

Briefing Report

**Civil Rights Implications of
Comprehensive Immigration
Reform on Illinois'
Immigrant Communities**

A Report of the
Illinois State Advisory Committee to the
U.S. Commission on Civil Rights

December 2014

State Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

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UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 PENNSYLVANIA AVENUE, NW, WASHINGTON, DC 20425

www.usccr.gov

LETTER OF TRANSMITTAL

Illinois State Advisory Committee to the U.S. Commission on Civil Rights

The Illinois Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding various civil rights concerns facing the immigrant community in Illinois, and the potential impact of proposed comprehensive immigration reform legislation on this community. The Committee submits this report as part of its responsibility to study and report on civil rights issues in the State of Illinois. The contents of this report are primarily based on testimony the Committee heard during a series of panel discussions hosted on September 23, 2013 at DePaul University in Chicago.

This report details concerns raised by panelists with respect to due process of law for all noncitizens in Illinois facing immigration charges, as well as the vulnerabilities and need for additional civil rights protections for several special immigrant populations. The report also considers the civil rights implications of specific aspects of currently proposed immigration reform with respect to national origin, sex, disability, and age.

In addition to these findings, the Committee notes that the U.S. Commission on Civil Rights intends to hold a briefing on civil rights at immigration detention facilities on January 30, 2015, and another briefing on workplace discrimination against LGBT communities on March 16, 2015. The findings included in this report in some instances relate to the matters to be discussed at these upcoming Commission briefings. Therefore, the Illinois Advisory Committee presents the findings and recommendations in this report to the Commission as a matter of mutual concern. The Committee hopes that by raising these concerns now, the Commission will be better informed about how various proposed immigration reform efforts may impact the civil rights of noncitizens living in Illinois. By extension, the Committee also hopes that this report will help to prepare the Commission to speak to these issues at the national level as the conversation continues in the coming months.

Illinois State Advisory Committee to the U.S. Commission on Civil Rights

Barbara Abrajano, *Chair, IL Advisory Committee*, Chicago

James Botana, *Co-Chair, Immigration Subcommittee*, Chicago

Anthony Sisneros, *Co-Chair, Immigration Subcommittee*, Springfield

Nancy Andrade, Chicago

Jonathan Bean, Carterville

Lisa Bernstein, Chicago

Trevor Copeland, Chicago

Richard Garcia, Chicago

William Howard, Chicago

Bishop Demetrios of Mokissos, Chicago

Rev. Herbert Martin, Chicago

Malik Nevels, Chicago

Darlene Oliver, Chicago

Gordon Quinn, Chicago

Ennedy Rivera, Waukegan

Cynthia Shawamreh, Chicago

Betsy Shuman-Moore, Chicago

Farhan Younus, Downers Grove

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Executive Summary

The Immigration Reform and Control Act of 1986¹ (IRCA) was the last successful legislative attempt at a long term solution to immigration reform that included a path to citizenship. Since then, the nation’s immigration system has continued to face many challenges. However, there has been little analysis regarding the civil rights gaps of the federal policies that currently operate, or of the civil rights implications of current immigration reform efforts.

On September 23, 2013 Illinois State Advisory Committee (Committee) to the U.S. Commission on Civil Rights (Commission) hosted a series of five panel discussions focused on current civil rights concerns facing the immigrant community in Illinois. Panelists spoke primarily of the proposed, bipartisan “Border Security, Economic Opportunity, and Immigration Modernization Act,” otherwise known as “Senate Bill 744” (S. 744),² which passed the United States Senate on June 27, 2013. While S. 744 may not be enacted in its current state, on November 20, 2014, President Obama announced a series of executive actions intended to address some of the ongoing concerns related to the current immigration system, and he called for more comprehensive reforms moving forward.

The Committee believes that the concerns raised by Senate Bill 744 and discussed in this report will be present in any immigration reform efforts, regardless of whether these efforts are in the form of an amended Senate Bill 744 or other legislative or executive action. In this context, the purposes of this report are: (1) to relay the civil rights concerns brought forth by the panel as they relate to both current immigration law and the proposed legislation; and (2) to lay out specific recommendations to the Commission regarding actions that can be taken to better understand and address these issues on an ongoing basis in anticipation of further efforts to reform the nation’s immigration laws.

Concerns raised during the panel discussion fell into three primary categories:

1. ***Due process of law.*** Because immigration is considered a “civil” rather than a “criminal” matter, panelists raised concern that many constitutional due process protections are denied to noncitizens — despite the fact that respondents facing immigration charges are often subject to harsh penalties typically reserved for criminal defendants. Such protections include *the right to an attorney, the right to an informed defense, and the right to a fair and speedy trial.*
2. ***Special populations.*** Panelists also raised concern over the need to include additional protections for several especially vulnerable populations, including *noncitizen children*, who

¹ Pub. L. No. 99-603, 100 Stat.3359 (1986).

² S. 744, 113th Cong. (2013).

are not afforded the same “best interest” standard as other children in the U.S. justice system; *migrant farmworkers*, who are especially vulnerable to labor abuses; *Lesbian, Gay, Bisexual, and Transgender Immigrants*, who may face additional barriers in applying for immigration relief on behalf of their families; and individuals facing *medical repatriation*, who may effectively face unofficial “deportation” without appropriate oversight from an immigration judge or the right to due process.

3. ***Civil rights concerns with proposed legislation.*** Panelists identified several provisions of S. 744 that may either exacerbate existing civil rights concerns regarding immigration or create new ones. These provisions include the *expansion of the E-Verify system*, which may contain erroneous data and be subject to employer misuse; *increased border enforcement*, which does not include protection against law enforcement profiling on the basis of perceived religion or national origin, and may exacerbate already-existing concerns regarding excessive use of force; and finally, the proposed *merit-based points system* for allocating future immigrant Visas, which may have a disparate and negative impact on some immigrant groups on the basis of national origin, sex, disability, and age.

In response to these concerns, the Illinois State Advisory Committee issues the following recommendations to the U.S. Commission on Civil Rights:

1. The Illinois Advisory Committee recommends that the U.S. Commission on Civil Rights undertake a study of the primary civil rights issues confronting diverse immigrant communities and consider legislative provisions that may address these issues in the future.
2. The Illinois Advisory Committee recommends that when future legislation on immigration reform is introduced, the U.S. Commission on Civil Rights conduct a civil rights review and offer comment in an effort to ensure no immigrant is discriminated against or denied equal protection of the laws under the Constitution if the legislation is enacted.
3. In its forthcoming briefing on the state of civil rights at immigration detention facilities to be held on January 30, 2015, the U.S. Commission on Civil Rights should consider the findings of this report, particularly related to administration of justice concerns, and raise questions among presenters related to the findings in the report when appropriate.
4. In its forthcoming briefing on examining workplace discrimination against LGBT communities to be held on March 16, 2015, the U.S. Commission on Civil Rights should consider the findings of the Illinois Advisory Committee regarding immigrant LGBT members and raise questions among presenters related to the findings when appropriate.

The Committee hopes that by raising such concerns now, the Commission will be better informed about how various proposed immigration reform efforts may impact the civil rights of noncitizens living in Illinois. By extension, the Committee also hopes that this report will help to prepare the Commission to speak to these issues at the national level as the conversation continues in the coming months.

