast? You won't find them in this bill. It's as if, once an alien

has managed to evade Border Patrol agents, or simply overstays his tourist or student visa, the federal government is just supposed to pretend he doesn't exist, because there certainly won't be enough interior agents to effectively handle their responsibilities. The disparity between the authorization to hire ICE agents and CBP agents and officers is so lopsided as to be offensive.

It's also worth noting about this modest increase in ICE agents that they are roughly split between ERO and HSI, and yet in the past several years HSI's involvement in immigration enforcement work has diminished significantly, down to where it constitutes a small fraction of productive agent hours for the division. This has put almost all of the burden for enforcing provisions of the INA on ERO. Why, then, should HSI be the happy recipient of nearly half the (inadequate) number of agents being authorized, which falls considerably short of the 10,000 *additional* agents mentioned in the president's executive order on interior enforcement?[15]

Section 135. Authorizes increases in the number of assistant U.S. attorneys, immigration judges, appellate board judges, immigration trial attorneys, forensic document examiners, fraud detection and national security officers who work with adjudicators that decide immigration benefits, and attorneys who litigate immigration appeals in the federal court system.

Section 141. Authorizes new district court judge and magistrate positions for selected southern border federal judicial districts, along with accompanying deputy U.S. marshals and support staff, but specifies that the new funds and positions must be used to "increase the number of criminal prosecutions for unlawful border crossing in each and every sector of the Southern border *by not less than 80 percent per day,* as compared to the average number of such prosecutions per day during the 12-month period preceding the date of the enactment of this Act." (Emphasis added.) Such ambitious, legislatively mandated increases in the number of prosecutions seem unrealistic.

Section 142. Directs the U.S. attorney general to reimburse state, local, and tribal governments for costs they incur for "federally initiated, immigration-related cases" whose prosecution is declined by the U.S. attorney's offices, but goes on to say that reimbursement will not be available when those governments engage in "unlawful conduct in connection with immigration-related apprehensions". Such a scheme is both costly and unworkable. There are unlikely to be appropriations adequate to meet submissions under this provision; there is no bright-line definition of "federally initiated"; and who is to determine whether the agency engaged in "unlawful conduct"? We are also left with the fundamental question of why, if the case was federally initiated, the U.S. attorney's office would decline to prosecute.

Section 151. Amends that portion of the INA relating to State Criminal Alien Assistance Program (SCAAP) grants. These grants have been the subject of much discussion of late, in light of the Department of Justice announcement that grants will not be provided to state, local, or tribal governments with sanctuary policies that shield criminal aliens from the reach of ICE agents. This was a grand opportunity for Cornyn to weigh in on the matter by legislating against sanctuaries. He has not done so, tinkering instead with definitions of aliens for whom reimbursement may be sought — in fact, *expanding* such definitions — while doing nothing to statutorily preclude sanctuary jurisdictions from receiving federal money while thumbing their noses at federal immigration enforcement efforts. This is unconscionable.

Section 152. Deals with providing grants to state, local, and tribal agencies under the umbrella Operation Stonegarden program administered by the Border Patrol. This provision is comparable to Section 141 in McCaul's House bill. It defines eligible agencies as those in "State[s] bordering Canada or Mexico ... or ... a State or territory with a maritime border; and [that are] involved in an active, ongoing, U.S. Customs and Border Protection operation coordinated through a [Border Patrol] sector office." Recipients can then use any money apportioned for such things as equipment, personnel, and overtime.

Unfortunately, as in McCaul's bill, and mirroring the flaw in the amendments to SCAAP, Cornyn has inserted absolutely no language limiting recipients of Stonegarden funds to those agencies that also fully cooperate with all DHS immigration enforcement entities, including through honoring of ICE detainers and providing timely information about release dates and times of alien criminals being held in their custody.

Section 153. Authorizes the federal government to reimburse local and tribal governments for the costs "associated with the transportation and processing of unidentified alien remains that have been transferred to an official medical examiner's office or an institution of higher education." At the risk of appearing callous, if they are unidentified, how does one know whether the human remains belong to aliens? Is it to be presumed simply because they are often found in remote wilderness locations?

Many, perhaps most, of the remains will not have identifying documents because U.S. citizens in remote border locations may be engaged in illicit enterprises and will have removed their identification beforehand; whereas aliens crossing illegally either begin the trek without documents, or have them removed by smugglers because they sometimes can be trafficked for reuse in the black market when the owners are abandoned or left dead, so that tracing the remains is more difficult.

Section 154. Outlines a whole series of mandatory accountability measures to be taken to ensure that federal grants are used appropriately, and includes "clawbacks" (reimbursements) for unauthorized expenses as well as a two-year bar from future grants for that program. Once again, however, there is no reference to grant recipients being obliged to comply with all federal laws, most especially those involving cooperation with immigration authorities, such as is required under the INA.[16]

Title II. Emergency Port of Entry Personnel and Infrastructure Funding

Section 205. Establishes the requirement for DHS to create a biometric capture and storage system that includes not only photographs and fingerprints, but also iris and voice scanning technology. Ironically, the provision specifies that the system would be available not only to DHS, but other federal, state, and local agencies. (Tribal agencies are not mentioned, but presumably they would also be authorized access.)

Given the intransigence of various state, local, and tribal agencies in steadfastly refusing to cooperate with DHS immigration enforcement efforts, a better approach would have been to require reciprocity, providing access only to those agencies that cooperate with, rather than impede, federal immigration agents.

Section 206. Requires that DHS establish a biometric exit system to permit reconciliation of data between arriving and departing aliens, to determine who fails to leave the United States when required. Such a provision was also included in the McCaul House bill. That our Department of Homeland Security has not yet tackled this matter successfully is a national disgrace. We live in an age of technological wonders, and suggesting that systems cannot be envisioned, developed, and implemented to handle alien exits is unfathomable. Any number of websites reaffirm how much can be done when talented programming is appropriately mated with operational experience. Look at Google, look at Facebook, look at Amazon. But embedding the alien exit registration requirement in law — as has been done previously with mandated entry-exit legislation — neither guarantees that it will come to fruition, nor salvages this bill.

Title III. Domestic Security and Interior Enforcement

Section 301. Amends the INA by purporting to end the "catch and release" of apprehended illegal aliens, and authorizes the DHS secretary to take aliens into custody on his own warrant and to hold them in detention. However, the provision also indicates that such aliens may instead be released on bond of at least $5,000 or on their own recognizance (provided they are determined not to be a threat to the community or a flight risk). In truth, this is little different than existing provisions of law, and the only thing singular is that the amendment eliminates reference to release on conditional parole.

While curbing misuse of immigration parole is important given the abuses of the prior administration, there is no reason to think that release on personal recognizance may not end up being misused in a similar way by future administrations similarly disposed. What's more, Section 307 later in the bill does address the possibility of release from custody on parole, so it is not entirely eliminated.

Subsection (c)(1)(B) of Section 301 also contains a significant typographical error. It states:

> *(c) MANDATORY DETENTION OF CRIMINAL ALIENS.—*
> *(1) CRIMINAL ALIENS.—The Secretary shall take into custody and continue to detain any alien who—*
>
> …
>
> *(B) is **admissible** by reason of having committed any offense covered in section 212(a)(2) (Emphasis added.)*

Given the context, surely the provision is intended to address aliens who are *inadmissible* by reason of having committed any offense covered in the noted section of the INA, not those who are "admissible".

Section 302. Substantially amends the first portion of Section 214 of the INA dealing with admission of nonimmigrant aliens with visas, or under the visa waiver program, and specifies that any nonimmigrant who overstays his authorized period of admission shall be ineligible for any immigration benefit (excepting asylum, withholding of removal, or Torture Convention relief), except for good cause shown, and solely within the discretion of the DHS secretary. The bar to receipt of benefits for nonimmigrants who overstay is further reinforced by amending Section 221 of the INA to require that consular officers require visa applicants to sign an acknowledgement of the bar. A similar requirement is levied on nonimmigrants seeking entry under the visa waiver program by amending Section 217 of the INA.

Section 303. Directs the DHS secretary to increase the daily detention capacity to nearly 49,000 by the end of the 2018 federal fiscal year, subject to appropriations needed to fund at full capacity.

Section 304. Requires initiation of a DNA collection program for all criminal aliens, and all aliens detained for violations of the INA. This is an excellent (and long overdue) requirement and may very well aid not just federal immigration agents, but state and local law enforcement organizations also in the solving of a host of different crimes in which DNA forensic evidence has been obtained, but the owner of the DNA is unknown for lack of being in a database.

