



# Analyzing H.R. 7059, the ‘Build the Wall, Enforce the Law Act of 2018’

By Dan Cadman

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It took several days after House Majority Leader Kevin McCarthy (R-Calif.) publicly announced introduction of a new bill to fund the border barrier and implement important immigration measures before the text of the proposed legislation became available.

The bill McCarthy announced was the “Build the Wall, Enforce the Law Act of 2018”, H.R. 7059,<sup>1</sup> which was described in the media as a “new get-tough immigration bill that would build the rest of President Trump’s border wall, punish sanctuary cities and stiffen penalties on repeat illegal immigrants.”<sup>2</sup>

The legislative language of the bill may not completely live up to its media depiction, but there are a number of extremely desirable law enforcement provisions crafted into the bill. Other features are desirable, but flawed as written and merit amendment to ensure that they have the effect intended. A few appear to be a step backward.

Following is a brief analysis.

**Section 1.** Titles the bill.

**Section 2.** Enumerates a list of findings related to the many accomplishments of Immigration and Customs Enforcement (ICE), a Homeland Security component that has been the subject of much public vilification and proposals for abolishment of late.<sup>3</sup>

These findings are primarily intended to illustrate the important contributions to public safety and homeland security that ICE agents perform daily throughout the nation, although they also contain other findings, such as the importance of safeguarding the integrity of electoral processes by combating voting fraud and precluding ineligible individuals such as illegal aliens from voting.

**Section 3.** States a sense of Congress that allowing illegal aliens to vote diminishes the voting power of citizens; that denounces calls to abolish ICE; and that supports ICE and other law enforcement personnel who “bring law and order to our Nation’s borders.”

Some might see Sections 2 and 3 as more symbolic than substantive, but there is value nonetheless in establishing an official record that articulates the findings and sense of Congress on these matters — assuming the bill manages to get enacted into law, which may or may not take place in light of current Senate rules that effectively require a 60-vote majority before it can pass, an anti-democratic rule if ever one existed.<sup>4</sup>

**Section 4.** Focuses on state and local government obstruction of enforcement of federal immigration laws by amending and augmenting the existing language of Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, codified at 8 U.S.C. Section 1373, relating to the right of federal, state, and local authorities to exchange information about the immigration status of any person, free from official interference.<sup>5</sup>

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That provision of law has been invoked by the U.S. Department of Justice (DOJ) to withhold law enforcement grant funding from state and local jurisdictions that exercise sanctuary policies and decline to cooperate with ICE or honor immigration detainees, or otherwise impede federal immigration enforcement functions. In this regard, the state of California has gone so far as to not only forbid law enforcement officials from honoring detainees or cooperating with ICE, but also to enact a law that prohibits private employers from cooperating with ICE in investigating the presence of illegal aliens in the workplace. Understandably, Section 1373 has become a flashpoint in the ongoing battle between federal and state/local officials who have gone to court to contest the right of DOJ to deny funds and the obligation of state/local officials to provide information to federal authorities.

Section 4 addresses this issue by expanding the reach of Section 1373 to prohibit not only federal, state, or local official interference in exchanging information, but also to “individuals” in newly revised subsections (a) and (b), which were apparently inserted with private employers in mind. For instance, subsection (b), whose language in many ways mirrors that of subsection (a), says:

*Notwithstanding any other provision of Federal, State, or local law, no Federal, State, or local government entity, **and no individual**, may prohibit, or in any way restrict, a Federal, State, or local government entity, official, **or other personnel** from undertaking any of the following law enforcement activities as they relate to information regarding the citizenship or immigration status, lawful or unlawful, the inadmissibility or deportability, or the custody status, of any individual.*  
[Emphases added.]

This is perhaps a small matter, but the intent of the phrasing is not immediately clear. In both subsections, instead of referring to “individuals” (shown in bold in the sentence), the intended reach of the language might be more apparent had it referred to “no individual or employing entity” in the first instance; and in the second, instead of “other personnel” (also shown in bold), perhaps it ought to have referred to “other personnel or employees”.