Introduction

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice. The Commission has established advisory committees in each of the 50 states and the District of Columbia. These State Advisory Committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction.

On July 30, 2013, the Illinois State Advisory Committee (Committee) to the U.S. Commission on Civil Rights voted unanimously to take up a proposal to better understand current civil rights concerns facing immigrant communities in Illinois. Specifically, the Committee elected to examine potential equal protection violations and discrimination based upon national origin, race, age, gender, or disability within the immigrant population in the state. As part of this initiative, on September 23, 2013 the Committee hosted a series of five panel discussions which included testimony from diverse immigrant communities, advocates for those communities, immigration scholars, legal professionals, and academics from various perspectives within the immigration conversation. The panelists' testimony focused on current civil rights concerns facing the immigrant community in Illinois, as well as areas of concern related to currently proposed reform efforts. The agenda also included an open forum for discussion whereby members of the public could comment and ask questions of the panelists.

The purposes of this report are: (1) to relay the civil rights concerns brought forth by the panel as they relate to both current immigration law and proposed reform legislation; and (2) to lay out specific recommendations to the Commission regarding actions that can be taken to better understand and address these issues moving forward. The report begins with a brief background on immigration in Illinois specifically, and the U.S. more broadly. It then provides an overview of currently proposed immigration reform, and a detailed analysis of the civil rights concerns raised during the September 23rd panel testimonies related to this proposed reform. It concludes with a series of specific findings and recommendations to the Commission to further address these issues. The Committee hopes that by raising such concerns now, the Commission will be better informed about how various proposed immigration reform efforts may impact the civil rights of noncitizens living in Illinois. By extension, the Committee also hopes that this report will help to prepare the Commission to speak to these issues at the national level as the conversation continues in the coming months.

BACKGROUND

According to a recent study of the Pew Research Center, as of 2011 there were an estimated forty million immigrants in the United States, eleven million of whom were undocumented.³ In Illinois, the Illinois Coalition for Immigrant and Refugee Rights (ICIRR) estimates that 1.7 million immigrants live in the state, which generally ranks among the top six states for receiving new immigrants.⁴ The ICIRR further estimates that 511,000 of the immigrants currently living in Illinois are undocumented.⁵ While the vulnerability of those living and working in the state without authorization certainly increases, many concerns regarding the civil liberties and protections afforded to the immigrant population in Illinois have been raised for decades — both for those with authorization and those without. In addition, an economic need to recognize the role of immigrants in building and advancing our society has prompted repeated calls for more comprehensive reform efforts.

The Immigration and Nationality Act (INA),⁶ first codified in 1952, “initiated the modern era of immigration law.”⁷ Before the enactment of the 1952 INA, a number of different laws governed immigration and included racial exclusions, national origin quotas, and literacy requirements.⁸ The 1952 INA abolished race restrictions dating back to the 1790s, which had restricted naturalization to immigrants who were “free white persons” of “good moral character.”⁹ The INA was amended in 1965,¹⁰ forming the basis of immigration policy in the United States today. The 1965 INA was deemed important from a civil rights perspective, in part, because preceding immigration law was described by one scholar as “just unbelievable in its clarity of racism.”¹¹

Since its implementation, the INA has undergone many revisions to address various concerns including lengthy backlogs in immigrant Visa applications, border security troubles, and, possibly most notable, the growing numbers of undocumented immigrants living in the country. For instance, the last successful legislative attempt at comprehensive immigration reform which

³ A Nation of Immigrants: A Portrait of the 40 Million, Including 11 Million Unauthorized, Pew Research Hispanic Trends Project, January 2013. More at: <http://www.pewhispanic.org/2013/01/29/a-nation-of-immigrants/> (last accessed Dec. 1, 2014).

⁴ U.S. and Illinois Immigrants by the Numbers, Illinois Coalition for Immigration and Refugee Rights, (2011). Text available at <http://icirr.org/sites/default/files/fact%20sheet-demography%202011.pdf>. (last accessed Dec. 1, 2014).

⁵ Illinois’ Undocumented Immigrant Population: A Summary of Recent Research. Illinois Coalition for Immigrant and Refugee Rights, Feb. 2014, available at http://icirr.org/sites/default/files/Illinois%20undocumented%20report_0.pdf. (last accessed Dec. 1, 2014).

⁶ Pub. L. No. 414, 182 Stat. 66 (1952).

⁷ U.S. Senate Committee on the Judiciary. Border Security, Economic Opportunity, and Immigration Modernization Act. (S. Rep. 113-40), 2013 [hereafter “Senate Report”] at p. 10.

⁸ *Id.*

⁹ *Id.*, citing the Naturalization Act, ch. 3, 1 Stat. 103 (1790).

¹⁰ Pub. L. No. 89-236, 79 Stat. 911 (1965).

¹¹ “1965 Immigration Law Changed Face of America.” *All Things Considered*. National Public Radio (May 9, 2006). More at <http://www.npr.org/templates/story/story.php?storyId=5391395> (last accessed December 8, 2014).

included a path to citizenship for the undocumented was the Immigration Reform and Control Act of 1986 (IRCA),¹² which legalized three million undocumented immigrants and created employer sanctions against hiring undocumented workers.¹³ Despite its legalization of three million documented immigrants, gaps in the 1986 IRCA left a significant undocumented population “underground and in long-term limbo.”¹⁴ Four years later, the Immigration Act of 1990¹⁵ was enacted and, like IRCA, it amended and repealed significant sections of the INA, specifically those involving family immigration, business immigration, naturalization, and exclusion and deportation grounds and procedures.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹⁶ made significant changes in regard to the nation’s border control, immigrant deportation and detention policies, and employment eligibility verification guidelines. IIRIRA also authorized as a pilot in five states E-Verify, an Internet-based program that allows employers to electronically verify newly hired workers’ employment eligibility by accessing databases maintained by the Department of Homeland Security and the Social Security Administration.¹⁷ In 2009, a final rule was issued requiring certain federal contractors and subcontracts to use E-Verify.¹⁸ Since the enactment of IIRIRA, challenges with backlogs in applications and growing numbers of undocumented immigrants have continued, and the escalation and introduction of E-Verify and the Secure Communities program have raised further concerns about law enforcement profiling and labor abuses.

On June 27, 2013, the United States Senate passed the “Border Security, Economic Opportunity, and Immigration Modernization Act,”¹⁹ otherwise known as “Senate Bill 744,” (S. 744) as the most recent, bipartisan effort to address comprehensive immigration reform in the country. As a result, the panel discussions before the Committee on September 23, 2013 addressed both current civil rights concerns with standing immigration laws in the United States, as well as the extent to which S. 744 may or may not address them. Panelists were also asked to comment on any new civil rights concerns that S. 744 may create.

The Committee recognizes that since the time of these panel discussions, it has become clear that S. 744 is unlikely to be approved by the House of Representatives and become enacted by the President, at least in its current state. However, it has also become clear that the conversation about comprehensive immigration reform in the United States is far from over. On November 20, 2014, President Barack Obama announced a series of executive actions intended to increase

¹² Pub. L. No. 99-603, 100 Stat. 3359 (1986).