Section 305. Another welcome, and overdue, statutory amendment that permits the DHS secretary to require submission of biometric data including fingerprints, photos, voice prints, signatures, iris scans, and even DNA from any individual filing an application or petition for benefits under the INA. The phrase "any individual" rather than "any alien" suggests that this provision applies to U.S. citizens filing petitions on behalf of alien recipients. This is an important advance given past incidents involving U.S. citizens filing paperwork on behalf of alien fiancées and spouses who later proved to be involved in national security and terrorist offenses. The information may be used for purposes of benefits adjudication and enforcement of the INA.

This section also provides that DHS may share and exchange such biometric data with the Departments of Defense and State and the FBI for purposes of national security vetting. Finally, the section authorizes and directs federal agencies to negotiate biometric data exchange agreements with Mexico and Central and South American nations.

Section 307. Amends the language in the INA regarding authority to parole aliens. The title is "Ending Abuse of Parole Authority", an obvious reference to the abuses that occurred during the Obama administration:

> *The Secretary may not use the authority under subparagraph (A) to parole in generalized categories of aliens or classes of aliens based solely on nationality, presence, or residence in the United States, family relationships, or any other criteria that would cover a broad group of foreign nationals either inside or outside of the United States.*

It is not clear, though, that these amendments ensure that future White House occupants or their cabinet officials will be curbed from the temptation toward abuse of the parole power. The problem, quite simply, is that no administration ever admits that it is engaging in the behavior this provision would prohibit. Even the Obama White House maintained the fiction that such paroles were being exercised judiciously even though the numbers made plain that such was not the case.

One interesting note is that the new language provides that the DHS secretary may require a bond prior to granting parole. Grant of parole is also prohibited to threats to national security and public safety, except in certain defined "extreme exigent circumstances" and solely in the determination of the secretary.

The section also specifically defines "advance parole" into the United States, and distinguishes it from a parole from custody such as is discussed immediately above. This portion of Section 307 specifies that an individual in the United States as the result of a grant of advance parole may not adjust status inside the country.

Section 308. One of the most important provisions in the entire bill that Cornyn has introduced, it incorporates in its entirety what was previously a standalone bill, the "Stop Dangerous Sanctuary Cities Act", which has been introduced several times in the Senate without passage.[17] The various subsections of this section:

- Assert that any state or local officer who honors detainers filed under provisions of the INA is deemed to be acting as a DHS agent;

- Immunize and indemnify state and local agencies and officers for actions taken pursuant to their cooperation with DHS officials in enforcing immigration laws, and require that in lawsuits filed against state or local agencies for actions taken pursuant to the section, DHS shall be substituted as defendant in lieu of that agency;

- Define sanctuary jurisdictions as those that decline to honor immigration detainers, or inhibit exchange of information with DHS agents regarding alienage or immigration status (with the exception of victims or witnesses); and

- Mandate that sanctuaries shall be ineligible to receive federal grant funds for various public works and economic or community development grants, and further require "clawbacks" of funds provided if at any time during a grant period a state or local government adopts sanctuary policies.

Curiously, though, this section of the bill doesn't debar sanctuaries from receiving DHS or Justice Department grants under various law enforcement programs. Such an omission is difficult to comprehend or justify.

Section 309. Legislatively requires reinstatement of the Secure Communities program — which was already reinstated by presidential executive order at the outset of the new administration. Embedding the requirement in law would simply preclude future administrations from once again discontinuing it.

Section 310. Amends "extreme hardship" waivers available under Sections 212(h) and (i) of the INA for alien spouses, parents, sons, and daughters of U.S. citizens and resident aliens by prohibiting grant of such a waiver if the intended recipient at any time engaged in fraud to procure an immigration benefit. The provision also exacts the same penalty for applications to cancel removal under INA Section 240 when the intended recipient fraudulently procured or attempted to procure immigration benefits.

Sections 320 through 329. Incorporate in their entirety (as Subtitle B of Title III of the bill) a bill previously introduced twice by Cornyn, the "Protecting Children and America's Homeland Act".[18] Collectively, these sections modify the provisions of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1232(a)), and focus particularly on the problems that have arisen as the result of present policies governing the handling of unaccompanied alien children (UACs).[19]

Section 321. Eliminates the existing legal restriction on returning unaccompanied minors who have not been trafficked only to contiguous countries, substituting instead "'Canada, El Salvador, Guatemala, Honduras, Mexico, and any other foreign country that the Secretary determines appropriate", provided that bilateral agreements are in place.

The section also mandates expedited removal of unaccompanied minors who are criminals and gang members convicted of, or determined to be juvenile offenders who have committed a variety of offenses, including drugged/drunk driving; crimes involving violence or weapons or participation in terrorist acts or groups; those who have provided false biographic or identity information; or who are serial immigration offenders.

Section 322. Creates a new INA Section 235B expedited removal process for unaccompanied minors such as those described immediately above, which must take place from start to finish in no more than seven days after asylum screening; be conducted by an immigration judge whose responsibilities include determining whether the trafficking victim provisions of the Wilberforce Act apply to the minor; and result in a decision to be issued within 72 hours after the hearing's conclusion. The provision also provides immigration judges contempt of court powers with the right to assess civil fines and requires issuance of an order of removal for minors who fail to appear for their hearing unless certain defined exceptional circumstances exist.

Note that this new hearing procedure is not so tough as it seems at first glance: If the alien minor establishes to the immigration judge that he or she "is likely to be entitled to be lawfully admitted to the United States or eligible for any form of relief from removal", then the judge is obliged to suspend the hearing and refer the alien instead for a "regular" removal hearing under Section 240 of the INA.

What's more, if during the hearing, the minor makes a claim to asylum, the immigration judge then refers him or her to an interview before asylum officers for that purpose. If recent past history is any indicator, the statistical chances are extraordinarily good that those officers will determine that credible fear exists,[20] at which point the minor will be placed into custody of the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (HHS) while the asylum application is considered.

If the asylum request is denied, the asylum officer then issues an order of removal, which the alien can then request that the original presiding immigration judge review and confirm, or overturn. If the judge confirms denial of asylum, the alien minor may then seek judicial review of that determination in the federal courts.

As one can see, this is a confusing, extraordinarily intricate system with multiple levels of review and appeal; it is most unlikely to actually result in prompt removal of ineligible aliens. It is a classic example of perpetual motion with the likelihood of no discernable forward movement.

Section 323. Establishes a requirement that when HHS takes custody of a minor and is considering resettlement into the hands of private individuals, it obtain from DHS information concerning the immigration status of those individuals prior to making the placement. HHS is similarly tasked with providing information to DHS, as requested or necessary, concerning the location of the minor and the individuals with whom he or she has been placed.

Section 324. Obliges the inspector general of HHS to periodically conduct inspections of all facilities used by HHS/ORR in placement of minors, and tasks the HHS secretary with ensuring the efficient and cost-effective operation of such facilities at costs not to exceed $500 daily per minor unless the HHS secretary certifies that need exists for a higher rate.

Section 325. Specifies that after enactment of this bill, minors who are put into "regular" removal proceedings under the INA may not be placed by HHS/ORR with private individuals unless those individuals are confirmed as biological or adoptive parents or legal guardians (including through DNA testing); they are legally present in the United States at the time of the placement; and they have been biometrically screened for prior criminal histories. Specifically disqualifying sponsor offenses include sex crimes, human trafficking, and weapons and violence-against-the-person offenses.

Furthermore, HHS must determine that the minor is neither a threat to public safety nor a flight risk. Exceptions exist for "special needs" minors. The language specifies that these requirements must be followed even if, prior to enactment, the placement would have been in accordance with court orders or regulations.

The provision also requires registration of the minor into an alternatives-to-detention program while removal proceedings are ongoing, and that the sponsoring adult wear an electronic monitoring device. (One wonders about the effectiveness of requiring the sponsor to wear the device, since it has little or no relationship to whether the minor him- or herself complies or flees. Simply levying a reporting requirement on the sponsor that the minor has fled or violated conditions of release would serve the same purpose.) Civil money penalties are established if the monitoring device is inappropriately removed or tampered with, and the sponsor risks having the alien minor taken from his or her care and back into HHS custody.

The section requires home studies in cases where a minor has previously been subjected to severe forms of trafficking, or has been physically or sexually abused, or where placement with a sponsor may subject the minor to such risks, with six-month follow-ups for extended periods of time.

The section also amends the definition of special immigrant juveniles contained in the INA by eliminating the phrase "and whose reunification with *1 or both of the immigrant's parents* is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" and replacing it with "and whose reunification with *either parent of the immigrant* is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." (Emphasis added.) The difference is subtle, perhaps too much so. Other bills introduced in past sessions of Congress have attempted to amend the definition by expanding it so that it includes grandparents and adult siblings. Such an approach might be a better course of action. The amendment also requires that the DHS secretary make a formal determination that he or she is an "unaccompanied child" within the meaning of the act, in order to obtain special immigrant juvenile status (which confers resident status). This is a technical, but very significant and welcome, definitional change.