Section 4 makes additional changes to Section 1373 by specifically making it a condition of federal grant funding from either DOJ or the Department of Homeland Security (DHS) that the recipient be in compliance with the cooperation requirements levied by the new language, which encompasses “any other grant administered by the Department of Justice or the Department of Homeland Security that is substantially related to law enforcement, terrorism, national security, immigration, or naturalization.”

Noncompliance by an entity is evidenced by annual lists to be compiled by the DHS secretary and forwarded to DOJ and Congress. There is, however, a large exception carved into the new language:

*A political subdivision is not found not to be in compliance with subsection (a) or (b) as a consequence of being required to comply with a statute or other legal requirement of a State or another political subdivision with jurisdiction over that political subdivision, and shall remain eligible to receive grant funds described in paragraph (1). In the case described in the previous sentence, the State or political subdivision that enacted the statute or other legal requirement shall not be eligible to receive such funds.*

The double negative used by the language makes proper reading of the exception difficult (perhaps deliberately), but the long and short is that local sanctuary governments are off the hook and can keep federal money rolling in, as long as they can point to a state law that “makes” them ignore ICE.

This is likely the exception that will completely eviscerate the reach of the law. Consider California again by way of example. Some of the largest metropolitan jurisdictions — and, not coincidentally, those with the most statistically significant number of alien criminals and immigration law violators, including San Francisco, Oakland, and Los Angeles — have sanctuary policies not just because of California law, but also by enactment of their own local rules and policies. *This is what they choose to do.*<sup>6</sup> Establishing an exception effectively gives them cover to continue their scofflaw policies at the expense of community security, officer safety, and law and order.

In some instances, the states that have established sanctuary policies covering their political subdivisions take in far less in DOJ and DHS grants than the local governments do cumulatively. They may be happy to forego a pittance at the state level to keep the dollars flowing locally, knowing that the exception will prohibit a shutoff of funds.

Consider what would happen, though, if this exception were to be eliminated. Deprived of important, multiple sources of grant funding, county sheriffs (who are among the most powerful politicians within each state, and constitute a significant body collectively) would immediately raise a hue and cry that would force state legislators and governors to stop and rethink the wisdom of either enacting or perpetuating sanctuary laws and regulations. Is that not a better outcome by far, if Congress is serious about obliging all state and local governments to acknowledge the supremacy of federal immigration laws?

Other provisos in Section 4 amend the language of 8 U.S.C. Section 1373 by 1) giving the DHS secretary discretion whether or not to render aliens in removal proceedings to state or local officers, notwithstanding the existence of a state warrant or writ if the requesting jurisdiction is within the list of noncompliant jurisdictions; and 2) in the case of an alien under a final order of removal, prohibiting the DHS secretary from rendering the alien to noncompliant state or local jurisdictions.<sup>7</sup>

Finally, Section 4 contains language specifying that the cooperation mandates do not apply to victims of, or witnesses to, crimes, and specifies that monies withheld from noncompliant jurisdictions are to be redistributed to other cooperating state and local governments.

**Section 5.** Amends Section 287(d) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. Section 1357(d).<sup>8</sup> Existing language refers solely to immigration detainers filed at the request of other federal, state, or local authorities against deportable alien narcotics violators. The revised language authorizes filing of immigration detainers against any “individual who is arrested by any Federal, State, or local law enforcement official or other personnel for the alleged violation of any criminal or motor vehicle law [provided] the Secretary has probable cause to believe that the individual is an inadmissible or deportable alien.”

Probable cause is then spelled out within the revised language in clauses A through E. However, there appears to be a drafting flaw because there is no use of the word “or” after each of the clauses, which might lead some to argue that *all* of the conditions must apply, rather than any single one of them, even though a logical reading of the clauses suggests otherwise.<sup>9</sup> But why leave that to chance when a simple fix is available?