¹³ Senate Report at p.3.

¹⁴ *Id.*

¹⁵ Pub. L. No. 101-649, 104 Stat. 4978 (1990).

¹⁶ Pub. L. No. 104-208, 110 Stat. 3009 (1996).

¹⁷ Senate Report at p. 8.

¹⁸ *Id.*

¹⁹ S. 744, 113th Cong. (2013).

border security, prioritize the deportation of criminals, and allow for temporary deferred action and employment authorization for many of the undocumented immigrants currently living in the United States.²⁰ In his press conference announcing these measures, the President acknowledged that such executive action is insufficient to address all of the problems with the current immigration system, and he urged Congress to work together to pass a more comprehensive immigration bill moving forward.²¹

²⁰ See <http://www.uscis.gov/immigrationaction>; and: <http://www.whitehouse.gov/issues/immigration/immigration-action>; and <http://www.whitehouse.gov/issues/immigration> (last accessed December 3, 2014)

²¹ Remarks by the President in Address to the Nation on Immigration. November 20, 2014. Full text available at: <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> (last accessed December 1, 2014)

Overview: Immigration Reform Under S. 744

The Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 (“S. 744”)²² passed by the United States Senate in June of 2013 is organized into five large titles: Border Security (Title I); Immigrant Visas (Title II); Interior Enforcement (Title III); Reforms to Nonimmigrant Visa Programs (Title IV); and Jobs for Youth (Title V).

Title I of the bill is intended to address the issue of border security, and it establishes goals that must be achieved before other provisions of the bill can be implemented. For example, this title requires at least 38,405 new Border Patrol agents along the U.S. southern border; the use of electronic exit systems at all ports where Customs and Border Protection agents are deployed; and the construction of at least 700 additional miles of fencing among other provisions. The bill requires that these “triggers” must be satisfied before other provisions of the bill that may allow some undocumented immigrants to apply for legal status may begin.

Title II of S. 744 pertains to the immigrant Visa system in the United States. Immigrant Visas are for those who seek to establish residency and live in the U.S., and so are different from temporary work, student, or travel Visas which do not lead to permanent residency or citizenship.²³ Under Title II, S. 744 proposes to reform the current immigrant Visa system in three primary ways. First, it establishes a new “Registered Provisional Immigrant” status (RPI), which will become available for currently undocumented immigrants who (1) have lived in the U.S. since December 31, 2011; (2) have not been convicted of a felony or three or more misdemeanors; (3) have paid their taxes; (4) pass background checks; and (5) pay application fees along with a \$1000 penalty. Undocumented immigrants who are approved for RPI status will be granted deportation relief and work permission, as well as a path to eventually apply for permanent residency and citizenship. Second, it establishes a “Blue Card” immigration option for experienced agricultural workers in the U.S. who have (1) worked a minimum of 100 days or 575 hours in the two years prior to the date of the bill’s enactment, (2) have no felony or violent misdemeanor convictions, and (3) have paid taxes and a \$100 fee. Third, it establishes a merit-based point system whereby foreign nationals will be able to apply for legal permanent residency status in the future. The allocation of points is based on a combination of factors including: (1) education and employment; (2) civic involvement; (3) English language proficiency; (4) family ties and age; and (5) nationality. The bill provides for between 120,000 and 250,000 Visas annually based on the point system.

²² S. 744, 113th Cong. (2013).

²³ See U.S. Customs and Border Protection: Immigrant Visas vs. Nonimmigrant Visas. at: https://help.cbp.gov/app/answers/detail/a_id/72/~/_/immigrant-visas-vs.-nonimmigrant-visas (last accessed Dec. 4, 2014)

Title III of the bill seeks to address interior enforcement of existing immigration laws. It expands the existing employment verification system (E-Verify), making it mandatory for all employers within the next five years to verify the work eligibility of their employees by comparing their individual eligibly documentation to a database of other government records. The bill also expands the U-Visa program for victims of serious workplace abuses, trafficking, and slavery; and it address important refugee and asylum issues. Next, it increases the number of immigration court judges and Immigration Board of Appeals Staff Attorneys, and appoints counsel for vulnerable populations such as immigrant children and people with serious mental disabilities. Finally, it establishes stricter penalties and expands the offenses for which a noncitizen may either be determined “inadmissible” or deported, and establishes prevention measures designed to protect against human trafficking.

Title IV provides several reforms to Nonimmigrant Visa Programs. First, it establishes caps on the H-1B Visa program for skilled workers in specialty occupations. It also allows work permission for the spouse of an H-1B Visa holder under some circumstances. Second, it creates fraud protections and revises various provisions for other nonimmigrant Visas such as those provided to foreign or multinational businesses, students, traders, athletes and artists. Third, it exempts returning workers from caps placed on H-2B Visas (for temporary, nonagricultural workers), and requires employers to certify that H-2B Visa holders will not displace any U.S. workers in the same metropolitan area. It also requires H-2B employers to cover certain employee expenses. Finally, the bill creates a “W” nonimmigrant Visa program under which immigrant workers with less formal skills could apply for work permission for three years, and bring their spouse and minor children. A new entity will be created, the Bureau of Immigration and Labor Market Research, which will designate shortage occupations and provide data and recommendations for this program. This W Visa program differs from past efforts to reconcile business needs with the protection of workers’ rights because it allows workers to work for other employers registered for the program, which creates a pool of labor responsive to economic needs.

Finally, Title V of the bill establishes a fund dedicated to creating employment opportunities for low income youth.

According to the Senate Judiciary Committee Report on the bill, two central failures of our modern immigration system are its inability to meet the demands of U.S. businesses that wish to attract and retain highly qualified immigrants, and its failure to reunite many Americans with their loved ones living abroad.²⁴ Designed to address these issues, S. 744 establishes new opportunities for work authorization for both skilled and unskilled workers by clearing long standing backlogs of Visa applications, and by establishing a path to citizenship for many of the

²⁴ Senate Committee on the Judiciary. Report on the Border Security, Economic Opportunity, and Immigration Modernization Act, United States Senate, 113th Congress, S. REP. NO. 113-40, available at <http://www.gpo.gov/fdsys/pkg/CRPT-113srpt40/pdf/CRPT-113srpt40.pdf> (last accessed Dec.1, 2014).

millions of undocumented people already living in the United States. Panelists identified some of the provisions outlined in this bill as positive steps forward; they identified others as either unsatisfactory to address current civil rights concerns, or as creating new ones of their own. These concerns are discussed in greater detail in the following sections of this report.

Summary of Panel Testimony

The panel discussion on September 23, 2013 at DePaul University in Chicago included testimony from diverse immigrant communities, advocates for those communities, immigration scholars, legal professionals, and academics from various perspectives within the immigration conversation. Panelists were selected to provide a diverse and balanced overview of the issues impacting immigrants in Illinois, including specific consideration for immigrants from different regions of the world; immigrant children; women; people with disabilities; and lesbian, gay, bisexual, and transgender immigrants (see Appendix A for the complete panel agenda and list of speakers). Panelists were selected not to speak from an advocacy position either directly for or against S. 744, but rather to speak to the larger civil rights concerns within current immigration legislation, and how individual provisions of S.744 may or may not address them. The discussion focused primarily on concerns with denial of equal protection under the law in the administration of justice — specifically the right to due process. The panelists also provided testimony related to new areas of civil rights concern that the passage of S.744 could raise, including a disparate and negative impact on specific immigrant communities on the basis of sex, age, disability status, religion, and national origin. Finally, the Committee heard comments and questions from members of the public during open session at the conclusion of each panel.