Section 326. Amends 47 U.S.C. by adding a new section 1041, which criminalizes fraud and misrepresentation on the part of anyone who attempts to obtain custodial transfer of a minor, and provides enhanced penalties for those who would do so in order to traffic or otherwise abuse or exploit the minor.

Section 327. Requires the secretaries of DHS or HHS, respectively, to notify the governors of any receiving state at least 48 hours prior to transfer of alien minors into facilities in their state, as well as a report of prior transfers from October 1, 2013, until enactment of the bill. Detailed monthly reports are also required thereafter for each affected state. It similarly requires notification to foreign governments of placements for the purpose of reunifying minors with their parents. Finally, it requires potential sponsors to agree to seek permission before moving once a minor is received, and to provide the HHS secretary with wellbeing monitoring reports and changes of pertinent information with regard to each minor, before he or she may be placed into the sponsor's custody.

Title IV. Penalties for Smuggling, Drug Trafficking, Human Trafficking, Terrorism, and Illegal Entry and Reentry; Bars to Readmission of Removed Aliens

Section 401. Amends Section 274 of the INA (8 U.S.C. Section 1324) relating to alien smuggling by enhancing penalties, particularly when the smuggling is for the purpose of, or results in, aliens being impressed into labor servitude, prostitution, or involuntary sex acts. While such enhancements are desirable, there may be unintended consequences to statutory comingling of the two separate concepts of human trafficking and alien smuggling, since persons who are trafficked are entitled to benefits and relief under the immigration laws that smuggled aliens are not.

Another portion of this section specifies the extraterritorial reach of the smuggling statute, when the intended destination of the aliens being smuggled is the United States. Embedding the concept in statute is not a bad thing, although as a matter of practice and court precedent, such extraterritorial reach already exists.

The section also amends the seizure and forfeiture provision of INA Section 274 to make clear that all fruits and instrumentalities of smuggling ventures, whether property or conveyances or tools and mechanisms, can be taken.

In addition, Section 401 extends to 10 years the statute of limitations for frauds or misrepresentations against the United States when the conduct underlying the fraud involved criminal human rights violations or war crimes. Such frauds and false statements often take place when aliens hide their persecutor backgrounds while seeking entry into, or immigration benefits from, the United States.

Section 402. Amends federal commercial motor vehicle license laws, at 48 U.S.C. Section 31310, by specifying that any individual who uses a vehicle to engage in, or aid and abet, alien smuggling, or the illegal entry of an alien, is ineligible for a commercial driver's license (CDL) for a prescribed period of time. Likewise, use of a vehicle to transport drugs, weapons, contraband, or illicit money will result in ineligibility for a CDL. Repeat or multiple violations result in long-term, or even permanent, disbarment from CDL eligibility.

Section 403. Creates a new chapter 28 in the federal criminal code, at 18 U.S.C. Section 581, which establishes, "[e]nhanced penalties for drug trafficking and crimes committed by illegal aliens". The new provision mandates sentences of:

- Five years when a crime is committed, one element of which is "the use or attempted use of physical force or the threatened use of physical force or a deadly weapon or a drug trafficking crime", and the perpetrator is an alien unlawfully in the United States;

- Fifteen years, one element of which are the same factors described above, and the perpetrator is an alien who is under an order of removal at the time the offense is committed; and

- Mandatory imposition of sentences under these provisions to be *consecutive to* any other crime for which convicted.

Section 404. Provides that in determining whether an alien is inadmissible or deportable based on criminal convictions (e.g., in deciding whether the offense constitutes a "crime involving moral turpitude" (CIMT) or "crime of domestic violence"), if the conviction record is inadequate to make an appropriate judgment, then DHS may use other information, such as "charging documents, plea agreements, plea colloquies, jury instructions, [and] police reports".

This amendment is important in providing a basis for DHS adjudicators (in applications for benefits) and agents (in filing removal charges) to look behind documents that may reflect conviction for a statute that has many different prongs, some of which meet the CIMT or domestic violence threshold, some of which may not.

Section 405. Amends Section 275 of the INA (8 U.S.C. Section 1325) having to do with illegal entry, by newly providing that aliens who enter (or attempt to enter) without inspection, or elude examination by federal officers, or engage in misrepresentations at immigration, customs, or agricultural inspection, are ineligible for immigration benefits.

It also enhances existing criminal penalties for second and subsequent entries or attempts, or for aliens who prior to entry or attempted entry have been convicted of three or more misdemeanors or felonies. The existing civil monetary penalties are similarly enhanced for second or subsequent entries or attempts.

This section additionally enhances penalties for any alien entering or attempting to enter illegally "for the purpose of engaging in, or with the intent to engage in, any Federal crime of terrorism" in which case the sentence to be imposed carries a minimum of 10, and maximum of 30 years imprisonment.

Very significantly, the amendment provides that illegal entry under INA Section 275 will be deemed a "continuing offense", which renders the alien subject to prosecution at any time he is found after entry. Present statutory language and case law provide that an alien can only be charged with the offense if caught immediately proximate in time and location to the illegal entry.

Section 406. Incorporates the language found in the previously introduced (but never passed) "Kate's Law" bill, which enhances penalties for aliens who reenter the United States after having been previously removed.[21] Like prior Section 405, the new language would disbar reentrants and attempted reentrants from eligibility for immigration benefits, and establishes an escalating ladder of jail sentences for repeat reentrants, or those with criminal histories, or who have been excluded or deported as security threats. The enhancements also include mandatory minimum sentences for reentrants who are aggravated felons and multiple illegal reentrants; and additionally requires that aliens who were under conditions of probation or parole when removed will be re-incarcerated to serve the remainders of their sentences if caught after having illegally reentered, or attempting to illegal reenter, the United States.

Section 407. Adds the predicate offense of "[human] trafficking with respect to peonage, slavery, involuntary servitude, or forced labor" to existing federal money laundering crimes.

Title V. Protecting National Security and Public Safety

Section 501. This is a technical amendment that helps clarify existing language in the INA relating to the inadmissibility of aliens who commit or incite terrorist acts, although there appears to be a numbering flaw in adding the new subclause into the INA required by Section 501(2)(a) of the bill; it does not appear consonant with the already existing numbering system.

Section 502. Also a technical language clarification, this section also adds the DHS secretary (and his or her designees), along with consular officers and the attorney general, as officials who may consider an alien's inadmissibility based on grounds of national security and terrorism. The section also adds the key phrase "has been" in the several subclauses dealing with members or representatives of a terrorist organization, since as now written the language only contemplates inadmissibility based on an alien who "is" a member or representative — a serious omission.

Section 503. Amends that portion of the INA that permits expedited removal of aggravated felons (8 U.S.C. Section 1228) using administrative processes, by expanding it to include aliens who are deportable under terrorism grounds. The added language also provides that the section may be applied to exclusion cases under the criminal and drug trafficking grounds

(provided that the alien has not been found to have a credible fear of persecution, and is ineligible for relief in the form of a waiver of inadmissibility) or under the exclusion grounds relating to terrorism. However, the DHS secretary is prohibited from effecting removal until after 30 days has passed to permit the alien to seek judicial review.

Section 504. Amends INA Section 287 (relating to powers of immigration officers) to authorize the DHS secretary to negotiate agreements with state or local law enforcement agencies to physically co-locate federal agents at those agencies for the purpose of reviewing and determining the alienage and removability of arrestees and detainees handled by the agency; to collect biographic and biometric information; to enter data into federal systems, including the FBI's NCIC system, based on those reviews; and to make arrangements for transfers of removable aliens into federal custody when being released by the agencies.

This new proviso is apparently envisioned as a way to sidestep the controversy that has surrounded refusal of some police and sheriff's departments to honor immigration detainers and/or provide information to federal immigration agents on the citizenship status of arrestees. The reality is, though, that there just aren't enough officers and agents within ICE's Enforcement and Removal Operations Division to make this feasible — and, as discussed earlier, Cornyn's bill isn't proposing to enhance that corps of officers sufficiently enough to make it so.[22] Thus, such agreements would inevitably be at the expense of other, equally meritorious operational work that would not get done for lack of personnel. This approach is neither an efficient nor a cost-effective way to spend the taxpayer dollars that underwrite the salaries and expenses of ICE agents in order to encourage cooperation with federal immigration enforcement efforts.

The section also modifies the way that the 90-day tolling period is tallied during which an alien under a removal order is required to be repatriated (and after which he is likely to be released in order to comply with the Supreme Court's *Zadvydas* decision).[23] The new tolling method takes into account, and exempts from the tally, periods during which court stays are granted, during which the alien refuses to cooperate as needed to procure repatriation documents, etc. The section also amends the language covering supervision of an alien after tolling of the 90-day period to add that the DHS secretary may require "affirmative acts" as well as restrict activities while the alien is under conditions of release. While all of this is desirable, it's unlikely to substantially alleviate the difficulty of removing certain cases, which result more from intransigence on the part of foreign governments to receive their citizens back than from such procedural delays.

