

BACKGROUND

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The Senate's Comprehensive Immigration Bill: Top 10 Concerns

The Heritage Foundation Immigration and Border Security Reform Task Force

Abstract

More than any other nation in history, the United States has welcomed immigrants in search of a better life. Over the past several decades, however, immigration policy has become confused, unfocused, and dysfunctional. Millions of people who entered the U.S. illegally belie the core principle of the rule of law and belittle the legal naturalization process, while continued large-scale immigration without effective assimilation threatens social cohesion and America's civic culture and common identity. This is especially true when immigrants are assimilated into the welfare state rather than into a society of opportunity. American citizens, as well as current and future immigrants, deserve better. In April 2013, the Senate introduced the Border Security, Economic Opportunity, and Immigration Modernization Act. But, instead of offering meaningful reform, the act fails to address the intricacies of America's immigration challenges by trying to solve everything in one colossal bill; it also imposes exorbitant costs and is filled with political trade-offs and misguided policies. In this Background, the Heritage Foundation Immigration and Border Security Reform Task Force details the 10 most critical reasons why Congress should reject the Senate's flawed approach, and lays out steps for true immigration reform.

The United States is—by far—the world's leading destination for immigrants.¹ More than any other nation in history, the United States has made itself a welcome home for immigrants in search of a better life. Over the past several decades, however, immigration policy has become confused, unfocused, and dysfunctional. America

KEY POINTS

- More than any other nation in history, the United States has offered immigrants a new home. Over the past several decades, however, immigration policy has become confused, unfocused, and dysfunctional.
- Millions of people who broke U.S. law to live in America make a mockery of the legal naturalization process. Continued large-scale legal immigration without effective assimilation threatens social cohesion and America's civic culture and common identity.
- In April, the Senate introduced the misnamed Border Security, Economic Opportunity, and Immigration Modernization Act. The act is an amnesty bill that fails to address the intricacies of America's immigration challenges, imposes exorbitant costs on taxpayers, and is filled with political trade-offs and policies that merely encourage additional illegal immigration.
- Amnesty was tried in 1986. It failed. Instead of repeating the mistakes of the past, the U.S. should implement reforms that encourage lawful immigration, discourage unlawful immigration, and uphold America's principles.

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lacks a simple system to attract the qualified immigrants who can help the economy grow. Millions of people who came to the U.S. unlawfully belie the core principle of the rule of law and make a mockery of the legal immigration process, while continued large-scale immigration without effective assimilation threatens social cohesion and America's civic culture and common identity. This is especially true if immigrants are assimilated into the welfare state rather than into a society of opportunity.

American citizens, as well as current and future immigrants, all deserve better than the current system. Yet, the present reform proposal in the Senate amounts to little more than an "easy button" solution that will fail to solve the many challenges of America's broken immigration system. History, in fact, has shown that big bills designed to solve everything wind up creating as many problems as they address.² They become loaded with payoffs for special interests and often introduce measures that work at cross-purposes. The same is true of the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744).

Introduced on April 17, 2013, the Border Security, Economic Opportunity, and Immigration Modernization Act offers a flawed approach to fixing the nation's broken immigration system. Not only does the legislation fail to address the intricacies of America's immigration challenges by trying to solve everything in one colossal bill, it also imposes exorbitant costs and is full of political trade-offs and misguided policies. Following are the top 10 concerns that make the bill unworkable and unfixable:

1. Amnesty

According to the most recent numbers published by the Department of Homeland Security, there

were an estimated 11.5 million illegal immigrants in the United States in January 2011.³ While the majority are believed to have crossed the U.S. border illegally, approximately 40 percent of illegal immigrants overstayed the terms of their legal visa.⁴ Regardless, S. 744 would create a framework for providing amnesty to the majority of these individuals.

Amnesty comes in many forms, but in all of its variations it discourages respect for the law, treats law-breaking aliens better than law-following aliens, and encourages future unlawful immigration into the United States. The U.S. saw these facts ring true back in the 1980s when the United States last granted a mass amnesty.

In legislation remarkably similar to S. 744, the 1986 Immigration Reform and Control Act granted unlawful immigrants who entered the U.S. before 1982 "temporary resident status." Aliens with this status were authorized for travel and employment. Eighteen months after receiving temporary legal resident status an individual could become a legal permanent resident (LPR). After five years he could then become a citizen.

When the bill passed, its proponents argued that the bill's amnesty provisions would be a one-time thing. Specifically, the House committee originating the legislation said that "a one-time legalization program is a necessary part of an effective enforcement program."⁵ The chief architects of the legislation argued that the enforcement and security provisions contained within the bill, including border security and stepped-up enforcement of existing immigration and labor laws, would ensure that illegal immigration would not be a problem in the future. Since that time, however, the unlawful immigrant population in the United States has nearly quadrupled.

1. "A Nation of Immigrants," Pew Hispanic Center, January 29, 2013, <http://www.pewhispanic.org/2013/01/29/a-nation-of-immigrants/> (accessed June 4, 2013).

2. Amy Payne, "5 Ways the Immigration Bill Is Like Obamacare," The Heritage Foundation, The Foundry, May 2, 2013, <http://blog.heritage.org/2013/05/02/morning-bell-5-ways-the-immigration-bill-is-like-obamacare/>.

3. Michael Hoefer, Nancy Rygina, and Bryan Baker, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011," Department of Homeland Security, Office of Immigration Statistics, March 2012, p. 1, http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf (accessed June 4, 2013).