The Committee recognizes that the current topic of immigration in the United States, and specifically in Illinois, is a complex matter which raises many concerns, and involves many important details to understand — a number of which were raised by panelists and other members of the public. However, for the purposes of this report, the Committee chose to focus exclusively on those concerns relating directly to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice. While a number of other worthy topics were raised, those matters that may have fallen outside of this specific civil rights mandate are left for another discussion.

Civil Rights Concerns with Current Immigration Law and Relation to Proposed Legislation

1. Administration of Justice: The Right to Equal Protection and Due Process of Law

The Fifth Amendment to the Constitution of the United States of America declares that “no person” shall be “deprived of life, liberty, or property, without due process of law.”²⁵ Furthermore, the Fourteenth Amendment to the Constitution forbids states from denying “to any person within its jurisdiction the equal protection of the laws,” and affirms that no person shall be denied ““life, liberty, or property without due process of law.”²⁶ However, despite the fact that the language of the Constitution states these protections apply to “any person,” a number of panelists testified that immigrants as a class are regularly denied equal protection and due process of law in the administration of justice. Jennifer Chan, Associate Director for Policy at the National Immigrant Justice Center, explained that because deportation is classified as a civil rather than a criminal sanction, “immigrants facing removal are not entitled to the same Constitutional rights as respondents facing criminal punishments are provided.”²⁷ It is notable however, that though immigration proceedings are considered “civil,” the outcomes of these proceedings can separate people from their families and deprive them of their liberty, property, and livelihood. Therefore, some advocates have argued that respondents in immigration proceedings should be entitled to the same rights and protections afforded to others facing criminal punishments of similar severity.²⁸ The protections discussed during the panel discussion include the right to an attorney, a respondent’s access to review their case files, and the right to appear in person before a judge. Additionally, panelists described disparate treatment in the administration of justice for several special and vulnerable populations such as noncitizen children, migrant and farm workers, LGBT immigrants, and immigrants facing medical repatriation.

The right to an attorney. The right to be represented by an attorney in criminal proceedings is fundamental to the United States judicial system, so much so that it has been enshrined in our constitution as a part of the Sixth Amendment.²⁹ However, because immigration charges are classified as “civil” rather than “criminal,” the state is not required to provide an attorney to those who cannot afford one, leaving many to navigate the system without counsel. Several panelists described both the complexity of the immigration system and the high stakes for those who are faced with navigating it as a fundamental civil rights concern that denies the estimated

²⁵ U.S. CONST. AMEND. V., available at http://www.law.cornell.edu/constitution/fifth_amendment (last accessed Dec. 1, 2014).

²⁶ U.S. CONST. AMEND. XIV. available at <http://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html> (last accessed Dec. 1, 2014).

²⁷ Jennifer Chan, testimony before the Illinois Advisory Committee to the U.S. Commission on Civil Rights, Chicago, IL, September 23, 2013. Transcript, p. 119 lines 06-09. [Hereafter cited as *Transcript*].

²⁸ See for example, Geoffrey Heeren, *Transcript*, p. 24, line 13 through p. 25, line 5.

²⁹ U.S. CONST. AMEND. VI. Available at http://www.law.cornell.edu/constitution/sixth_amendment (last accessed Dec. 1, 2014).

21,859,000 noncitizens living in the United States, and the 869,600 living in Illinois, equal protection in the administration of justice.³⁰

For example, in their testimony, Geoffrey Heeren, Assistant Professor at Valparaiso University School of Law and Jennifer Chan, Associate Director of Policy at the National Immigrant Justice Center, both cited a December 2011 study on the topic conducted by the Study Group on Immigrant Representation in New York.³¹ To illustrate the inequality of protection in the administration of justice, the study group reports:

A noncitizen arrested on the streets of New York City for jumping a subway turnstile of course has a constitutional right to have counsel appointed to her in the criminal proceedings she will face, notwithstanding the fact that it is unlikely she will spend more than a day in jail. If, however, the resulting conviction triggers removal proceedings, where that same noncitizen can face months of detention and permanent exile from her family, her home, and her livelihood, she is all too often forced to navigate the labyrinthine world of immigration on her own, without the aid of counsel.³²

This study also showed the dire consequences of not being represented by counsel in immigration proceedings. Specifically, the report stated that having proper representation was one of the “two most important variables affecting the ability [of immigrants] to secure a successful outcome in a case (defined as relief or termination),”³³ and that “unrepresented, detained immigrants failed to be successful in their cases 97 percent of the time.”³⁴

These findings suggest that the denial of the right to representation for those who cannot afford it creates a disparity in the administration of justice, as noncitizens lose their cases not on the merits, but because they cannot afford an attorney to represent them. Under these circumstances, noncitizens may be incarcerated for long periods of time, or deported to a country they barely know, especially if they came to the United States as children. As Professor Heeren stated, “in immigration cases, noncitizens should not be deported because they're poor, any more than

³⁰ Population estimates from The Henry J. Kaiser Family Foundation, Population Distribution by Citizenship Status, available at: <http://kff.org/other/state-indicator/distribution-by-citizenship-status/> (last accessed Dec. 3, 2014).

³¹ New York Immigrant Representation Study Report, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings (pt. 1), 33 Cardozo L. Rev. 357 (Dec. 2011), available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf (last accessed on Dec. 3, 2014). *See also* Heeren Testimony, *Transcript*, p. 25, lines 16-23 and J. Chan Testimony, *Transcript*, p. 125, lines 06-13.

³² New York Immigrant Representation Study Report, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings (pt. 1), 33 Cardozo L. Rev. 357 (Dec. 2011), available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf (last accessed on Dec. 3, 2014). At p.1

³³ *Ibid.* at 3 (the other important factor was whether or not the respondent had been detained, with detention significantly decreasing the chances of a favorable ruling).