The revised language also specifies the time limits within which DHS must respond to a federal, state, or local law enforcement agency when it advises that an alien subject to a detainer is ready for pickup (“within 48 hours (excluding weekends and holidays), but in no instance more than 96 hours.”).

It also provides qualified immunity to state and local departments and officers, including contracting entities acting on behalf of the state or local department. This is an important recognition of the fact that various state and local governments have such contracts for the detention of certain prisoners in their custody. In addition, the revised language specifies that in the event of lawsuits filed as the result of cooperation and honoring of detainers, the federal government is the proper party to be named as defendant, in lieu of the state or local entity.

The importance of this language cannot be overstated. Many agencies that would otherwise cooperate with ICE have been intimidated and declined to do so out of fear of fiscally ruinous lawsuits that would bankrupt them even if ultimately won.

Note, however, that the revised language also specifies that qualified immunity does not cover either state or local departments, their contractors, or their officers or personnel in the event of “bad faith” in which it is established that they exceeded their authority and engaged in abusive behavior.

Finally, Section 5 establishes a “private right of action”, which provides the legal basis by which victims or their survivors may file lawsuits against state or local governments that ignore immigration detainers and release a criminal alien to the streets, as a consequence of which that alien later commits an act of “murder, rape, or any felony, as defined by the State” resulting in his sentencing to a year or more imprisonment.<sup>10</sup> This is an exceptionally powerful tool that provides a measure of justice to the victims of scofflaw sanctuary policies, and at the same time acts as a powerful curb to enactment of such policies in the first place.

**Section 6.** Amends the statutory bases for detention during the pendency of removal proceedings. It does this by amendment of the existing provisions of INA Section 236 (codified at 8 U.S.C. 1226).<sup>11</sup>

For instance, a new subsection (f) permits detention “without time limit” for all removable aliens encompassed within Section 236, except specified categories of alien criminals defined at subsection 236(c)(1), in which case such detention is mandatory.<sup>12</sup>

In addition, there are revisions to categories of aliens enumerated in subsection (c)(1), to include aliens convicted of driving under the influence of alcohol or drugs, as well as aliens whose visas are revoked, and aliens who overstay or otherwise violate the conditions of their entry as nonimmigrants.

Another addition to this category of mandatory detention relates to aliens deportable under INA Section 237(a)(1)(C)(i), relating to criminal offenses, who “[have] been arrested or charged with a particularly serious crime or a crime resulting in the death or serious bodily injury (as defined in section 1365(h)(3) of title 18, United States Code) of another person.”

Note that there is no definition of “particularly serious crime” embedded in the draft legislation and this fact, in combination with the reliance on another portion of the U.S. Code to define serious bodily injury, makes one wonder whether at some point in the future the provisions will be stricken on judicial review as “constitutionally vague”. That is precisely what happened a few months ago when the Supreme Court nullified the portion of the definition of aggravated alien felons convicted of “crimes of violence”, which also relied on a definition found elsewhere in the Code.<sup>13</sup> The question is admittedly speculative at this juncture, however.

The bill also adds some highly technical, detailed language relating to when an alien may be taken into custody as the result of being a member of the revised categories of mandatory detention. The language is contained between lines 4 and 19 on p. 18 of the bill. Reading it several times, one concludes that the intent is to render moot an ongoing legal controversy as to whether an alien — even an alien criminal otherwise subject to mandatory detention — may be entitled to a bond hearing if he is not “immediately” taken into custody by federal agents.<sup>14</sup> Unfortunately, the language making clear that assumption of custody at the direction and discretion of the DHS secretary is the only trigger — not when it occurs — isn’t itself very clear. This is an important provision and merits a redrafting to make its intent crystal clear.

Section 6 also specifies that the attorney general (AG) may administratively review custody and detention decisions of the DHS secretary *only* in specified categories of cases. Note that when one reads “attorney general” in this context, it means an immigration judge acting under authority of the AG. Thus, the intent is to preclude bond hearings in immigration courts except in the specifically identified categories.