4. Edward Alden, "Visa Overstay Tracking: Progress, Prospects and Pitfalls," testimony before the Committee on Homeland Security, U.S. House of Representatives, March 25, 2010, http://www.google.com/url?sa=t&rt=j&q=&esrc=s&source=web&cd=1&ved=0CDAQFjAA&url=http%3A%2F%2Fcontent%2Fpublications%2Fattachments%2FAldenTestimony3.25.2010.pdf&ei=P_StUZ6218XK4AOo3YCAAQ&usq=AFQjCNFl1c1fg84kfOuRvya65vAkXquOQ&sig2=yOwajpl5aLufvc-PN_CUmg&bvm=bv.47244034,d.dmg&cad=rja (accessed June 4, 2013).

5. "Report to Accompany H.R. 3810 of the 99th Congress, the Immigration Reform and Control Act of 1986, Report 99-682 (Part 1)," Committee on the Judiciary, U.S. House of Representatives (July 16, 1986), reprinted in 1986 U.S. Code Cong. & Ad. News 5649, 5653, 1986 WL 31950.

Now, more than two decades later, leaders in Congress are once again proposing amnesty. Specifically, S. 744 would:

- Create a “registered provisional immigrant” (RPI) status that would grant travel and work authorization similar to the “temporary resident status” of 1986. RPI status would be initially valid for six years and could be renewed indefinitely.⁶
- Allow those granted RPI status to adjust their status to “legal permanent resident” once the bill’s border security provisions are met. So too, an individual must be able to show that he was “regularly employed” while an RPI, demonstrate that he is not likely to become a public charge (through an average income or resources not less than 125 percent of the federal poverty level), and pursue government-assisted English language and civics education.⁷
- Streamline the naturalization process for unlawful immigrants by stipulating that an alien LPR who has been eligible for work authorization for no fewer than 10 years before gaining that LPR status may be naturalized after three years as an LPR.⁸ Current law requires that applicants for naturalization have resided in the U.S. as LPRs for five years.⁹

Making matters worse, the draft law states that anyone who was present in the U.S. on or before December 31, 2011, would qualify for amnesty, creating massive opportunity for fraud, since there is no proof required that applicants have been in the U.S. several years.

At the same time, the bill also contains a version of the DREAM Act, which would grant amnesty to

those illegal immigrants who came to the U.S. when they were under the age of 16. This version would be more inclusive than previous bills, since it sets no upper age limit for DREAM Act recipients.¹⁰ The bill also creates a special “blue-card” program that would grant work authorization and lawful status to unlawful agricultural workers.¹¹ After five years, DREAM Act-eligible immigrants would be granted citizenship and those with blue-card status would be eligible to become legal permanent residents.¹²

To allow an amnesty would teach precisely the wrong lesson to America’s lawful immigrants and the culture at large. The message of amnesty is: When a group of people who have violated the law grows too big to prosecute, the U.S. will simply change the law to accommodate them. Even more, the U.S. will allow them to stay in the country until, ultimately, they become permanent residents or even citizens. A massive pardon of intentional violation of law also undermines the rule of law, particularly since it would be the second blanket amnesty in about a quarter century.

Amnesty is also deeply unfair to all those who waded through the United States’ complex and convoluted immigration system to come and remain here legally. The same is true for the approximately 4.4 million individuals who at this very moment are waiting in line to come to the United States, some of whom have been waiting for more than two decades.¹³

2. Border Security “Triggers”

In 1986, Congress promised the American people enhanced border security in exchange for amnesty. This improved security largely never came to fruition. This time around, S. 744’s authors included requirements that the Secretary of Homeland Security certify certain “border triggers” before additional steps

6. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong., 1st Session, §2101.

7. *Ibid.*, §2102.

8. *Ibid.*

9. Immigration and Nationality Act Sec. 316, 8 U.S.C. §1427.

10. Border Security, Economic Opportunity, and Immigration Modernization Act, §2103.

11. *Ibid.*, §2211.

12. *Ibid.*, §2103 and §2212.

13. U.S. Department of State, Bureau of Consular Affairs, *Annual Report of Immigrant Visa Applicants in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center, as of November 1, 2012*, <http://www.travel.state.gov/pdf/WaitingListItem.pdf> (accessed June 4, 2013), and U.S. Department of State, Bureau of Consular Affairs, “Visa Bulletin for March 2013,” http://travel.state.gov/visa/bulletin/bulletin_5885.html (accessed June 4, 2013).

in the legalization process can proceed. Specifically, the bill requires that the Department of Homeland Security (DHS) commence the implementation of a Comprehensive Southern Border Security Strategy and a Southern Border Fencing Strategy before the Secretary can begin processing applications for RPI status.¹⁴ The bill also requires that the Comprehensive Southern Border Security Strategy is substantially deployed and operational, and that the Southern Border Fencing Strategy is implemented and substantially completed in order for those with RPI status to be adjusted to LPRs.

While these requirements may sound good on paper, in reality, the DHS has been trying unsuccessfully to define credible metrics for border security since 2004. Even if it had effective triggers, they do not guarantee a secure border. Border-crossing conditions constantly change. Thus, even if the goal is achieved, there is no guarantee it will stay that way.

The U.S. should do more to secure its borders, but using border security as a political tool to pass a bloated comprehensive bill is simply wrong.

Further, the Secretary of Homeland Security has repeatedly stated that U.S. borders “have never been stronger.”¹⁵ So too, in the past five years, the White House has never asked for additional border security funding. Yet, this bill lavishes billions of additional spending on the DHS with no clear requirements on how the money is to be spent. At least \$2 billion could legitimately be labeled the Secretary’s slush fund. Added to this is the fact that the Secretary of Homeland Security can waive the final border security requirements where litigation, a disaster, or an act of God has prevented their implementation; implementation has been declared unconstitutional;

or 10 years have passed since the bill was enacted. One may be left with serious doubts about whether the border security requirements of S. 744 will actually be met.