Section 504 contains a technical modification of language describing the reinstatement of final orders of removal, exclusion or deportation against aliens previously expelled who reenter, and asserts that federal courts may not look to review or re-litigate the circumstances surrounding the previous order, but then goes on to create, where none now exists, a specific avenue of federal court review for reinstated final orders under INA Section 1251(h). It is difficult to conceive that opening the window into review of reinstated orders can do anything except harm, given the propensity for many activist courts to read new meanings into law even when the language is clear and concise. One wonders why a bill purporting to bolster border security and immigration enforcement would contain such self-defeating and misleading language.

Another example of conflicting purpose and misleading language can be found in the way that Section 504 handles post-final-order detention of aliens: On one hand it asserts that aliens may be detained without limitation at the discretion of the DHS secretary beyond the 90-day removal period; on the other it prescribes a method for release on immigration parole of inadmissible aliens who were arrested after having crossed illegally and later ordered removed. The section goes so far in its amending language as to provide that the DHS secretary may specify that "the alien shall not be returned to custody" except under limited circumstances.

Section 504 creates a new post-final order proviso specific to detained aliens "who were previously admitted to the United States", requiring the DHS secretary to establish a "detention review process" by which these aliens may seek release. Nowhere in the language, though, do we find a definition of "previously admitted to the United States". Thus it's not beyond possibility that an alien who at one time in his life was admitted as a bona fide nonimmigrant, expelled, and then returned illegally, could claim to merit a chance to submit his request for relief under this review process. Once again, we see provisions being added that cannot possibly result in efficient and effective immigration enforcement, either at the border or in the interior.

There are a number of other INA amendments embedded within Section 504, frankly too many to enumerate, although so many have already been outlined. The long and short of it is that, where enforcement matters are concerned, Section 504 — which in itself is longer than many single purpose standalone bills — falls short.

Sections 505 and 506. Mandate Government Accountability Office studies on the number of detainee deaths and whether proper procedures were followed (Section 505), and the number of migrant deaths along the southern border of the United States within the past five years (Section 506).

Section 507. Creates a new section 3302 of Title 18 (the federal criminal code) establishing a statute of limitations of 20 years on various visa offenses, when the underlying conduct for the fraud was to misrepresent or conceal evidence of participation in war crimes, torture, genocide, crimes against humanity, or other recognized persecution-related offenses.

Section 508. Amends 18 U.S.C. Section 3142 describing the procedures that should be followed when federal judicial officers consider ordering detention in lieu of bail. It is titled "Criminal detention of aliens to protect public safety", and modifies portions of that provision to assert that:

> *Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required if the judicial officer finds that there is probable cause to believe that the person* ***is an alien and that the person—***
> ***(A) has no lawful immigration status in the United States;***
> ***(B) is the subject of a final order of removal****; or*
> *(C) has committed [certain] felony offense[s].* (Emphasis added.)

Other linguistic changes to the section include this proviso in determining eligibility for bail:

> *(C) whether the person is in a lawful immigration status, has previously entered the United States illegally, has previously been removed from the United States, or has otherwise violated the conditions of his or her lawful immigration status.*

Section 509. Creates a new federal offense for the crime of recruiting individuals into terrorist organizations, at 18 U.S.C. Section 2332c.

Section 510. Strengthens existing inadmissibility/exclusion grounds under Section 212(a)(3)(E) of the INA relating to persecutors (including superiors and commanders) by adding a particular section addressing crimes against humanity and other persecutions based on race, religion, nationality, social group, or political opinion. The phrase "crimes against humanity" is specifically defined and quite broad, including such things as kidnapping, peonage, slavery, sexual abuse, forced labor, etc.

Use of, and material support for use of, child soldiers are also grounds of exclusion, as is female genital mutilation. Aliens who fall into these grounds of excludability are ineligible for waivers, and barred from findings of good moral character (a requisite for certain kinds of relief or benefits). Given the shocking human rights abuses we have seen from such groups as ISIS in recent years, these changes are both applicable and welcome.

The section also increases the criminal penalties prescribed under Section 277 of the INA (8 U.S.C. Section 1327) for persons who aid or abet the entry of persecutors, from 10 years to life in prison.

Section 511. Establishes a definition of criminal gangs within the INA. This is not the first bill to include such a provision, whose intent is to aid law enforcement in disrupting and dismantling violent transnational organizations such as Mara Salvatrucha (MS-13), the Latin Kings, and other alien-oriented and -dominated gangs that have gained such a foothold throughout the United States.[24] For instance, the Davis-Oliver Act, versions of which were introduced into both the Senate and House, contained similar provisions; unfortunately, neither version achieved passage.[25]

In fact, this section of Cornyn's bill is substantially similar to a bill recently introduced into the House of Representatives, H.R. 3697, the "Criminal Alien Gang Member Removal Act".[26]

To be designated as a proscribed gang, the organization must have as its purpose the violation of specified laws (including drug trafficking, extortion, violence, alien smuggling and trafficking, etc.) Using this baseline, the section also creates a new

provision in the INA at Section 220, which renders it a ground of removability under both the exclusion and deportation provisions to be a member or associate of such a gang.

Importantly, the section provides that aliens may not seek asylum on the basis of being former members of such a gang.[27] Nor are gang members or associates entitled to temporary protected status. Unfortunately, this section covering alien criminal gangs suffers the same flaw that can be found in the House bill, in that the list of predicate crimes doesn't include certain significant immigration-related offenses such as passport, travel document, visa, and marriage fraud — all being crimes in which alien gangs routinely engage.[28]

Section 512. Defines aliens who have been convicted of drunk/drugged driving as "aggravated felons" under Section 101(a)(42) of the INA, and thus renders them subject to expedited removal and ineligible for relief. A first offense *only* qualifies as an aggravated felony if it results in "serious bodily injury or death of another person"; however, a second or subsequent offense, with or without injury or death, places the alien squarely into the definition of "aggravated felon".

The section also provides that conviction of a single first offense, not involving injury or death, nonetheless renders an alien *who is in the country illegally* excludable or deportable, as applicable, and bars such an alien from a finding of good moral character. Under such circumstances, he or she would not be subject to expedited removal as an aggravated felon, and thus would face a hearing before an immigration judge. Note, therefore, that by the plain language of the section, resident aliens convicted of a first offense — and, in fact, even nonimmigrant aliens who are still in status — would not be removable. While one may or may not argue that this is an appropriate way to deal with resident aliens, the author can see no reason for permitting temporary visitors to this country to avoid the immigration consequences of drunk or drugged driving on the nation's roadways.

Section 513. Renders inadmissible to, and thus excludable from the United States, aliens convicted of a variety of crimes: aggravated felons; border checkpoint runners; sex offenders, including those who fail to register when required; aliens convicted of Social Security fraud or identity theft; firearms violators; aliens convicted of procuring citizenship by fraud; aliens who commit domestic violence or violate court protection orders. With regard to the latter, there are waivers for this offense if the evidence shows it was an act of self-defense, although one wonders why a conviction would occur in the first place if the act was indeed one of self-defense.

The section also renders these crimes as grounds of deportability, in those instances where they have not already been so identified.

Section 514. Prohibits U.S. citizens or resident aliens from filing petitions on behalf of aliens to accord them immediate relative or fiancé(e) status, if the citizens or resident aliens have been convicted of certain serious offenses, such as murder, rape, sexual crimes, or child pornography, unless the DHS secretary certifies that the citizen poses no risk to the alien beneficiary. The bases for making such a determination are not specified.

Section 515. Enhances the penalties found at 18 U.S.C. Section 758 relating to those who evade, or otherwise attempt to run, border controls and checkpoints, particularly if a land, air, or sea conveyance is used in excess of its rated capacity, in excess of posted limits, or in a reckless or dangerous manner. It also provides for forfeiture of real property such as the conveyances used in evading border controls.

Section 516. Bars grant of asylum or cancellation of removal for terrorists — although in each case, the DHS secretary or attorney general (whose powers are delegated to immigration judges) may, as a matter of unreviewable discretion, waive the bar if the alien is determined not to be a security danger. The bases for making such a determination are not specified.