Ironically, among those entitled to immigration court bond hearings under the language of this section are aliens being charged with national security, persecution, genocide, war crimes, crimes against humanity, and related offenses under Sections 212(a)(3) and 237(a)(4) of the INA.<sup>15</sup> One might think that such aliens would be prime candidates for mandatory detention. It’s not that this is a new state of affairs. But one might think a bill amending the categories of mandatory detention to include aliens convicted of DUIs could also do the same for war criminals, genocidaires, and spies.

Section 6 also contains a proviso specifying that “No bond may be granted except to an alien who establishes by clear and convincing evidence that the alien is not a flight risk or a danger to another person or the community.” While flight risk and danger have generally been understood to be the bases by which bond decisions are supposed to be made, it is important and significant that this language makes clear that the burden is on the alien to establish by “clear and convincing” evidence that he merits consideration for release from detention.

**Section 7.** Amends the provisions of INA Section 276, 8 U.S.C. Section 1326, relating to the criminal offense of reentry after removal. The amendments create a tiered structure of penalties similar to that currently in effect, while at the same time increasing the amount of time to which an alien may be sentenced for reentry depending on his adverse criminal or immigration history. For instance:

- Existing language refers to aliens who reenter who have previously been convicted of three or more misdemeanors involving “drugs, crimes against the person, or both”, whereas the proposed language removes those qualifiers so that any three misdemeanor convictions would trigger the sentencing enhancement from the usual base of two years, upward to 10 years.

- Current language subjects reentrants with prior convictions for aggravated felonies to penalties of up to 20 years imprisonment, whereas the bill eliminates reference to aggravated felonies and assigns enhanced prison sentences for reentry depending on how much time the alien was sentenced to if previously convicted of a felony.<sup>16</sup>
- Murder, rape, terrorism, and other slavery and peonage crimes are now specifically enumerated as a basis for incarceration not to exceed 25 years.
- Any alien who reenters after having been removed three or more times is subject under the bill to a sentence of 10 years imprisonment.

The amendments this bill makes to INA Section 276 also require that when alleging a reentry whose penalties are enhanced based on factors involving prior criminal convictions, the burden is on the government to establish the existence of those convictions.

Notably, this bill eliminates the language in current law precluding aliens from using collateral attacks on the underlying removal as a basis to defend against a charge of reentry after removal. (See 8 U.S.C. Section 1326(d).) *That is a singular mistake and should be rectified, because eliminating this key provision will provide an avenue for endless litigation by aliens trying to fight the criminal consequences of having been found in the United States after having been previously removed.* I can think of no valid reason for eliminating the existing preclusion, and it runs contrary to the authors' avowed intent to crack down on immigration law violators and criminals.

**Section 8.** Establishes new and specific grounds of inadmissibility and deportability for aliens who are members or associates of designated criminal gangs, which must consist of at least five persons. This is not the first time that draft legislation has contained such provisions, although unfortunately to date none has been enacted into law.<sup>17</sup> Under this bill, to meet the definition, a criminal gang would have to be designated by the secretary of DHS in consultation with the AG.

The definition of a criminal gang is offered at the outset of the section, to be embedded within a new INA Section 101(a)(53). Included in the definition are the kinds of criminal activity engaged in on a continuing basis by gangs, such as:

- Drug trafficking
- Alien smuggling
- Crimes of violence
- Obstruction of justice and witness tampering
- Identity fraud
- Peonage and slavery
- Interfering with commerce through threats or violence
- Racketeering
- Money laundering
- Conspiracies to commit any of the above

Note that the designated crimes may be offenses charged by a state, federal, or even foreign criminal justice system. Note also that it is not a requirement that any particular member have been convicted of these offenses in order to be removable, once a gang has been designated. Finally, note that, curiously, weapons crimes such as gun trafficking have not been included in this otherwise fairly comprehensive list of serious offenses. This would appear to be a significant lapse.