The bill’s overall strategy would also put greater pressure on U.S. border security measures and drive up the cost associated with them, given that amnesty will create a greater incentive for would-be illegal border crossers. In fact, in April 2013, the chief of the U.S. Border Patrol testified that apprehensions at the border were up 13 percent over 2012 numbers, indicating a significant increase in unlawful entries.¹⁶ The U.S. should do more to secure its borders, but using border security as a political tool to pass a bloated comprehensive bill is simply wrong.

3. Cost to Taxpayers

In addition to concerns of rule of law and fairness, amnesty will cost taxpayers trillions of dollars. This is because some taxpayers contribute more in taxes than they receive in government benefits, while others consume more than they contribute. Most unlawful immigrants fall into this second category of net tax consumers. Even now unlawful immigrant households consume \$14,387 more in benefits than they pay in taxes on average.¹⁷ Current unlawful immigrants receive public education for their children and services at the state and local levels, such as policing, fire protection, road use, and sewer maintenance. Illegal immigrants on average do not pay enough in taxes to cover the cost of these services. In addition, roughly half of illegal immigrants have minor children who were born in the U.S. These children are eligible for nearly all federal means-tested welfare programs including food stamps, Medicaid, Temporary Assistance for Needy Families, and the Children’s Health Insurance Program (CHIP). The total cost of means-tested welfare to these children comes to around \$17 billion per year. Under current law, illegal immigrant households receive about \$2.40 in

14. Border Security, Economic Opportunity, and Immigration Modernization Act, S3 and S5.

15. Jordy Yager, “Napolitano at Immigration Hearing: U.S. Borders Have ‘Never Been Stronger,’” *The Hill*, February 13, 2013, <http://thehill.com/homenews/senate/282845-napolitano-says-us-borders-have-never-been-stronger#ixzz2VG6xdKtt> (accessed June 4, 2013).

16. Michael Fisher, “Questions + Answer,” testimony before the Committee on Homeland Security and Governmental Affairs, U.S. Senate, April 10, 2013.

17. Robert Rector and Jason Richwine, “The Fiscal Cost of Unlawful Immigrants and Amnesty to the U.S. Taxpayer,” Heritage Foundation *Special Report* No. 133, May 6, 2013, <http://www.heritage.org/research/reports/2013/05/the-fiscal-cost-of-unlawful-immigrants-and-amnesty-to-the-us-taxpayer>.

government benefits for every \$1.00 paid in taxes. The overall cost to taxpayers (total benefits minus total taxes) is \$54 billion per year.

S. 744 would provide millions of these immigrants with amnesty, eventually entitling them to extensive new benefits. Indeed, a recent Heritage study indicates that the net cost of amnesty for all unlawful immigrants would be at least \$6.3 trillion.¹⁸ These costs must be paid by current taxpayers, either by increased taxes or reduced benefits. While S. 744 does not grant every unlawful immigrant amnesty, it would grant it to the vast majority, leading to trillions in new costs.

The Senate bill is designed to conceal costs from taxpayers by delaying amnesty recipients' access to most government benefits for the first decade after the bill's enactment.

Specifically, S. 744 would immediately provide RPIs with access to cash welfare benefits through the refundable earned income tax credit (EITC) and related additional child tax credits (ACTC). The cost of these welfare benefits to the taxpayer would be around \$10 billion per year.¹⁹ While RPIs would pay more in taxes after amnesty as their wages increased and they began to work more on the books, these increased tax payments would be largely offset by the new EITC and ACTC welfare payments. Overall, Heritage estimates that amnesty would continue to cost taxpayers over \$50 billion per year (total benefits minus taxes) for the first 10 to 13 years after the bill becomes law.²⁰

The situation gets worse. S. 744 is designed to conceal costs from taxpayers by delaying amnesty recipients' access to most government benefits for the first decade after the bill's enactment. About 13 years after passage, amnesty recipients would become eligible for over 80 federal means-tested welfare programs and Obamacare. Heritage estimates that when this happens the net fiscal cost (total benefits minus total taxes) of amnesty would rise to \$106 billion per year. Amnesty recipient households would receive roughly three dollars in government benefits for each dollar in taxes paid.²¹

S. 744 would also give most illegal immigrants access to future Social Security and Medicare benefits. The Heritage study estimated that once the amnesty recipients reach retirement age, the annual net cost to the taxpayers will reach \$160 billion per year. Ultimately, amnesty recipients will be net tax consumers at every stage of their lives; the total benefits they receive will always exceed the taxes they pay.²²

The Senate bill also continues the problem of family-chain migration, which drives up the cost of federal, state, and local programs. While S. 744 does remove siblings as beneficiaries of family-based visas, it also classifies spouses and children of LPRs as immediate relatives entitled to family visas that are not subject to visa limits.²³ With the majority of family-chain immigrants being predominantly low-skilled laborers, this provision would likely raise welfare costs and poverty levels.²⁴ Additionally, as Heritage Fellow Robert Rector explains:

Once unlawful immigrant households were legalized, there would be an increased tendency for brothers, sisters, and cousins to migrate from abroad both lawfully and unlawfully to join their

18. Ibid.

19. Based on figures from the 2010 Current Population Survey of the U.S. Census Bureau, there are at least 3.44 million unlawful immigrant households in the U.S. On average, each unlawful immigrant household would be eligible to receive approximately \$2,900 in EITC and ACTC tax credits. As a result, the government could pay around \$10 billion in tax credits per year to amnesty recipients.