Section 517. Amends that portion of the definition of "aggravated felony" in the INA relating to sex crimes against minors to make it more encompassing. This is almost certainly a reaction to recent federal appellate court decisions that had limited the scope and reach of the existing definition of sexual abuse of a minor. The amendment also amends the language relating to "crimes of violence" and additionally provides that if a conviction record by itself is inadequate to make an appropriate judgment as to whether the crime is one of "violence" for purposes of meeting the definition of aggravated felony, then DHS may use other information, such as charging documents, witness statements, plea agreements, plea colloquies, jury

instructions, police reports, and the like. The same additional information may be solicited in cases involving theft or burglary to determine whether they are aggravated felonies under the INA.

The new language continues the exception that precludes a finding that an alien is an aggravated felon if he or she is convicted of smuggling relatives. This is a disappointment in that there is a significant problem with illegal alien parents paying smuggling organizations to bring their children illegally into the United States to join them, at great risk to those minors. Such language also virtually guarantees that in another decade, even were the Congress to grant amnesty to the existing group of so-called "Dreamers", there will be another such group demanding once again that they be permitted to remain. Until all branches of the U.S. government develop the resolve to put a stop to this reprehensible practice, they are for all intents and purposes complicit in the smuggling and trafficking of vulnerable alien minors.[29]

Section 517 adds various criminal passport, travel document, and visa fraud offenses into the ambit of the definition of aggravated felony; it also amends the language relating to attempts and conspiracy to commit covered offenses by adding such terms as "facilitating", "aiding and abetting", and the like. And it clarifies the language relating to the time frame in which offenses may be considered as aggravated felonies, by providing that any crime in which imprisonment ended within the past 20 years (rather than the 15 years in existing language), and regardless of sentencing enhancements, will be considered.

The new language also actually *narrows* the reach of the aggravated felony definition, by limiting its applicability to aliens who are caught and convicted for illegally crossing, or reentering the United States after removal. For a "border security bill" that purports to concern itself with eliminating the turnstile effect of illegal alien border crossers and recidivists, this change is puzzling, to say the least.

Finally, the section amends the INA definition of "conviction" to provide that:

> *Any reversal, vacatur, expungement, or modification of a conviction, sentence, or conviction that was granted to ameliorate the consequences of the conviction, sentence, or conviction, or was granted for rehabilitative purposes shall have no effect on the immigration consequences resulting from the original conviction. ... The alien shall have the burden of demonstrating that any reversal, vacatur, expungement, or modification, including modification to any sentence for an offense, was not granted to ameliorate the consequences of the conviction, sentence, or conviction record, or for rehabilitative purpose.*

This is a clear and welcome reaction to the actions of various states (such as New York), which have actually established commutation and sentencing policies whose overt aim is to aid alien convicts in evading the removal consequences that arise from their convictions, by permitting retroactive restructuring of their sentences or convictions in such ways as to ensure that they stop short of the requirements embedded in immigration law. (As a parenthetical note, one wonders about the constitutionality of such lopsided actions, since they violate the notion of equal treatment under the law — certainly U.S. citizens are unable to gain from such retroactive benefits, even though they too suffer corrolary harms from their convictions and sentencing in everything from eligibility to vote or carry firearms, to entitlement to public housing, to whether or not they lose custody of their children.)

Section 518. This section also deals with convictions by providing that, within both the exclusion and deportation grounds relating to crimes, all statutes and common laws will be deemed "divisible so long as any of the conduct encompassed by the statute constitutes an offense that is a ground of inadmissibility." It also permits consideration of other information, such as charging documents, witness statements, plea agreements, plea colloquies, jury instructions, and police reports.

Like other language found in the bill that amends the INA, this section, too, is almost certainly a reaction to various court decisions that have taken a "categorical approach" to determining deportability based on the language of a criminal statute.[30] That is to say the court considers the breadth of the statute, without giving any regard to the conduct actually engaged in by the alien when the offense was committed. For example, when statutes are sufficiently broad that they encompass conduct that both would, and would not, place an alien into the definition of "aggravated felony" or "crime involving moral turpitude", then rendering the statute divisible (as this provision would allow) makes it possible for immigration judges to actually delve down into the underlying conduct to see if it fits the definition within the INA and issue an appropriate order of removability.

Section 519. Amends the INA by asserting that the pardon of a governor, without regard to its purpose, has the effect of rendering the original underlying conviction outside the reach for purposes of removal. One wonders how Cornyn is able to philosophically reconcile this proviso with that in Section 518, since many of the same states — again, such as New York — that have adopted policies permitting aliens to derive retroactive benefit from commutations and sentence restructuring (which he opposes) have also adopted policies permitting governors to grant pardons for the sole and specific purpose of defeating removal of criminal aliens.

Section 520. Amends INA Section 243 (8 U.S.C. Section 1253), which criminalizes conduct to obstruct or impede attempts to remove an alien under a final order of deportation, by also making it applicable to aliens under a final order of exclusion. It also eliminates the ability of judges to suspend the sentence and release the alien in such cases, as a matter of statute.

Section 521. Amends that portion of INA Section 243 that permits withholding of visa issuance to countries that fail to timely accept their citizens being removed from the United States. The existing provision has rarely been used in the past, although that appears to be changing under the Trump administration, which has imposed visa suspensions against several countries.[31] The amendments would require DHS to publish a list of uncooperative nations semi-annually, although the DHS secretary may exempt countries for "significant foreign policy or security" reasons. The secretaries of DHS and State would additionally be authorized to discontinue granting visas, or admission to the United States, to various citizens and nationals from the non-cooperative country until such time as the DHS secretary certifies that the country has come into compliance.

Section 522. Enhances the sentencing penalties under 18 U.S.C. Section 555, relating to illicit tunnels and passages created to evade border controls, by establishing mandatory minimum/maximum sentences for those who construct them (seven to 10 years), or those landowners who willfully or recklessly disregard the construction of such a pathway (three to 10 years).

Section 523. Enhances sentencing penalties through mandatory minimum/maximum sentences for those who commit visa fraud to further terrorism (12 to 25 years), drug trafficking (10 to 20 years), to commit any other offense (seven to 15 years), and absent such aggravating factors (five to 10 years).

Section 524. Requires CPB and ICE air assets to increase the number of repatriation removal flights by 15 percent over existing figures. It also requires ICE air operations to increase service to domestic metropolitan hubs (by an undefined percentage) in order to consolidate detainees into locations from which they can ultimately be repatriated. For this purpose, the bill authorizes appropriations of $10 million yearly from 2018 through 2021, although of course an authorization of appropriations doesn't actually provide the money that would be required to make these requirements a reality — such funding can only come via a budget act.

Sections 531 through 544. These sections constitute Subtitle B of Title V and incorporate the provisions of the "Strong Visa Integrity Secures America Act" within S. 1757.

Section 532. Strengthens the Visa Security Program, which authorizes embedding of DHS agents at selected U.S. embassies and consular posts abroad to assist consular officers in vetting of visa applicants. The section directs that, within three years, such agents be stationed at a minimum of 50 posts, using defined risk assessment criteria in the selection of those posts, such as cooperation with U.S. counterterrorism efforts, presence of terrorists and extremists within the population of foreign countries, adequacy of their immigration and border controls, etc. The section prohibits the secretary of State (and by extension the ambassador or chief of mission at the U.S. post abroad) from refusing to cooperate in the stationing of visa security officers where selected.

However, another proviso in the section appears to contradict this mandate by specifying that where DHS does not physically station agents, the functions may be performed by a remote unit, presumably within the United States, which shall act as a "Visa Security Advisory Opinion Unit" whose function is to provide advice on particular visa applicants when solicited by consular posts.

Section 533. Requires CBP, within one year of enactment, to ensure that all air ports of entry use chip-reader technology for electronic passports — particularly as regards passports of U.S. citizens and nationals of visa waiver participant countries — and, "to the greatest extent practicable", adopt facial recognition technology. Annual reports to Congress on implementation are required.

The section also requires that CBP "continuously" screen visa waiver nationals who are present in the United States or expected to arrive within 30 days against a panoply of federal terrorism, national security, and criminal databases.

Section 534. Makes a technical amendment to the requirement for annual DHS reporting to Congress on overstays, to direct the secretary to ensure that the report contains "any additional information that the Secretary determines necessary", in addition to the already-specified data. It then goes on to supplement the particular data requirements that DHS must submit to the various House and Senate committees with oversight of DHS operations. Interestingly, as amended, the report would require future breakdowns on the number of border crossing card overstays (a problem unique to the southern border as such cards are given to Mexican nationals), as well as the number of non-controlled Canadians who enter and then overstay their authorized period of admission.

Section 535. Mandates that the information contained in SEVIS (the Student and Exchange Visitor Information System) be made available to CBP line inspectors at ports of entry, so that they may make better decisions about (re)admitting, or denying entry to, foreign students or exchange visitors who violated their status while in the United States, for instance by dropping out of school.