The bill goes on to create new sections in the inadmissibility and deportability removal grounds of the INA, at Sections 212(a)(2)(J), 8 U.S.C. Section 1182(a)(2)(J), and 237(a)(2)(G), 8 U.S.C. Section 1227(a)(2)(G), respectively, to encompass gang members and other aliens who "participate" in the enumerated crimes and thus further the criminal aims of the gang.

Section 8 of the bill outlines the designation process to be followed within a new Section 220 of the INA. The process outlined closely follows the same methodology already existing in the INA as related to designation of foreign terrorist organizations at Section 219, 8 U.S.C. Section 1189. The process requires notification to Congress, permits use of classified information in considering propriety of designation, allows for petitions by the alleged gang to revoke a designation, authorizes judicial

review of designations, and directs periodic revisiting of designations to determine whether they should be retained on the list of designated gangs.

The bill also amends INA Section 236, relating to apprehension and detention, by adding a provision requiring mandatory detention of alien criminal gang members and associates. It further precludes such individuals from accruing various benefits under the INA, including asylum, temporary protected status, special immigrant juvenile status, or parole except when the individual is to be paroled to “assist” the U.S. government in a law enforcement matter.

Note that the bill does not preclude criminal gang members who are resident aliens and later charged with deportability for their membership from the benefit of cancellation of removal. This appears to be an oversight that should be rectified.<sup>18</sup>

**Section 9.** Provides funding for border barriers, technology and other items with direct proximity to our southern border:

*[T]here is hereby appropriated to the “U.S. Customs and Border Protection—Procurement, Construction, and Improvements” account, out of any amounts in the Treasury not otherwise appropriated, \$23,400,000,000.*

The \$23.4 billion appropriation may only be used for the purposes specified, which include:

- \$16.625 billion for “a border wall system ... including physical barriers and associated detection technology, roads, and lighting”. The bill also lays out a staged apportionment time frame by which this money will be disbursed, and specifies that all monies will remain available for a period of five years.
- \$6.775 billion for “infrastructure, assets, operations, and technology”, which includes ports of entry and Border Patrol facilities, aircraft, an entry-exit system, and family residential centers for detention of illegal border-crossers. As with the \$16.625 billion, this money, too, is apportioned in stages over a period of years. While nearly \$7 billion sounds like a lot of money, the items specified are exceedingly costly, and it is almost certain that something will get short shrift within this grouping.

The section also requires DHS secretary notifications to Congress of funds transferred into operational accounts for the purposes described, as well as submission of a multi-year plan that specifically accounts for how the funds will be used. In addition, the relevant committees of Congress are to receive quarterly briefings on progress in accomplishing the goals laid out in the plan as well as funds expended.

**Section 10.** Excludes the border barrier and associated funding from the tally ordinarily imposed by the Pay-as-You-Go Act of 2010.