20. Derrick Morgan, "How to Read the CBO's Scoring of the Immigration Bill," Heritage Foundation *Issue Brief* No. 3963, June 10, 2013, <http://www.heritage.org/research/reports/2013/06/how-to-read-the-cbo-s-scoring-of-the-immigration-bill>.

21. Rector and Richwine, "The Fiscal Cost of Unlawful Immigrants and Amnesty."

22. Ibid.

23. Border Security, Economic Opportunity, and Immigration Modernization Act, §2307 and §2305.

24. Robert Rector, "'Merit-Based' Immigration Under S.1348: Bringing In the High-Tech Waitresses," Heritage Foundation *WebMemo* No. 1492, June 7, 2007, <http://www.heritage.org/research/reports/2007/06/merit-based-immigration-under-s1348-bringing-in-the-high-tech-waitresses>.

relatives. Thus, other things being equal, amnesty would likely increase future unlawful immigration, in turn increasing future fiscal costs.²⁵

At the same time, S. 744 does not require unlawful immigrants to file tax returns to pay back taxes before gaining legal status, contrary to claims by its proponents. Rather, the bill only requires those seeking RPI status to pay “all Federal income taxes assessed” by the Internal Revenue Service (IRS). This means, of course, they would have had to file their income tax returns while here illegally. The payment of back taxes has been a long-held requirement of immigration reform that members of the “Gang of Eight,” who wrote the bill, have often supported publicly. However, the bill itself gives the Treasury Department and IRS no guidance on how to calculate the tax liability of illegal immigrants that have not filed tax returns in all the years they were in the country illegally. Presumably many will fit into this category because they were working off the books for cash, and their employers provided them no income documentation and forwarded none to the Treasury Department. The bill also requires unlawful immigrants to pay only assessed federal retroactive income taxes, and says nothing of state and local taxes.²⁶

In the end, it is highly probable that Treasury would waive the back taxes requirement for those illegal immigrants without income documentation because of the difficulty of establishing their tax liability—especially with the considerable burden the IRS is already carrying due to enforcing the current tax code, implementing Obamacare, and determining why some of its employees wrongly targeted certain groups for extra and unnecessary scrutiny. Even worse, S. 744 may provide amnesty recipients with retroactive eligibility to the refundable EITC and ACTC. The value of unpaid retroactive EITC and ACTC payments roughly equals the value of unpaid federal income and Federal Insurance Contributions Act (FICA) taxes. This means that retroactive tax “collection” could be a net *cost* to the government.

Overall, unlawful immigrants are not likely to compensate current taxpayers by paying back taxes, and, in fact, they may end up collecting retroactive welfare payments. In the future, their taxes will not begin to cover the benefits they would receive after amnesty.

4. Open Season on Spending

Another key concern is that S. 744 would ignore the U.S. spending and debt problems. Indeed, the bill would provide the Secretary of Homeland Security with extensive new spending authority. This is in addition to ballooning spending on welfare, entitlement, and other public benefits for those granted amnesty. For example, the Senate bill gives \$8.3 billion to the Secretary of Homeland Security in the Comprehensive Immigration Reform Trust Fund.²⁷ This fund would be used for the implementation of various provisions of the bill, such as \$3 billion for the Southern Border Security Strategy and over \$1 billion for general startup costs associated with this bill. While Congress calls for these funds to be repaid by fees and penalties, there is no guarantee that this will happen. Indeed, Congress has been known to use trust funds and new streams of money to pay for additional spending. This “spend now, repay later” mentality worsens the U.S. fiscal condition.

The bill also includes opaque spending measures with no clear limits, listed as “such sums as may be necessary.” These unlimited spending measures include funding for the new Office of Citizenship and New Americans, free cell phones for those who live or work near the border, and undefined and obscure “grant programs” within the U.S. Citizenship and Immigration Services (USCIS) that fund public or private nonprofit organizations to assist amnesty applicants.²⁸ These open-ended streams of money reduce transparency and accountability, making misuse or wasting of funds more likely.

Worryingly, all of this new spending would not be offset in the budget, even though it is required by the Budget Control Act (BCA).²⁹ A loophole in the BCA allows the Gang of Eight to list the bill as “emergency spending,” thus enabling lawmakers to spend billions

25. Rector and Richwine, “The Fiscal Cost of Unlawful Immigrants and Amnesty.”

26. Border Security, Economic Opportunity, and Immigration Modernization Act, §2101.

27. *Ibid.*, §6, and Romina Boccia, “Immigration Bill Is a Trojan Horse for Spending,” The Heritage Foundation, The Foundry, April 19, 2013, <http://blog.heritage.org/2013/04/19/immigration-bill-spending-a-trojan-horse/>.

28. Border Security, Economic Opportunity, and Immigration Modernization Act, §2215, §1107, and §2106.

outside existing budget limits.³⁰ Of course, emergency spending is supposed to be for events that are sudden, unforeseen, temporary, and require immediate action. Even though this bill meets none of those criteria, too many in Congress are willing to ignore the law and the U.S. spending problem. As a result, S. 744 would only add to the U.S. growing national debt, both in the short term and the long term.