³⁴ J. Chan Testimony, *Transcript*, p. 125, lines 9-12.

criminal defendants should be convicted because they are poor. Any noncitizen who needs to have a good defense to their removal should be entitled to a court appointed attorney.”³⁵

The panelists noted that S. 744 provides a way to partially address these concerns. Under the proposed legislation, the attorney general can, if he or she believes it is useful and important to do so, appoint an attorney to represent an individual during their immigration proceedings at court.³⁶ S.744 also *requires* the attorney general to appoint an attorney for the mentally ill, unaccompanied alien children, and for vulnerable noncitizens.³⁷ While panelists noted these provisions as very important reforms, they also stated that they are insufficient as a final solution. They cited the complexity of immigration law as a major concern and urged that the right to counsel be extended to all facing serious immigration charges, especially those involving detention and possible removal. As Professor Heeren noted, “immigration law is complicated. Even a mentally competent adult is not able to understand it to apply for and seriously advocate for many different types of immigration benefits.”³⁸ Ms. Chan also testified:

. . .DHS data suggests that over 70 percent of all immigrants removed from the United States each year, are removed through expedited and streamlined procedures which do not involve review by an immigration judge. So, oftentimes, an individual will be pressured into signing a stipulated order, which means they are agreeing to being removed from the country without any sort of meeting with a judge. And, many times, people do have a solid case. They would have, they probably would have been successful in arguing their case and being able to stay in the country, but because they don't understand the process, they face language barriers, they may not have enough money to hire an attorney, they just give up their rights, and there's no sort of judicial oversight to make sure this doesn't happen.³⁹

In short, the lack of access for many in immigration proceedings to have competent representation was a civil rights issue raised throughout the panel. While it may be partially remedied by some provisions of S. 744, concern remains for noncitizens who do not fall into one of the “vulnerable” categories identified in the bill, yet who continue to be vulnerable before our judicial system.

³⁵ Heeren Testimony, *Transcript*, p. 25, line 23 through p. 26, line 2.

³⁶ S. 744, 113th Cong. § 3502 (2013)

³⁷ *Ibid.*

³⁸ Heeren Testimony *Transcript*, p. 25, lines 13-16.

³⁹ J. Chan Testimony, *Transcript*, p. 124, line 14 through p. 125, line 5. *For more information, see also: Immigration Policy, Removal without Recourse: The Growth of Summary Deportation from the United States* (April 28, 2014), available at <http://www.immigrationpolicy.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states>. (last accessed Dec. 3, 2014)

The right to an informed defense. In addition to having the right to an attorney, in criminal proceedings U.S. citizens have a constitutional right to “be informed of the nature and cause of the accusation.”⁴⁰ However, the Committee heard testimony that in immigration proceedings, noncitizen respondents facing incarceration and removal are afforded no such rights. Professor Heeren described this disparity as follows:

. . . [W]hen an employer is charged with knowingly hiring an undocumented person who is ineligible to work, in the Department of Justice hearings for that employer, the employer can file document requests, interrogatories, requests for evidence, and even take depositions. In contrast, in immigration court, a noncitizen cannot even get basic documents about their case from their own immigration file without filing a Freedom of Information request from the government, which typically takes months to be produced. That's too long for persons in detention. Even for those persons who received their files on time before their court hearing, the files are often so heavily redacted as to virtually be useless. The Department of Homeland Security, unlike noncitizens, has all sorts of ways to get information about noncitizens. So, it's really only the non-citizen respondent who goes to court without information. In these cases, this creates a real imbalance of power between noncitizens and the government.⁴¹

Such testimony suggests systematic, disparate treatment of noncitizens in the administration of justice. Professor Heeren went on to note that S.744 does attempt to address this disparity by including a provision that requires the government to disclose the entire contents of a respondent’s “alien file” before the case starts.⁴² However, if the Department of Homeland Security (DHS) redacts or otherwise withholds information from a respondent’s file under a claim that the information is “privileged,” S.744 as currently written does not provide any mechanism for such claims to be evaluated by an immigration judge. Professor Heeren stated that without clarifying language empowering a judge “to assess the claims of privilege that DHS raises, and order DHS to turn over documents when it's reasonable to do so. . .it's unlikely that this reform would improve the status quo in a meaningful way.”⁴³

The denial of access to pertinent information about a noncitizen respondent’s own case in a timely manner is a continued civil rights concern regarding equal treatment in the administration

⁴⁰ U.S. CONST. AMEND. VI. Available at http://www.law.cornell.edu/constitution/sixth_amendment (last accessed December 1, 2014).

⁴¹ Heeren Testimony, *Transcript*, p. 21, line 15 through p. 22, line 11.

⁴² S. 744 113th Cong. §3502 (b)(1)(B) (2013)

⁴³ Heeren Testimony, *Transcript* p. 22 lines 18-23

of justice, impeding due process of law. While S. 744 makes strides toward addressing this concern, the testimony heard suggests a need for additional protection to more fully remedy these disparities.

The right to a fair and speedy trial. Finally, in addition to the right to an attorney and the right to an informed defense, the committee heard testimony that noncitizens facing immigration charges are often denied the right to a fair and speedy trial due to the backlog of cases, the insufficient number of judges, and the widespread use of videoconferencing in trial.

Professor Heeren of Valparaiso University School of Law said “the problem is that immigration courts are already overwhelmed. ...In the Chicago immigration court right now [September 2013], judges are commonly setting final hearing dates in 2016, and these delays cause considerable prejudice to persons that have good cases.”⁴⁴ In the case of custody and bond determinations, panelist Jennifer Chan noted that “Currently, or as of August, 2013, the backlog nationally was over 345,000. And in Illinois, the number of pending cases is a little over 18,000. In Illinois immigrants wait an average of 612 days for their hearings, which exceeds the national average of 556.”⁴⁵ Furthermore, according to a 2010 report of the American Bar Association (ABA), “in 2008, immigration judges [nationally] completed an average of 1,243 proceedings per judge and issued an average of 1,014 decisions...in comparison, Veterans Law Judges decided approximately 729 veterans benefits cases per judge...and Social Security Administrative law judges decided approximately 544 cases.”⁴⁶

Such overwhelming numbers facing immigration judges creates two challenges for those responding to charges in the immigration system. First, the long wait times leave people vulnerable to months or even years of detention – living in constant fear of deportation and separation from their families. For asylum seekers such multiple year wait times can also endanger the respondent’s family. Professor Heeren stated, “These folks have fled, left family members behind in their country of origin. They are very desperate; in dangerous circumstances. The fact they have to wait for several years for their case to be decided before they can petition for their family members to join them is a serious problem.”⁴⁷

Second, once a person is finally able to go before a judge, the sheer volume of cases poses a substantial concern that respondents do not receive fair consideration of their case. According to the American Bar Association, “the shortage of immigration judges and law clerks has led to...a

⁴⁴ Heeren Testimony, *Transcript* p. 17 lines 15-18

⁴⁵ J. Chan Testimony, *Transcript* p. 125 line 20 – p. 126 line 1. See also Trac Immigration, Immigration Court Backlog Tool (August 2014), available at http://trac.syr.edu/phptools/immigration/court_backlog/ (noting an increase in this number during 2014). (last accessed Dec. 1, 2014)

⁴⁶ “Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases,” American Bar Association (2010) at ES-28. Available at http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_executive_summary_audithcheckdam.pdf (last accessed Dec. 1, 2014) [hereafter cited as ABA Report].