## End Notes

- <sup>1</sup> The legislative language can be found on the Congress.gov [website](#).
- <sup>2</sup> Stephen Dinan, [“House GOP leader announces get-tough immigration bill”](#), *Washington Times*, October 12, 2018.
- <sup>3</sup> For a sampling of the many dimensions of the vilification and abolishment proposal, search for “abolish ICE” on the Center for Immigration Studies [website](#).
- <sup>4</sup> For an explanation of why this rule has been so detrimental to enacting fundamental, rational, and long-overdue changes to immigration law enforcement matters, see Dan Cadman, [“Kill the Filibuster to Fix Immigration”](#), Center for Immigration Studies blog, April 6, 2017.
- <sup>5</sup> The current language of 8 U.S.C. Section 1373 can be seen [here](#).
- <sup>6</sup> See, for example, Jessica Vaughan, [“Sanctuary Laws Risk Americans’ Safety”](#), Center for Immigration Studies blog, July 9, 2015; and Dan Cadman, [“Oakland Mayor Once Again Flirts with Federal Felony Charges for Obstructing Immigration Enforcement Efforts”](#), Center for Immigration Studies blog, March 1, 2018.
- <sup>7</sup> These provisos are clearly a congressional reaction to the murder of Kate Steinle in San Francisco. The alien charged in that case was initially taken into custody by ICE agents who, noting existence of an outstanding drug warrant, turned the alien over to local authorities. However, the charges were dismissed, and the local officials then refused to render the alien back to ICE and instead released him to the street, ultimately resulting in Steinle’s death. The case sparked national outrage. See, e.g., Dan Cadman, [“Rending the Fabric of Truth in the Steinle Case”](#), Center for Immigration Studies blog, July 9, 2015.
- <sup>8</sup> The current language of 8 U.S.C. Section 1357 can be seen [here](#).
- <sup>9</sup> The language for the clauses relating to “probable cause” begins on line 22 of p. 11 in the [PDF version of the bill](#).
- <sup>10</sup> For additional information relating to private lawsuits by victims or survivors of alien criminals after release by sanctuary jurisdictions, see Dan Cadman, [“Suing for Deportation: Creating a private right of action for victims of criminal aliens”](#), Center for Immigration Studies *Background*, June 2014.
- <sup>11</sup> The current language of 8 U.S.C. Section 1226 can be seen [here](#).
- <sup>12</sup> Note that there is an apparent drafting and citation error at line 18 of p. 17 of the bill in the portion authorizing detention of an alien criminal who is inadmissible. It states, “(F)(i)(I) is inadmissible under section 212(a)(6)(i)” when it ought to refer to “section 212(a)(6)(A)(i)”.
- <sup>13</sup> For more details on the scope of that litigation, refer to Andrew Arthur, [“SCOTUS Deems ‘Crime of Violence’ Provision Unconstitutionally Vague”](#), Center for Immigration Studies blog, April 17, 2018.
- <sup>14</sup> To better understand this controversy, see Andrew Arthur, [“SCOTUS to Decide when Mandatory Detention Applies: What is ‘when?’”](#), Center for Immigration Studies blog, October 12, 2018; and Dan Cadman, [“Should ‘Taking Immediate Custody’ Determine Whether the Government Can Detain Alien Criminals Without Bond?”](#), Center for Immigration Studies blog, October 12, 2018.
- <sup>15</sup> Section 212(a)(3) of the INA, codified at 8 U.S.C. Section 1182(a)(3), lays out the grounds of inadmissibility for terrorism, national security, and genocide/persecution/war crimes violations. It can be seen [here](#). Section 237(a)(4), codified at 8 U.S.C. Section 1227(a)(4), is a parallel to those inadmissibility grounds, but relates to deportability. It can be seen [here](#). As the reader will note, the grounds are very similar in verbiage, and in each case, address an alien’s removability (for being inadmissible or deportable) because he is a threat to national security; has engaged in terrorist activities, war crimes or persecution; or who otherwise represents foreign policy risk. Note that although terrorists are enumerated within both the inadmissibility and

deportability grounds, the INA requires that they and their supporters be detained. See INA Section 236A, [8 U.S. S Section 1226a](#).

<sup>16</sup> “Aggravated felony” offenses are defined at INA Section 101(a)(43), [8 U.S.C. Section 1101\(a\)\(43\)](#).

<sup>17</sup> See, for example, Section 312 of the Senate version of the Davis-Oliver Act bill introduced in 2015, which can be viewed [here](#). See, also, H.R. 3697, the [“Criminal Alien Gang Member Removal Act”](#).

<sup>18</sup> Cancellation of removal may be found at INA Section 240A, [8 U.S.C. Section 1229b](#). Subsection (a) relates to resident aliens; subsection (b) to “nonpermanent residents”. Based on the language in the latter subsection requiring evidence of good moral character, one might presume that members of designated criminal gangs could not meet the bar. However, no such qualifier exists as regards resident aliens. The safest course would be if the bill simply added cancellation of removal to the list of benefits that criminal gang members and associates cannot obtain.