5. Expansion of Government Bureaucracy

In addition to creating an open season on government spending, the provisions within S. 744 would also substantially expand government bureaucracy. The bill creates several new offices, task forces, and commissions including the:

- **Southern Border Security Commission**, composed largely of appointed members and charged with making recommendations to achieve effective control along the border;³¹
- **Department of Homeland Security Border Oversight Task Force**, composed of members appointed by the executive and charged with providing review and recommendations on government immigration and border enforcement policies and programs, and their specific impact on border communities;³²
- **Task Force on New Americans**, composed largely of Cabinet members and created to establish coordinated federal policies and programs to promote assimilation;³³
- **Joint Employment Fraud Task Force**, created to investigate compliance with immigration

employment verification requirements;³⁴ and

- **Bureau of Immigration and Labor Market Research**, charged with analyzing labor shortages, developing methodologies for determining the annual cap for the newly created employment-based W visa, and help employers to recruit W visa holders.³⁵

Even where the bill does not explicitly create new government agencies and offices, it is likely to expand government bureaucracy. For one, the amnesty provisions contained within S. 744 would create a flood of applications to be processed by USCIS, an agency that is already struggling to keep up. Yet, instead of providing much-needed reforms to USCIS that would create a healthier and more responsive agency, an issue that is not addressed within the bill, the likely response will be to simply throw more money and manpower at the problem.³⁶ The same response is likely to be true for the Internal Revenue Service, which may require more personnel to enforce the bill's requirement that amnesty applicants satisfy applicable federal tax liability.

Additional provisions also establish burdensome government regulations and fees that promise to have a direct effect on business, including the setting of mandatory wages for nonimmigrant agricultural workers and pro-union provisions restricting agriculture employers' ability to hire needed workers.³⁷ The bill also established numerous fees to be paid by employers seeking foreign labor, which add to business costs and ultimately fund many of the bill's other misguided priorities.³⁸ Such regulations and fees will only serve to burden business, raise costs,

29. Budget Control Act of 2011, Public Law 112-25.

30. Border Security, Economic Opportunity, and Immigration Modernization Act, §6.

31. *Ibid.*, §4.

32. *Ibid.*, §1113.

33. *Ibid.*, §2521.

34. *Ibid.*, §3101.

35. *Ibid.*, §4701.

36. James Jay Carafano and Matt A. Mayer, "Better, Faster, Cheaper Border Security Requires Better Immigration Services," Heritage Foundation *Backgrounder* No. 2011, February 28, 2007, <http://www.heritage.org/research/reports/2007/02/better-faster-cheaper-border-security-requires-better-immigration-services>.

37. Border Security, Economic Opportunity, and Immigration Modernization Act, §2232.

38. *Ibid.*, §6.

and decrease the incentive for employers to create new jobs.

6. Loopholes and Ambiguity

At more than 1,000 pages, it should come as little surprise that the Border Security, Economic Opportunity, and Immigration Modernization Act is laced with trade-offs and ambiguity. Much like Obamacare, the complexity of this legislation creates several loopholes and waivers within U.S. immigration law, fostering an environment where Congress neglects its constitutional duties. By delegating much of Congress's responsibility to secure the United States borders and control immigration to the executive branch and unelected bureaucrats, this legislation would make a challenging issue worse.

Throughout the legislation, Congress grants unprecedented discretionary and regulatory powers over immigration to the Department of Homeland Security. The Secretary of Homeland Security, for instance, may waive portions of the Immigration and Nationality Act when considering an alien's eligibility for RPI status. This includes restrictions on admittance of those who have committed crimes involving moral turpitude or use of controlled substances, prostitution, and smuggling.³⁹ The Secretary, along with the Attorney General, is also granted the authority to waive requirements for receiving amnesty set in the bill for "humanitarian purposes, to assure family unity, or if it is otherwise in the public interest."⁴⁰ These broad terms could be used to apply exceptions to a wide range of otherwise ineligible illegal immigrants, including criminal aliens. Indeed, the word "waiver" alone appears 94 times throughout the legislation. Of course, this does not even take into account the vast areas over which the bill gives federal bureaucrats free rein to write regulations for implementing the law. In the case of Obamacare, it has been more than three years since President Obama signed the bill into law, and the regulations are still being written.

At the same time, loopholes are also abundant throughout the legislation. For one, as previously mentioned, amnesty applicants need not prove that they were physically present in the U.S. before December 31, 2011, thereby creating extensive opportunity for fraud.⁴¹ In fact, even in the case of an immigrant who has previously been deported, and then reenters the country illegally after December 31, 2011, the Secretary may still allow application for amnesty.⁴² So, too, would illegal immigrants who are granted blue-card status under the Agricultural Worker Program of 2013 not be prosecuted for any Social Security fraud committed while they were in the country illegally, including falsifying documentation or claiming benefits fraudulently. American citizens committing the same acts are subject to fines and imprisonment for up to five years.

The Senate bill grants unprecedented discretionary and regulatory powers over immigration to the Department of Homeland Security.

Other sections of the legislation also require that applicants for RPI status or adjustment from RPI to LPR status demonstrate an income above 100 percent or 125 percent of the federal poverty line, respectively. To get around proving that they are above the given poverty threshold, however, applicants need only show that they are not "likely to become a public charge."⁴³ Like the condition for physical presence, no requirements are offered for proving that one will not become a public charge. Inadmissibility of immigrants who are likely to become a public charge is, in fact, a long-standing feature of American immigration law, but it is virtually never enforced.

7. Fails on Lawful Immigration Reform

In addition to being extremely costly to the American people, amnesty and the provisions of

39. *Ibid.*, §2101.

40. *Ibid.*, §3405.

41. *Ibid.*, §2101.

42. *Ibid.*, p. 7.

43. *Ibid.*

S. 744 are not fair to all those who have come, or seek to come, here legally. Today, there are approximately 40 million immigrants within the United States, making up nearly 13 percent of the U.S. population, and millions more arrive each year.⁴⁴ For many, going through the legal immigration system is a difficult and time-consuming process; many wait years or even decades to receive a visa to the U.S. In fact, an estimated 4.4 million individuals are currently in line to come through the U.S. immigration system, some waiting 24 years.⁴⁵

The current immigration system is slow and overly complex, yet, rather than address these problems, S. 744 would thrust millions of additional people on the system by granting amnesty to those who are in the U.S. unlawfully, and unrealistically requiring USCIS to first clear the backlog of those waiting to enter the country. While clearing the backlog is certainly a laudable goal, without real reform to USCIS, arbitrary mandates to clear the backlog are only likely to overwhelm the system. Not only that, but if S. 744 were to pass, the political pressure to proceed with amnesty would be so great that one must wonder whether the promise of not allowing illegal immigrants to jump the line in front of those trying to come here legally will be kept.