⁴⁷ Heeren Testimony, *Transcript*, p.18 lines 03-08.

lack of sufficient time for judges to properly consider the evidence and formulate well-reasoned opinions in each case.”⁴⁸ In addition, Professor Heeren testified that the frequent use of video communications (designed to speed up trials) creates yet additional disadvantages to the fair credibility of the respondent. The professor cited four specific concerns with the use of videoconference in trial: (1) it can exacerbate communication problems by making it difficult for the various parties to hear and understand one another; (2) it can create an additional challenge for interpreters; (3) it prevents private communication between a respondent and his or her attorney if they are appearing from separate locations; (4) it can lead to delays and additional time in detention if technological problems result in a continuance.⁴⁹ According to Professor Heeren, the use of videoconferencing is particularly problematic “in evidentiary hearings where credibility is oftentimes central to a decision on a case.”⁵⁰ State and federal courts in both criminal and civil cases have continued to grapple with the question of whether the use of telecommunications (such as video teleconferencing) for judicial proceedings meets constitutional standards because of the concerns stated above.⁵¹ However, the widespread use of such technology in immigration cases specifically was cited to the committee as suggesting “a dual system of justice in this country; one for citizens, and another one that is cheaper for noncitizens.”⁵²

Panelists testified that these problems significantly and disproportionately deny noncitizens equal protection in the administration of justice. They noted that S.744 does provide measures to help cut down on the inordinate delays in immigration trials; as Ms. Chan stated “the immigration bill in the Senate [S.744] requires timely custody and bond determinations, due process under equal orders over immigration judges. It also increases the number of immigration judges and their resources, which would greatly help immigrants not having to be stuck in immigrant detention for days on end.”⁵³ Professor Heeren also stated, “Section 3502 of the bill has 225 new immigration judges, assures one clerk per judge, adds 90 new staff attorneys to the Board of Immigration Appeals, the appellate body for the immigration courts.”⁵⁴ Such provisions were welcomed by panelists as a positive step toward ensuring each person’s constitutional right to a fair and speedy trial, and should be considered in any future legislation.

⁴⁸ ABA Report at p. ES-28

⁴⁹ Heeren Testimony, *Transcript*, p. 23-24

⁵⁰ Heeren Testimony, *Transcript*, p. 24 lines 11-12

⁵¹ Anthony Garofano, *Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials*, 56 *Cath. U. L. Rev.* 683 (2007), available at <http://scholarship.law.edu/lawreview/vol56/iss2/10>. (last accessed Dec. 1, 2014)

⁵² Heeren Testimony, *Transcript*, p. 24 lines 05-07

⁵³ J. Chan Testimony, *Transcript*, p. 125, lines 14-20

⁵⁴ Heeren Testimony, *Transcript*, p. 18, lines 09-14; *see also* S. 744, 113th Cong. § 3502 (2013).

2. Special Populations

In addition to considering overall disparities in the administration of justice for the noncitizen population, the Committee heard testimony about practices that disproportionately deny equal protection to other vulnerable groups, namely children; migrant and farm workers; immigrants who identify as lesbian, gay, bisexual, or transgender; and those facing serious medical conditions.

Noncitizen children. In recognition of the special vulnerability of children, the U.S. justice system holds several special protections for juveniles involved in criminal cases. In the juvenile system, courts are compelled to consider the “best interest of the child” in making determinations.⁵⁵ Juveniles in the U.S. are also seen in separate courts and, if detained, are held in separate detention facilities from adult offenders.⁵⁶ When released from detention, the courts must ensure that the child will have adequate care upon his or her release.⁵⁷ Noncitizen youth are especially vulnerable, as they may have come into the U.S. with no parents or other responsible adult to act as their caregiver, they may have become separated from their caregiver upon apprehension, and/or they may be facing additional challenges such as language barriers. Despite this especially vulnerable status however, noncitizen children facing immigration charges are not afforded many of the protections available to their peers.

Maria Woltjen, Director of the Young Center for Immigrant Children’s Rights of the University of Chicago School of Law, raised several specific concerns regarding child welfare protections that are notably missing for noncitizen children in immigration court. She cited concerns at every stage of the juvenile immigration proceedings process: apprehension, proceedings, and if applicable, removal, stating: “we think that...these children are treated vastly differently to U.S. citizen children in terms of the system that they face. . . .we have a juvenile justice system for our citizen children: we have child protection systems, and we need to take those lessons and just adapt them to our immigration courts.”⁵⁸

Apprehension. The committee heard testimony that often times children arrive at the border with parents, older siblings, or adult caregivers. However, at the border “the adults are turned away or placed in expedited removal...even though these adults could be parents, they could be siblings of the younger children. If you’re 18 you’re considered an adult.”⁵⁹ The effect is that children become separated from their adult caregivers and remain in the U.S. now unaccompanied, left to

⁵⁵ Child Welfare Information Gateway, *Determining the Best Interest of the Child 2*, (Nov. 2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf. (last accessed Nov. 7, 2014)

⁵⁶ Department of Juvenile Services, *History of Juvenile Justice System*, at: <http://www.djs.state.md.us/history.asp> (last accessed Nov. 7, 2014)

⁵⁷ The Clark County Prosecuting Attorney, *Juvenile Crime*, at: <http://www.clarkprosecutor.org/html/juvenile/juvenile9.htm>. (last accessed Nov. 7, 2014)

⁵⁸ Woltjen Testimony, *Transcript*, p. 36, line 24 through page 37, line 10.

⁵⁹ Woltjen Testimony, *Transcript*, p. 27 line 24 through page 28 line 4

navigate the system on their own. Ms. Woltjen noted that S.744 moves to remedy this issue by establishing new policies to enable families to stay together: “Homeland Security is supposed to establish standards for humane conditions for children in border patrol custody. There are provisions to require that in determining whether a parent will be detained or deported, the government needs to consider humanitarian needs of the parents and especially whether they have children. The bill calls for training border patrol in policies intended to protect and preserve family unity.”⁶⁰ Such provisions were cited as important considerations that should be included in any legislation moving forward.

Proceedings. Four major concerns emerged during testimony with respect to immigration proceedings for children. Two general concerns were the lack of a right to counsel and the lack of special proceedings for children. Two additional concerns included provisions for children caught in multiple justice proceedings, namely for those caught in both the immigration and the juvenile justice systems; and abused and neglected children.

As noted, under current immigration law respondents are entitled to an attorney but not an attorney at the government’s expense. This limitation includes children. As such, many children are left to represent themselves simply because they cannot afford access to qualified counsel. Ms. Woltjen described

[I]n every immigration court, every day there are children appearing...without attorneys...the court will say ‘Good afternoon, counsel. My name is Judge Smith. On my left, I have Attorney Marcus appearing for the government. On my right, I have Juan Rivera, and he’s 14 years old, and he’s appearing pro se.’ This would not happen in our state juvenile courts.⁶¹

If S. 744 passes, children will be among a class of noncitizens identified as “vulnerable” and thus they will be required to have access to legal counsel at the government’s expense if they cannot afford it. Panelists who mentioned this provision expressed support for it, but also felt that it did not go far enough. They cited concern that such rights were not extended to all those facing detention and possible removal through the immigration courts including the parents and adult caretakers of these children.⁶²

In addition to access to counsel, the Committee heard testimony about special proceedings for children. Specifically, the panel raised concern that the lack of any special training for judges responsible for children’s cases, and the lack of coordination of children’s cases, impedes the ability of advocates to provide services. Ms. Woltjen testified:

⁶⁰ Woltjen Testimony, *Transcript*, p. 30 lines 03–10; *See also* S. 744, 113th Cong. § 1113 (2013) (requiring the creation of a DHS Border Oversight Task Force).