Section 536. Creates new sections 434 and 435 in the Homeland Security Act by requiring "to the greatest extent practicable, and in a risk based manner and on an individualized basis" that officers adjudicating immigration benefits review the social media accounts of visa applicants who are citizens of, or who reside in, high risk countries". Presumably such screening will include the whole range of applicants, including those seeking asylum or refugee status.

The section then goes on to describe the manner in which those "high risk criteria" will be established, which basically repeats the same criteria to be used by DHS in determining which U.S. embassies or consular posts merit visa security reviews, e.g., cooperation with U.S. counterterrorism efforts, existence or prevalence of terrorist groups among nationals of the country, etc. (see Section 532 above).

To develop the methodology by which social media will be examined, DHS is directed to cooperate with national laboratories, university-based centers of excellence, and other federal agencies. The section also emphasizes the importance of reviewing existing open-source systems of information.

Section 541. Amends the INA to provide that when an alien's nonimmigrant visa is voided by virtue of overstaying authorized admission, then all other nonimmigrant visas concurrently possessed by that alien in other categories are also deemed to be void. The alien remains ineligible to enter unless granted a new visa in the original nonimmigrant category by a U.S. consular officer in the country of the alien's nationality or in the place of foreign residence.

Section 542. Liberalizes the conditions under which the secretary of State can provide otherwise confidential visa information on individuals to foreign governments, by striking the key phrase, "on the basis of reciprocity". The amendment also specifies that the information may be provided to the foreign government for the purpose of "determining a person's deportability or eligibility for a visa, admission, or other immigration benefit", but it is difficult to discern how providing such information to the foreign government will help the United States determine an alien's deportability or eligibility for a visa, if there is no requirement of reciprocity.

The amendment also provides for giving entire databases of information to foreign governments provided those governments agree to certain conditions in the use of the information — but again, there is no requirement of reciprocity. It is difficult to reconcile liberalizing provision of such information to foreign governments, in light of the continuing restrictions that exist in the remainder of the law which significantly inhibit providing visa information to other federal, state, and local agencies of the United States.

Section 543. Amends the INA with regard to when adjudication of visa and immigration benefits must be accompanied by personal interviews of the applicant. If an alien is determined on the basis of the application or other information to be inadmissible, the secretary of State may waive the interview in order to proceed directly to denial of the visa. It also provides that the DHS secretary may prescribe certain classes of aliens to represent national security risks in which event every individual within that class must submit to an in-person visa interview with a U.S. consular officer.

Section 544. Carries the somewhat misleading title, "Judicial Review of Visa Revocation", but doesn't, in fact, directly address such judicial review at all, which is already prohibited under existing statute at 8 U.S.C. Section 1201(i). In fact, the section acts as a parallel to that described above in section 541, by providing that when a visa is revoked (as opposed to being rendered void by overstay), "[a] revocation under this subsection of a visa or other documentation from an alien shall automatically cancel any other valid visa that is in the alien's possession."

Sections 551 and 552. These two sections incorporate the provisions of the "Secure Visas Act" within S. 1757.

Section 552. Extends and clarifies the authorities of the DHS secretary that now exist in the Homeland Security Act, at 6 U.S.C. Section 236. The secretary is given primacy over establishment of regulations and policies for the granting, denying, and revoking of visas (except for the class of diplomats accredited to the United States or international organizations such as the U.N., which remain a prerogative of the secretary of State). The DHS secretary holds these powers not just as a matter of regulation and policy, but right down to the ability to oblige denials and revocations at the individual visa applicant level. Where there is a disagreement, and the secretary of State wishes to approve, but the DHS secretary elects denial, then the DHS secretary's decision stands.

Many of the DHS secretary's powers over visa decision-making have existed since enactment of the Homeland Security Act in 2002, but have lain dormant, in no small measure because in the hierarchical structure of the cabinet, it is almost inevitable that a secretary of State holds more political weight, and therefore power and influence, than a DHS secretary — who is unlikely to want to upset the apple cart by appearing too heavy handed in ruling over the Bureau of Consular Affairs, which is a significant portion of the State Department fiefdom. It is uncertain whether mere enactment of the more robust language of S. 1757 would actually result in any change to the political landscape.

The principle of no domestic judicial review of visa decisions made by U.S. consular officers abroad is retained in the amendments.

The amendments also require that when any visa is revoked, all other visas in possession of the alien must also be concurrently revoked, and decisions to revoke visas must immediately be entered into the appropriate consular, DHS, and other databases so as to ensure that no alien derives a benefit or a visa, or achieves entry after having his visa(s) revoked.

Section 561. Amends the INA to require that background security checks must be performed, completed, *and the results obtained* before immigration officers or judges "approve or grant to an alien any status, relief, protection from removal, employment authorization, or any other benefit under the immigration laws, including an adjustment of status to lawful permanent residence or a grant of United States citizenship", or provide official documents to the applicant.

The amendment further provides that federal judges may not order actions to grant benefits or status (e.g. through writs of mandamus) while such background checks are outstanding.

Section 562. Provides that no law requires, and no court may order, the DHS secretary, the attorney general, a consular officer, or the secretary of labor, to proceed to adjudication of an application or petition either for the original benefit, or an extension of a benefit, while there is any criminal investigation or proceeding ongoing that has a material bearing on the benefit being sought. (An exception is made for the singular purpose of adjudicating Convention Against Torture relief.)

Curiously, though, the next portion of the section only states that these officials may, in their discretion, withhold adjudication, rather than mandating that they do so. One cannot imagine why the language of this amendment isn't proscriptive to disallow an adjudication if the matter being investigated or prosecuted is in fact material to the benefit or relief being sought.

One can also imagine that there are certain kinds of administrative civil proceedings in which an alien applicant is the respondent/defendant that would be equally material to his or her application for benefits or relief under the law. One circumstance that comes immediately to mind is, for instance, being the subject of a restraining order for stalking or domestic abuse. With this in mind, it seems unfortunate that the section didn't provide a parallel proviso for withholding adjudications in those circumstances.

Section 563. Establishes the statutory right of DHS and State Department consular officers to gain access to the criminal history files of the FBI's National Crime Information Center (NCIC) computer system for purposes of adjudicating visas, benefits, or relief from removal by deeming them to be "for a law enforcement purpose", which is the key phrase by which NCIC access is granted. The section further provides that such access shall be provided without fee.

Section 564. Significantly changes the ground rules under the Federal Rules of Civil Procedure. The section precludes courts from certifying class action cases "in any civil action that ... is filed after the date of enactment of this Act; and ... pertains to the administration or enforcement of the immigration laws." It also establishes a four-prong requirement for courts that order prospective corrective actions:

- Limit the relief to the minimum necessary;
- Adopt the least intrusive means;
- Minimize the adverse impact on national security, border security, immigration administration and enforcement, and public safety; and
- Provide for the expiration of the relief on a specific date.

Courts issuing orders requiring corrective actions are also required to enunciate in a written order how the above requirements have been met in sufficient detail for other (presumably appellate) courts to consider. Courts are also limited to granting injunctive relief for a period of no more than 90 days unless they can articulate how and why permanent injunctive relief meets the four-prong test.

In cases where a court orders injunctive or prospective relief, if the federal government files a motion to "vacate, modify, dissolve, or otherwise terminate" the order, it is automatically stayed after 15 days unless the court issues further orders prior to that time frame. If a court issues an order prior to that time frame that in any way precludes the automatic stay, it will be treated as a denial of the government motion, and becomes immediately appealable.

Courts also may not approve consent decrees between parties involving immigration administration or enforcement matters unless they, too, meet the four-prong test; and they are obliged by the language of the statute to expedite all such matters in order to bring them promptly to conclusion.

Section 565. In a belated move more than 30 years after the fact, this section amends the language embedded in the INA by the Immigration Reform and Control Act of 1986 in order to permit the release of otherwise confidential information collected by amnesty applicants under both the legalization (INA Section 245A) and seasonal agricultural worker (INA Section 210) statutory provisions when used for either census or national security purposes.

Section 566. Amends the federal criminal code at 18 U.S.C. Section 3291 to provide a uniform statute of limitations of 10 years for various immigration, naturalization, and peonage offenses. The offenses include 8 U.S.C. Sections 1253 (willful failure to depart), 1324 (alien smuggling/transporting/harboring), 1325 (illegal entry), 1326 (reentry after removal), 1327 (aiding or assisting entry of aggravated felons), and 1358 (importing aliens for prostitution or an immoral purpose); Chapter 69 of the federal criminal code (18 U.S.C. Sections 1421 through 1429, relating to citizenship and naturalization frauds); and Chapter 75 of the federal criminal code (18 U.S.C. Sections 1541 through 1547, relating to passport and visa frauds).