Indeed, while the bill seeks to take some laudable steps to reform the legal system, such as expanding the Visa Waiver Program and abolishing the diversity lottery, overall it fails to make the type of meaningful reforms necessary. Not only does it do nothing to strengthen the response and capacity of USCIS, it would make the *legal* immigration system more convoluted.

One prime example is the H-1B program, which the bill would make virtually unworkable. H-1B visas allow U.S. companies to hire highly educated foreign workers for occupations requiring specialized skills and knowledge. Employers must pay H-1B workers the “prevailing wage” and certify that their employment will not adversely affect other employees. This allows companies to expand and create more jobs for American workers as well. Section 4211 of the bill, however, guts the H-1B program by imposing heavy new restrictions, and additional amendments could make it even worse. It would also, among other things, force employers to pay higher wages to most H-1B employees than to U.S. workers. Forcing businesses to pay H-1B workers above-market wages is bad enough. The other restrictions would create a bureaucratic nightmare for employers, putting them in legal jeopardy.

Another prime example is the “merit-based” visa system that would be created by the bill. Rather than simply streamlining and fixing the current two-track visa system, the bill creates a third track, a complicated and confusing points system with nearly 30 different categories of consideration. So, too, does the bill complicate the existing family and employment based systems, with new waivers, fees, and requirements. Any true attempt at meaningful immigration reform should make it easier, not harder and more costly, for individuals to come here legally. This is one area where everyone should agree.

8. Disregard for Federalism

The Tenth Amendment of the United States Constitution clearly articulates that powers not

44. U.S. Department of Commerce, U.S. Census Bureau, “Selected Characteristics of the Foreign Born Population by Period of Entry into the United States: 2011 American Community Survey 1-Year Estimates,” http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_S0502&prodType=table (accessed June 4, 2013). In 2011, as many as 6.86 million individuals were admitted to the U.S. as longer-term non-immigrants or as lawful permanent residents (LPRs). In accounting for non-immigrants, Heritage did not include those who were briefly visiting the U.S. for pleasure or business, those who were merely transiting through the U.S., or those who were commuter students from Mexico or Canada. Heritage counted the remaining non-immigrants, which included those who came to the U.S. on work visas like H-1B, students on visas like F-1, and other categories, such as exchange students, diplomats, and alien fiancées, and came to a total of 6,377,120. In addition to these longer-term non-immigrants who were admitted to the U.S., 481,948 individuals came to the U.S. as new-arrival LPRs. This number does not include those who were already here on non-immigrant visas and had their status adjusted to LPR, because these visa adjusters have already been counted as non-immigrants. While the resulting total of 6.86 million may double-count some foreigners who received two different longer-term visas within one calendar year, it is a strong upper estimate of how many people came to the U.S. for more than just a brief stay in 2011. For these and other figures, see the Department of Homeland Security, Office of Immigration Statistics, “2011 Yearbook of Immigration Statistics,” September 2012, http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf (accessed June 13, 2013).

45. U.S. Department of State, Bureau of Consular Affairs, *Annual Report of Immigrant Visa Applicants*, and U.S. Department of State, Bureau of Consular Affairs, “Visa Bulletin for March 2013.”

explicitly delegated to the federal government are thereby reserved to the states.⁴⁶ The Founders understood that in order to know what is truly necessary and prudent for the protection of citizens' rights and liberties, one must be in constant interaction with the people. For this reason, the Founders felt that states fostered the best-equipped individuals to represent the interests of public safety on behalf of their own citizens.

States also have a unique familiarity with their communities that enables them to better navigate the difficult issues of detection, detention, and deportation of illegal aliens. Following this same rationale, many legal experts believe that state and local governments retain inherent authority to enforce federal civil law. Opponents to this practice, however, feel the federal government should be the controlling voice when determining immigration policies and border security, with little to no guidance from the states themselves. As was the case with Arizona's S. B. 1070 immigration law, when the state attempted to implement requirements it felt necessary to determine the immigration status of an individual, the federal government saw the state as an obstacle rather than an ally.⁴⁷

Yet, with fewer than 6,000 Immigration and Customs Enforcement (ICE) agents, failing to use the one million state and local law enforcement personnel to supplement federal personnel makes little sense. State and local law enforcement would, in fact, be a powerful force multiplier for immigration law enforcement. Yet, S. 744 continues to promote a top-down federal approach to addressing immigration while leaving minimum room for real collaboration.⁴⁸

The bill does include a select few instances where some form of collaboration presents itself between

the state, local, and federal governments. For example, four of 10 appointed members to the Southern Border Security Commission are to be representatives of the four states along the southern border. One representative is to come from each of the states and be either the governor or someone appointed by the governor.⁴⁹ Also, with approval from the Secretary of Defense, a governor may order personnel of the National Guard of his or her own state to perform operations and missions in the southwest border region for the purposes of assisting U.S. Customs and Border Protection.⁵⁰ These instances, however, are very limited.

State and local law enforcement would be a powerful force multiplier for immigration law enforcement. Yet, the Senate bill promotes a federal top-down approach to addressing immigration, leaving minimum room for real collaboration.