⁶¹ Woltjen Testimony, *Transcript*, p. 29 lines 08-20

⁶² Woltjen Testimony, *Transcript*, p. 29 lines 18-24

There's also no statutory requirement to create special [immigration] courts for children, as well as special asylum dockets for children...Right now, even in the Chicago immigration court, non-detained children appear any day of the week, before any different judge, at any particular time. Judges, all of the judges are required to hear children's cases, even though...there's no special training for these judges. And, because of the way this is set up, there's no way to provide services to these children. There's no way to have attorneys on site available to at least meet with children or screen them because you'd have to have attorneys there 5 days a week, 8 hours a day.⁶³

Special Cases. For children facing both delinquency and immigration charges, navigating the system becomes exponentially more complex. According to the testimony heard,⁶⁴ once a child is taken into the custody on even minor delinquency charges — truancy for example — Immigration and Customs Enforcement (ICE) can place a detainer on that child. This means that after a child has complied with the requirements of his or her delinquency charges, and is eligible for release, he/she will then immediately taken into custody by ICE on immigration charges. However, because immigration detention facilities for children do not exist in every part of the country, this means the child will likely be transported to another state. Ms. Woltjen described the ensuing problems with such arrangements:

[A] child who is apprehended, let's say somewhere in Alabama, may be transferred to Chicago or to New York for custody. And, that means the child has to follow some requirements such as going back to court, going to probation meetings. Now, he's violated his probation, and he's in county. So, the immigration system, when they go to release him to family, now they have to worry about the child being picked up again by the state government. So, it ends up really being a revolving door for these children.⁶⁵

In addition to trapping noncitizen children between juvenile and immigration courts in a way that would never happen to a U.S. citizen child for charges of a similar nature, Ms. Woltjen pointed out that, unlike in juvenile court, there is no limitation on the amount of time a child can be detained in immigration facilities: "They [children] can end up being detained for inordinate lengths of time; first in the juvenile system, then the immigration system, for which there's no limitation on how long kids can be in the immigration system, no federal judge or any judge overseeing the length of time for children in custody."⁶⁶

For noncitizen children who have been abused, abandoned, or neglected, the situation is equally complicated. Special Immigrant Juvenile (SIJ) is a status given to noncitizen children in these

⁶³ Woltjen Testimony, *Transcript*, p. 31 lines 04-18

⁶⁴ See Woltjen Testimony, *Transcript*, p. 35-36

⁶⁵ Woltjen Testimony, *Transcript*, p. 36 lines 08-18

⁶⁶ Woltjen Testimony, *Transcript*, p. 36 lines 18-23

circumstances, and it allows them to apply for immigration relief to stay in the country.⁶⁷ In order to receive SIJ status, a child must appear in juvenile court and receive a finding from the court stating that the “child has been abused, abandoned or neglected; that the child is determined to be dependent on that juvenile court, and it’s not in the child’s best interests to be repatriated to their country of origin.”⁶⁸ Once a child receives such an order from juvenile court, he or she may apply for SIJ status.⁶⁹ However, because juvenile courts in each state and each county have different rules around who can access the courts and under what circumstances, Ms. Woltjen described a significant disparity in the ability of noncitizen children, specifically in Illinois, to apply for SIJ status: “for those 450 [noncitizen, unaccompanied] children detained here in Chicago, they do not have access to our juvenile court, so they cannot. . .get that piece of paper that they need to go to federal court and get this [SIJ] Visa. And this is because. . .every state has different rules about access to juvenile courts. Every county has different rules.”⁷⁰

The Committee heard a clear need for such process to be made more uniform across the country, so that a child’s access to SIJ relief is not determined solely by the location in which he or she is detained. According to Ms. Woltjen, such disparities are so stark that sometimes the best recourse for children’s legal advocates is to work to transfer the child’s case to another jurisdiction entirely, where a juvenile court will accept them — though such a strategy is not always possible.⁷¹ Ms. Woltjen noted that the juvenile courts in Texas, where the majority of unaccompanied minors are currently detained, are much better equipped to handle such cases than the Illinois juvenile courts. She noted that the federal government could take a much more active position in helping the state and county systems to understand the importance of their role in hearing noncitizen children’s cases, and issuing rulings on abuse, abandonment, and neglect:

[W]e think it’s a problem, and we think that there is something that the federal government could do something about it in terms of working with state and county systems, states’ attorneys, juvenile courts, child protection agencies to disseminate information about the Visa, to explain the federal law, and really to emphasize the point that, although this child is in detention and safe at this exact moment in time, if the court doesn’t look at this child’s long term best interests, that child will not receive the protection that he needs, and he or she is still going to be at risk of being deported to their country.⁷²

⁶⁷ U.S. Citizenship and Immigration Services, *Special Immigrant Juveniles (SIJ) Status*, available at <http://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status> (last accessed Dec. 2 2014).

⁶⁸ Woltjen Testimony, *Transcript*, p. 32 lines 06-09

⁶⁹ U.S. Citizenship and Immigration Services, *Eligibility Status for SIJ*, at: <http://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij> (last accessed December 3, 2014)

⁷⁰ Woltjen Testimony, *Transcript*, p. 33 lines 14-21

⁷¹ Woltjen Testimony, *Transcript*, p. 44 lines 16-22

⁷² Woltjen Testimony, *Transcript*, p. 34 lines 01-13

Removal. Finally, if a child is denied immigration relief and ordered to be deported to his or her home country, panelists raised significant concerns around the safety of such procedures, especially for children. Ms. Woltjen again noted the disparate treatment of noncitizen children in the administration of justice, as compared to their peers who are citizens:

Every day, children are repatriated to their countries of origin without there first being any investigation, and not even investigation, but any inquiries made as to whether there's an adult in the home country who is willing and able to receive that child, and take care of that child. Our system here in the U.S. is set up very well for children in detention. The government does an examination of what family member is going to receive that child here, makes sure they have a background check, makes sure they verify the family relationship before the child is released to that family member. We do not have a similar system when we're repatriating the children.⁷³

To remedy some of these concerns S.744 seeks to keep more families in tact at the border in the first place.⁷⁴ Also, the bill includes provisions to restrict deportations on the southern border to daylight hours.⁷⁵

Overall, the testimony to the committee indicates the existence of sharp disparities in the administration of justice for noncitizen children in the United States. By requiring counsel be provided to noncitizen children facing removal proceedings, setting safety standards for deportation, and revisiting policies that separate families with children at the border, S. 744 makes some attempt to remedy these disparities. While such provisions were described as positive, there was notable room for additional measures to protect the rights of noncitizen children, which are missing from the bill. The overarching recommendation for responding to each of these concerns is to ensure a “best interest” standard of protection for noncitizen children similar to that which is available to their U.S. citizen peers. According to Ms. Woltjen, the language provided in S.744 “doesn't require that the decision made has to be in the best interest of the child, but only that decision makers consider what's in the best interests of the child in making their decisions.”⁷⁶

Migrant and farm workers. Migrant and farm workers are another special, vulnerable population discussed by the panel, in part because farm work is known to be an especially hazardous occupation disproportionately occupied by people of color and by immigrants.⁷⁷ Indeed, according to the Bureau of Labor Statistics of the U.S. Department of Labor, “Despite the declines in fatal work injuries overall in this sector; agriculture, forestry, fishing and hunting still recorded the highest fatal injury rate of any industry sector at 22.2 fatal injuries per 100,000 FTE

⁷³ Woltjen Testimony, *Transcript*, p. 34 line 14 through page 35 line 02

⁷⁴ S.744 113th Cong. §1115 (2013)

⁷⁵ S.744 113th Cong. §1122 (2013)

⁷⁶ Woltjen Testimony, *Transcript*, p. 30 line 24 through p. 31 line 03.