Note that although this section is titled "Uniform Statute of Limitations for Certain Immigration, Naturalization, and *Peonage Offenses*" (emphasis added), by a drafting error none of the peonage, involuntary servitude, or slavery statutes are in fact covered by this change in the statute of limitations, because they are contained in Chapter 77, which is nowhere mentioned in the text — the amending language in the bill refers only to Chapters 69 and 75.

Section 567. Modifies the federal criminal racketeering statute, at 18 U.S.C. Section 1961(1), by adding several immigration and passport-related crimes as predicate offenses.

Section 568. Amends the INA, by creating a new Section 295 to provide that an electronic signature submitted in pursuit of an application, petition, or other proceeding under the immigration laws, is admissible in civil cases, and creates "a rebuttable presumption that the signature executed is that of the individual signing, and that the individual is aware of the contents of the document, and intends to sign it." The provision further requires the DHS secretary to establish identity verification and authentication procedures for the taking of electronic signatures.

The section also contains a parallel provision for introduction of handwritten or electronic signatures as evidence in criminal cases by providing that "the trier of fact may infer that the document was signed by that individual, and that the individual knew the contents of the document and intended to sign the document".

Title VI. Prohibition on Terrorists Obtaining Lawful Status in the United States

Section 601. Amends INA Section 101(a)(13)(C) to provide that a resident alien who falls within the exclusion or deportation grounds relating to terrorism or national security shall be deemed as seeking admission whether or not he or she has abandoned his residence, if seeking entry from outside the United States.

Section 602. Further amends the INA Section 101(a)(13) by adding a new clause (D) providing that adjustment of status to that of a resident alien shall be deemed an admission (thus precluding aliens within the United States who fall within the proscribed security grounds from adjusting status because they would be deemed inadmissible). It also amends the INA by providing that in determining whether an alien is removable for conviction of a crime of moral turpitude, the most recent "entry" (which by implication would include the date of adjustment) shall be the date by which removability is to be judged, thus extending the reach of this portion of the grounds of removability.

Section 603. Prohibits, at subsection (a), the DHS secretary from waiving the grounds of inadmissibility of alien asylees or refugees, with the exception of the health-related grounds laid out in INA Section 212(a)(1). This is a significant amendment, as existing law provides much more latitude to grant waivers, even where there are significant adverse factors such as commission of certain crimes.

However, in what may be a drafting flaw, the language of subsection 603(b) appears to contradict the provisions of subsection (a) as to which grounds may or may not be waived. This subsection appears to be residual language that ought to have been stricken: Note, for instance, that the title of this subsection is labeled "Need Header", as if the drafters forgot to go back and either eliminate it, or provide it a title, not to mention making it consonant with subsection (a).

Subsection (c) acts in a similar fashion to subsection (a), by denying adjustment of status to asylees and refugees who are deportable under any grounds in the INA except "public charge".

Section 604. Denies adjustment of status to human rights abusers, war criminals, and other persecutors who have managed to enter the United States (usually by material misrepresentations or withholding of information) as refugees, or who have been granted asylum while inside the United States. It additionally provides a mechanism for revoking grants of resident status to specific alien persecutors in the course of removal proceedings, whether they are within or outside of the United States, provided they are served proper notice of the proceedings.

Section 605. This section is a technical amendment to INA Sections 216A and 216B, specifying that conditional resident aliens are ineligible to naturalize unless and until the conditions have been met, the restrictions removed, and the alien has been made a full permanent resident of the United States.

Section 606. Amends INA Section 245 to provide that aliens who are terrorists or national security or public safety threats are ineligible to adjust status to permanent residence by adding the key requirement that "the alien is eligible to receive an immigrant visa, is admissible to the United States for permanent residence, *and is not subject to exclusion, deportation, or removal from the United States.*" (Emphasis added.)

The section also adds language providing that, in his/her unreviewable discretion, the DHS secretary may deny adjustment of status and require an alien to seek an immigrant visa outside of the United States if the secretary determines that "the alien may be a threat to national security or public safety or if the Secretary ... determines that a favorable exercise of discretion ... is not warranted." Under such circumstances, though, one wonders why the alien would not be arrested and charged in removal proceedings.

Section 607. Prohibits granting of adjustment of status to aliens who are the beneficiaries of petitions filed by naturalized citizens who are in the midst of denaturalization proceedings under INA Section 340. This is a wise and welcome change, since it makes little sense to permit aliens to derive benefits from individuals who derived their own benefits fraudulently. Note that the prohibition applies equally to potential beneficiaries of individuals being civilly or criminally denaturalized, since criminal denaturalization under 18 U.S.C. Section 1425 is incorporated by reference, at subsection (e) of INA Section 340.

Section 608. Modifies existing provisions of the INA relating to rescission (as opposed to revocation) of adjustment of status. This section extends the time frame in which rescission may be brought to 10 years; it also provides that if rescission has been effected by DHS, then in subsequent removal proceedings, immigration judges may not look behind or otherwise reverse that rescission. Note also that under the terms of the new provision, the DHS secretary in his/her discretion may choose to institute removal proceedings directly without being obliged to take the intermediate step of rescission. In such instances, there is no statutory time limit in which removal actions may be brought, and if the judge orders removal, it serves to rescind the alien's resident status.

Section 609. Amends the registry provision at Section 249 of the INA to prohibit addicts, criminals, traffickers in drugs or humans, prostitutes, national security risks such as foreign intelligence agents, terrorists, persecutors, aliens who have committed fraud or falsely claimed citizenship, alien smugglers, aliens ineligible for citizenship or who have been previously removed, or aliens who have willfully failed to attend required immigration proceedings, from deriving the benefits of legalizing their status under Section 249 of the INA.

Section 621. Prohibits terrorists and their associates and supporters from eligibility to naturalize except those aliens who have previously been accorded a waiver pursuant to INA Section 212(d)(3)(B)(i), which is specific to the actions that would render an alien inadmissible or deportable as a terrorist. The provision permits use of classified or sensitive information to be used in making such a determination.

The section also prohibits derivation of citizenship from a U.S. citizen if the citizenship was obtained by naturalization fraud and if the naturalized individual is later stripped of citizenship.

Section 622. Prohibits a finding of good moral character for individuals convicted of aggravated felonies, whether or not the crime was at the time considered an aggravated felony, provided however that if the sentence or term of imprisonment (whichever is later) for a single such crime occurred more than 15 years previously, the DHS secretary or attorney general, acting through immigration judges, may overlook the conviction.

The section also prohibits findings of good moral character for alien terrorists and their associates and supporters, permits use of classified or sensitive information to be used in making such a determination, and asserts that such findings are binding on reviewing courts.

Going further into the changes proposed by Section 622, at Subsection (a)(2), one again finds curious language in brackets that clearly doesn't belong in an enrolled bill, to wit: "[Client - made some change here and I can't figure out what it is.]" The remainder of this subsection provides that the DHS secretary or attorney general is not limited to the enumerated removability grounds in overall consideration of whether an alien exhibits good moral character, and may consider other acts or conduct without regard to when it occurred.

The section also makes clear that the subsections are retroactively enforceable.

Section 623. Places the burden (in relevant part) on naturalization applicants to establish that they obtained lawful resident status prior to submitting the application, and states that:

> *No application for naturalization shall be considered by the Secretary of Homeland Security or any court if there is pending against the applicant any removal proceeding or other proceeding to determine whether the applicant's lawful permanent resident status should be rescinded, regardless of when such proceeding was commenced.*

It also provides that even if an immigration judge terminates removal proceedings or declines to grant rescission, it does not bind the DHS secretary in determining whether or not the alien is eligible to naturalize.

Section 624. Permits judicial review of applications for naturalization when a decision on the application has been pending longer than six months after DHS has completed all documentary and case reviews (to be defined in regulation), but limits the court to remanding the matter to the DHS secretary for further determination.

The section also permits judicial review of naturalization denials, if filed within four months of the administratively final date of denial, but places the burden on the denied applicant to establish that the reasons for denial were "not supported by facially legitimate and bona fide reasons".

Finally, the section prevents courts from reversing adverse findings of the DHS secretary about whether the applicant:

- Is a person of good moral character;
- Understands and is attached to the principles of the Constitution of the United States; or
- Is well disposed to the good order and happiness of the United States.

This provision applies to all pending applications as of the date of enactment, and permits scrutiny of acts and conduct that occurred at any time.

Section 626. Adds a new subsection to INA Section 340, which provides that should any naturalized citizen engage in or incite an act of terrorism; or participate in an act of violence to oppose or overthrow the government at any time within 15 years of naturalization, it is prima facie proof that the individual was not attached to the Constitution or good order of the United States at the time of naturalization, and, "in the absence of countervailing evidence", provides the basis for denaturalization.