Otherwise, the bill provides no clear proposal for partnerships between the federal and state or local governments. Indeed, the legislation makes no mention of effective collaborative immigration enforcement programs, such as Section 287(g) of the Immigration and Nationality Act, which allows the federal government to enter into agreements with state and local law enforcement to "act in the stead of ICE agents by processing illegal aliens for removal."⁵¹ Instead, it pushes a federal-government-knows-best-and-will-fix-all mentality.

46. The Constitution of the United States of America, 10th Amendment, *The Heritage Guide to the Constitution*, <http://www.heritage.org/constitution#!/amendments/10> (accessed June 4, 2013).

47. Matt A. Mayer and John Malcolm, "Childish Reaction to Supreme Court Immigration Ruling: Obama Administration Ends a Key Joint Program with Arizona," Heritage Foundation *Issue Brief* No. 3651, June 27, 2012, <http://www.heritage.org/research/reports/2012/06/obama-administration-s-response-to-the-supreme-court-ruling-on-arizona-s-immigration-law>.

48. Jena Baker McNeill, "Section 287(g): State and Local Immigration Enforcement Efforts Are Working," Heritage Foundation *WebMemo* No. 2405, April 22, 2009, <http://www.heritage.org/research/reports/2009/04/section-287g-state-and-local-immigration-enforcement-efforts-are-working>.

49. Border Security, Economic Opportunity, and Immigration Modernization Act, §4.

50. *Ibid.*, §1103(a).

51. U.S. Immigration and Customs Enforcement, "Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," <http://www.ice.gov/news/library/factsheets/287g.htm> (accessed June 4, 2013), and Immigration and Nationality Act Sec. 316, 8 U.S.C. § 1357(g).

9. Special Interests and Earmarks

Among the many dangers of working on comprehensive pieces of legislation is the propensity for earmarks and unique carve-outs for special interests groups. The 1,000-plus-page immigration bill is no exception. There are several special-interest considerations that reveal not only the cronyism involved in the government process, but also how Congress picks winners and losers by determining who receives money and who does not.

Lawyers would receive an enormous boon and would directly benefit from the enactment of S. 744. An administrative appellate authority would be established that authorizes and incentivizes massive class-action lawsuits regarding immigrant status.⁵² The costs for these suits would be borne by taxpayers, but they unfortunately do not stop there. Taxpayers would also be on the hook for providing counsel to aliens, both legal and illegal, regardless of the alien's ability to afford his own.⁵³ This would provide an avenue to file a suit if an alien was ever denied free counsel, increasing the burdens for the Attorney General and the Department of Homeland Security. These two examples are just a few of the many provisions in the bill which boost business for immigration lawyers.

There is also the issue of funding for a wide assortment of new grants and programs. The catch to these programs is that the Secretary of Homeland Security decides which organization gets the money authorized by Congress. Among the many is a whopping \$50 million grant to "assist eligible applicants" through the process of applying for amnesty.⁵⁴ The Initial Entry, Adjustment, and Citizenship Assistance Grant Program also receives \$100 million, and the Legal Services Corporation, previously reserved for U.S. citizens and aliens with legal status, is expanded to offer services to blue-card aliens and workers with grievances, among others.⁵⁵

The cronyism goes further, as lawmakers include special provisions for specific special-interest groups. Ski and snowboard instructors, for instance, are exempted from the H-2B visa cap.⁵⁶ Also contained within the bill are special provisions for the residents of the Commonwealth of the Northern Mariana Islands and for carrier maintenance crews for airlines, cruise lines, and railways.⁵⁷ Lawmakers also include preferred entry for select groups of individuals through the Jobs Originated through Launching Travel (JOLT) Act provisions in the bill, through which visitors from Canada, China, and Brazil receive preferential treatment when applying for visas and are fast-tracked through the process.⁵⁸

A large, comprehensive bill is not good for Americans because of the limited time for proper scrutiny, and, as S. 744 makes clear, it is an easy vehicle for hiding special-interest provisions that benefit a few people while ignoring the rest.

10. Fails on Assimilation and Opportunity

The Senate immigration reform bill fails to address many of the nation's challenges that inhibit opportunity for immigrants, residents, and citizens alike. In fact, in many cases it would only make the problem worse and foster greater dependence on government, particularly among new immigrants and amnesty recipients. Whether this dependence is in the form of the entitlement system or assimilation programs which emphasize participation over integration, the outcome is the same: an overreliance on the federal government without equipping individuals to earn their success.

In terms of integration, the bill would shift assimilation priorities from the Office of Citizenship established by President George W. Bush to the newly created Office of Citizenship and New Americans and a new Task Force on New Americans. Whereas the current model of assimilation and integration

52. Border Security, Economic Opportunity, and Immigration Modernization Act, §2104.

53. *Ibid.*, §3502.

54. *Ibid.*, §2106.

55. *Ibid.*, §2537, §2211, §2232, and §2212.

56. *Ibid.*, §4601.

57. *Ibid.*, §2109 and §4604.

58. *Ibid.*, §4503 and §4508. See also, Jessica Zuckerman, "JOLT Act: Congress Moving in the Right Direction on Visa Reform," Heritage Foundation *Issue Brief* No. 3605, May 15, 2012, <http://www.heritage.org/research/reports/2012/05/jolt-act-congress-moving-in-the-right-direction-on-visa-reform>.

emphasizes the instruction in the culture, history, and language of the United States through community and faith-based organizations, S. 744 uses a federal-centric approach. Indeed, the Task Force on New Americans would be created to “provide a coordinated federal response to issues that impact the lives of new immigrants and receiving communities.”⁵⁹

Similarly, the Initial Entry, Adjustment, and Citizenship Assistance (IEACA) grant program would pour \$100 million into public and private organizations, selected by the government, to design or implement integration programs. Grants from the IEACA program would also fund direct assistance to individuals seeking to apply for amnesty, those seeking an adjustment of status, and those seeking to become naturalized U.S. citizens, along with “any other assistance that the Secretary or grantee considers useful to aliens who are interested in applying for registered provisional immigrant status.”⁶⁰ Essentially, what this and other programs in the bill would do is promote an entitlement view of citizenship and government.