Section 627. This section is a logical companion to previously discussed section 607 (which prohibits granting resident status to alien beneficiaries of petitions filed by citizens who are under denaturalization proceedings). This provision prohibits the according of immediate relative status to such an alien, which is the preliminary basis by which an alien obtains an immigrant visa or adjustment of status, until the denaturalization process has been finally decided. It also prevents the subject of the denaturalization proceeding from filing any kind of immigration-related application or petition.

Section 628. Requires DHS to retain all naturalization papers and supporting documents for a minimum of seven years "for law enforcement and national security investigations and for litigation purposes", but permits their retention in electronic format.

Section 631. Amends the federal criminal code at 18 U.S.C. Section 981(a)(1), by providing for the seizure and forfeiture of the fruits and instrumentalities (property, funds, etc.) used to violate the provisions of Chapter 75 of Title 18, relating to passport, travel document, and visa frauds.[32]

Section 632. Provides for the denial or revocation of U.S. passports of individuals convicted of various terrorism-related offenses in the federal criminal code;[33] or who are determined by the secretary of State to be a member, associate, or material supporter of designated terrorist organizations. However, the secretary may decline to revoke such a passport for emergency, humanitarian, or law enforcement purposes; and similarly may limit use of a passport for the purpose of return to the United States. Individuals whose passports are denied or revoked may request an administrative hearing before the secretary within 60 days. Such denials and revocations must also be reported to Congress within 30 days.

Title VII. Other Matters

Sections 702 and 703. State that the provisions of the Administrative Procedure and Paperwork Reduction Acts shall not apply to all activities undertaken to implement the bill.

Section 704. Amends 28 U.S.C. Section 530C by expanding its reach beyond the Justice Department, and making it equally applicable to DHS and its ICE component. (This provision of law describes permitted uses of available agency funds for purposes of hiring, contracting, equipment and material acquisitions, etc., and presumably would aid DHS and ICE in implementing the provisions of an enacted bill.)

Section 705. Establishes "severability", meaning that should any portion of the statute be deemed unconstitutional, all of the remainder shall be deemed valid and in force.

Conclusion

The people of this nation deserve and demand a robust border security and interior enforcement bill; it is past time. The need is particularly acute if, as seems possible or even likely, such a bill is to be tied to some kind of amnesty for a significant portion of the illegal alien population.

We have seen previous promises attached to such amnesties, claiming that they would be a one-time deal because the enforcement provisions attached would be up to the task of curtailing large-scale illegal immigration — and yet the decades intervening have proven how false that promise was.

The question is whether the many noteworthy and positive provisions of *this* bill sufficiently outweigh the flaws and contradictions it also contains. Our initial answer is that, absent significant polishing, redrafting and further amendment, it is not.

End Notes

[1] The text of S. 1757 can be found at Congress.gov.

[2] "Voters Don't Believe Immigration Reform Will Lead to Border Control", Rasmussen Reports, September 12, 2017.

[3] Dan Cadman, "With One Tweet, the President Gilds the DACA Lily", Center for Immigration Studies blog, September 8, 2017.

[4] See, for instance, Mark Krikorian, "DACA Fix vs. DREAM Act: Moving the Goalposts", Center for Immigration Studies blog, September 13, 2017.

[5] Stephen Dinan, "Trump unveils new strict 70-point immigration enforcement plan: Calls for comprehensive rewrite of laws to stiffen border and interior, cut chain migration", *Washington Times*, October 9, 2017.

[6] Heather Caygle, Seung Min Kim, and Sarah Ferris, "House Leaders Meet on Dreamers – Paul gets AUMF vote today – Trump to Huddle with House Moderates – GOP torn on Obamacare repeal", Politico Huddle, September 13, 2017.

[7] "Immigration-Reduction Grades", NumbersUSA, undated.

[8] See Laura, "Dream Act-Border Security Bill Possible in 2017, Thune Says", Litvan, Bloomberg Government/Bloomberg First Word (behind a paywall), September 17, 2017.

[9] Jordain Carney, "Key Democrat: 'Naive' to think DACA will pass without border security", *The Hill*, September 19, 2017.

[10] The text of Rep. McCaul's bill, H.R. 3548, the "Border Security for America Act of 2017", can be found on Govtrack.us.

[11] Because the McCaul bill and the first portion of S. 1757 are substantially the same, the author has taken the liberty of re-using much of the language in his recent analysis of the McCaul bill for purposes of this examination. That analysis looked at the highlights of the McCaul bill and concluded that it was entirely too narrowly focused given the many complexities confronting enforcement of the immigration laws in the United States today. See Dan Cadman, "A Myopic Border Security Bill", Center for Immigration Studies blog, August 21, 2017.

[12] Dan Cadman, "Using CBP and ICE Assets in Houston Recovery Efforts", Center for Immigration Studies blog, September 4, 2017.

[13] A description of the Mérida Initiative can be found on the Department of State website.

[14] Clare Ribando Seelke and Kristin Finklea, "U.S.-Mexican Security Cooperation: The Mérida Initiative and Beyond", Congressional Research Service, June 29, 2017.

[15] "Enhancing Public Safety in the Interior of the United States", Presidential Executive Order, January 25, 2017.

[16] See, e.g., 8 U.S.C. Sections 1373 and 1644.

[17] A quick history of previous attempts to at passing the "Stop Dangerous Sanctuary Cities Act" in the Senate can be seen at Congress.gov.

[18] The prior attempts by Sen. Cornyn to pass the "Protecting Children and America's Homeland Act" can be seen at Congress.gov.

[19] CIS has tracked, and exhaustively reported on, many of these problems in recent years, including placement of minors into the hands of exploitative employers; release of UAC gang members who go on to commit murder; inability of accepting facilities to properly track or care for minors once received from HHS, ad infinitum. Many of these reports may be found on the Center's website.

[20] Unsurprisingly, "credible fear of return" claims made by illegal entrants, which initially dropped at the start of the Trump administration — no doubt in part because of Trump's campaign rhetoric — are now starting to climb. See Andrew Arthur, "Apprehensions and Credible Fear Numbers Creeping Back Up: Is the 'Trump Effect' Wearing Off?", Center for Immigration Studies blog, September 20, 2017.

[21] Kate's Law bills have previously been introduced in both the House and Senate. The bills are named after Kate Steinle, who was murdered by a multiply deported illegal alien in San Francisco (a sanctuary city) and died in her father's arms. CIS staff have written extensively about the case, as well as about sanctuary jurisdictions.

[22] Consider that the onboard staffing in ICE ERO at present hovers around 6,500 to 6,700 agents. By comparison, according to the May 2015 "Final Report of the President's Task Force on 21st Century Policing", there are nearly 18,000 police and sheriff's departments in the United States.

[23] *Zadvydas v. Davis et al.*, No. 99-7791, Supreme Court of the United States, June 28, 2001.

[24] CIS staff and fellows have written extensively about the pervasiveness of such gangs and their destructive effect on American communities.

[25] See Dan Cadman, "Analysis of the Senate Version of the Davis-Oliver Act", Center for Immigration Studies, July 16, 2015.

[26] For comparison purposes, the text of H.R. 3697 can be found at Congress.gov.

[27] Many readers may be shocked to find that such claims have been made (and granted) in the past, based on the "membership in a particular social group" proviso in the asylum laws. See, for example, Dan Cadman, "Asylum in the United States: How a finely tuned system of checks and balances has been effectively dismantled", Center for Immigration Studies, March 26, 2014.

[28] For commentary on the House bill, as well as its shortcomings, see: Andrew Arthur and Jessica Vaughan, "Bill Would Move to Control Gang Violence", Center for Immigration Studies blog, September 11, 2017; and Dan Cadman, "Strengthening the Bill to Combat Alien Gangs", Center for Immigration Studies blog, September 12, 2017.

[29] See, for example, Dan Cadman, "Uncle Sam, Coyote Extraordinaire", Center for Immigration Studies blog, December 19, 2013; William Chip, "Turning Off the Parent Magnet on Immigration", Center for Immigration Studies blog, July 25, 2014; and Dan Cadman, "Nancy Pelosi: A Legislator Whose Comments Make Her Unworthy for Office", Center for Immigration Studies blog, September 22, 2017.

[30] For a brief explanation of the categorical approach, see "Categorical Approach: 2016 National Seminar", U.S. Sentencing Commission, undated.

[31] See Andrew Arthur, "Won't Take Back Your Citizens? No Visas for You: Trump Pulls the Trigger on 243(d)", Center for Immigration Studies blog, August 24, 2017; and David North, "Delightfully Nuanced Threats as State Dept. Seeks to Expand Deportations", Center for Immigration Studies blog, September 19, 2017.

[32] A listing of the relevant passport and visa fraud statutes can be found at the Cornell Law School Legal Information Institute website.

[33] A listing of the relevant terrorism-related statutes may be found at the Cornell Law School Legal Information Institute website.