At the same time, S. 744 does nothing to correct the U.S. serious entitlement problems. There is nothing in the bill that reforms the broken entitlement system and creates a system of earned success. Rather than furthering an expansive welfare state which only breeds a culture of dependence, America should foster reforms to the education and welfare systems. These reforms should ensure that the U.S. welcomes all new immigrants into a society of opportunity and prosperity.

Making Immigration Work for All

The U.S. immigration system is in need of significant reform, but S. 744 relies on old, flawed solutions that will do nothing but make the current situation worse. Instead of passing this deeply flawed immigration bill Congress should:

- **Reject amnesty.** Amnesty ignores the rule of law, rewarding those who broke the law with legal status and ultimately U.S. citizenship. Amnesty is also unfair to those who followed the rules and waited or are still waiting to enter the U.S. Furthermore, amnesty only makes the U.S. immigration problems worse by encouraging even more

illegal immigration. Amnesty will also lead to trillions in new spending and huge increases in government bureaucracy. Such costs will be borne by current taxpayers. Instead of another costly and unfair mass amnesty, Congress should develop fair, compassionate, and practical solutions for unlawful immigrants.

- **Take a piece-by-piece approach.** Each aspect of immigration reform requires close attention to detail to make sure that any policies are well crafted and actually solve the problems they were designed to tackle. Trying to fix immigration with one comprehensive bill will only encourage special-interest handouts and ambiguous, poorly thought-out policies. Legal immigration, temporary worker programs, interior enforcement, border security, state and local cooperation, and many other important issues all deserve close inspection and rigorous debate. Tackling each of these critical policies one at a time will give each the attention it deserves, and foster meaningful reform.
- **Enhance border security.** The U.S. has dramatically increased the number of border agents over the past decade, but more needs to be done. Rather than using border security as a political football and promoting hollow metrics, meaningful steps should be taken. Through the use of technologies like unmanned aerial vehicles and cameras and sensors, the Border Patrol will be better able to monitor the border, detect and halt illegal border crossings, and better protect U.S. sovereignty. Congress should provide the U.S. Coast Guard with additional resources and funding so that it can provide adequate maritime security. To truly enhance border security, the U.S. must also seek more cooperation with Mexico. Specifically, U.S. and Mexican law enforcement should make greater use of Border Enforcement Security Task Forces and the Merida Initiative to cooperate on a variety of border security and law enforcement issues.
- **Reform the legal immigration system.** The U.S. legal immigration system should be fixed to

59. Border Security, Economic Opportunity, and Immigration Modernization Act, §2524.

60. *Ibid.*, §2537.

ensure that those who want to come to the U.S. legally can do so in a reasonable and efficient manner. To do so, Congress should reform United States Citizenship and Immigration Services by correcting the agency's faulty budget model to make it less dependent on application fees. The current visa process should also be streamlined to make it easier for foreigners to come here legally. Reforming the legal immigration system should also include new and enhanced avenues for the entry of skilled workers, particularly those educated in the U.S. For those who stay, the U.S. must also have a thoughtful policy of immigrant assimilation.

- **Make immigration more responsive to the economy.** In addition to an improved legal immigration system, the U.S. should seek to foster a focused temporary worker program tied to market and workforce needs that would provide a rotating, temporary workforce. Such a program would not only help ensure that employers' labor needs are met; it would also help to discourage additional illegal immigration by creating another avenue for legal entry and employment. Critically, a temporary program must be truly temporary or it will simply become a new path to unlawful entry, not a solution that fixes it.
- **Reinvigorate interior enforcement measures.** The Immigration Reform and Control Act promised enforcement in exchange for amnesty in 1986. More than 25 years later, this promise has not yet been fulfilled. Interior enforcement measures and programs such as Social Security No Match, random workplace inspections, checks of I-9 forms, and E-Verify help to depress the use of illegal labor and make it clear that the U.S. takes enforcement of its immigration laws seriously.

- **Recognize state and local authorities as responsible partners.** The U.S. has thousands of local and state law enforcement officers who could augment the limited and scattered capabilities of federal officers and agencies. Through programs like 287(g), which allow Immigration and Customs Enforcement to train state and local police to enforce federal immigration laws, state and local authorities can enhance enforcement. By working as partners with the federal government, state and local authorities can also help to guide policy, and improve security and enforcement of U.S. laws in a more efficient and effective manner than the current federal-government-knows-best approach.

A Nation of Immigrants, Built on American Principles

U.S. coins bear the phrase "E pluribus unum"—"out of many, one"—to signify the varied backgrounds of those who came together to make this country great. Millions have come to the U.S. because it is a nation built on the principles of liberty, limited government, and the rule of law that enable everyone to strive for the American Dream. The U.S. immigration system should allow those who want to pursue the American Dream and come to the U.S. legally to do so. The Senate's misnamed Border Security, Economic Opportunity, and Immigration Modernization Act tramples on the principles that made the U.S. the country it is today by disregarding the rule of law, increasing the size of government yet more, and allowing unlawful immigrants to fall into government dependence. Instead of repeating the mistakes of the past, the U.S. should implement reforms that encourage lawful immigration, discourage unlawful immigration, and uphold America's first principles.