⁷⁷ Keberlein Testimony, *Transcript*, p. 69, line 16 through page 75, line 24.

[Full Time Equivalent] workers in 2013.”⁷⁸ According to testimony of Miguel Keberlein, supervisory attorney of the Migrant Project at the Legal Assistance Foundation of Metropolitan Chicago:

Most farm workers in this country are Latino. . . There are somewhere between 2.5 million and 4 million farm workers at any given time. And more than half happen to be undocumented immigrants.⁷⁹

In Illinois specifically, Mr. Keberlein estimated roughly 75,000 farm workers each year.⁸⁰

The Fair Labor Standards Act (FLSA) is the federal law that governs minimum wage and overtime requirements.⁸¹ However, many farm workers are exempted from these protections, including those primarily engaged in livestock production; seasonal hand harvest laborers who were employed less than thirteen weeks in the previous year and who are paid on a piece rate basis; and nonlocal minors age sixteen or younger who work on the same farm as their parents.⁸² Similarly, the Occupational Safety and Health Act of 1970 establishes basic health and safety standards for American workplaces.⁸³ However, the appropriations language under the Occupational Health and Safety Administration exempts farming facilities with ten or fewer employees and who do not maintain a temporary labor camp from enforcement of these standards.⁸⁴ The Migrant and Seasonal Agricultural Worker Protection Act,⁸⁵ designed to provide some additional protections, also includes many critical exemptions.⁸⁶ For example, the Act excludes workers residing within a twenty five mile radius of the farm and working not more than thirteen weeks per year.⁸⁷

⁷⁸ National Census of Fatal Occupational Injuries in 2013, (Preliminary results) Bureau of Labor Statistics news Release Sept. 11, 2014, available at <http://www.bls.gov/news.release/pdf/foi.pdf>. (last accessed Dec. 2, 2014)

⁷⁹ Keberlein Testimony, *Transcript*, p. 70, lines 16-20. *See also* National Center for Farmworker Health, Inc., Facts about Farmworkers, available at <http://www.ncfh.org/docs/fs-Facts%20about%20Farmworkers.pdf>. (last accessed Nov. 22, 2014).

⁸⁰ Keberlein, Testimony, *Transcript*, p. 69, lines 21-23.

⁸¹ 29 U.S.C. § 201, *et seq.* Available at <http://www.dol.gov/whd/flsa/> (last accessed December 2, 2014).

⁸² U.S. Dept. of Labor, Wage and Hour Division. Fact Sheet #12: “Agricultural Employers Under the Fair Labor Standards Act (FLSA). Revised July 2008. Available online at: <http://www.dol.gov/whd/regs/compliance/whdfs12.pdf>. (last accessed December 2, 2014).

⁸³ P.L. 91-596, 84 Stat. 1590(1970), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=oshact&p_id=2743 (last accessed December 2, 2014).

⁸⁴ Occupational and Safety Health Administration, Enforcement Exemptions and Limitations under the Appropriations Act, 2014, available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1519#ENFORCE. (last accessed Dec. 2, 2014)

⁸⁵ 29 U.S.C. § 1801 *et seq.*

⁸⁶ *See* 29 U.S.C § 1803, available at <http://www.dol.gov/whd/regs/statutes/0001.mspa.htm> (last accessed Dec. 2, 2014)

⁸⁷ 29 U.S.C § 1803(a)3D

The Committee heard testimony that such exemptions leave many agricultural workers, who are disproportionately immigrants and Latinos, vulnerable to dangerous and abusive workplace practices. The millions of *undocumented* immigrant farm workers in the country face an even higher risk, as the fear of employer retribution and deportation can often prevent them from reporting injury/illness or filing complaints regarding labor abuses. Immigrant workers who do have work authorization face similar elevated risks. As Mr. Keberlein testified:

Right now, a guest worker who comes in is tied to one employer. So, they are very reluctant to come forward and complain about any abuses because as soon as you play with fire, then they're required to leave the country.⁸⁸

To remedy some of these vulnerabilities S. 744 seeks to provide many of the currently undocumented agricultural workers with the chance to apply for work authorization,⁸⁹ and to provide some employment portability whereby authorized immigrant workers could leave one employer to go work for another without losing their status.⁹⁰ While the panel welcomed such changes, testimony suggested that some important challenges remain. First, under S. 744, in order to apply for a Blue Card (temporary residency and work permission), an immigrant must have worked for 100 days or 565 hours during the previous two years.⁹¹ According to Mr. Keberlein's testimony however, such requirements may be difficult for many agricultural workers to meet:

A work day under the bill is considered 5.75 hours, which is important because with agriculture, the work is not always steady. So it can be difficult to even meet that minimum requirement of 100 hours over 2 years for some workers.⁹²

Second, S.744 provides only a one year filing period for current agricultural workers to apply for a Blue Card, from the time of the bill's passage.⁹³ Noting his staff of just three people, and the estimated 75,000 migrant farm workers in Illinois, Mr. Keberlein testified:

It would be virtually impossible to adequately serve that population unless there were more funds available to bring in more staffing to do that work. . .there are many issues at stake. . .one year is really a small period of time. Also, given that migrant farm workers, by definition, are on the move, many times they're only

⁸⁸ Keberlein Testimony, *Transcript* p. 73 line 23 through p. 74 line 03

⁸⁹ S. 744 113th Cong. §2211–2244 (2013)

⁹⁰ S. 744 113th Cong. §2232 (a) `218A (d) (2013)

⁹¹ S. 744 113th Cong. §2211(a). (2013)

⁹² Keberlein Testimony, *Transcript* p. 71 lines 04-09.

⁹³ S. 744, 113th Cong. § 2211(b)3(A) (2013).

here in our state for 3 or 4 months at a time. And, being able to sort of build a rapport with them, so they're trusting enough to work with you takes some time.⁹⁴

Such challenges are important because any guest agricultural worker who remains undocumented due to these barriers will continue to be disproportionately vulnerable to the dangers of the industry. Panelists suggested that any future comprehensive legislation should consider the importance of increased funding for legal services to educate migrant and agricultural workers of their rights and aid them in applying for immigration relief as they are eligible.⁹⁵

Finally, some important protections offered under the current H2A foreign agricultural guest worker program may be eliminated under S. 744. Again, according to Mr. Keberlein:

Right now, the program is referred to as the H2A Foreign Guest Worker program. . .the workers are brought in under a contract that pays them a higher wage. . .in Illinois, it's \$11.10 an hour.⁹⁶ The employer is required to follow certain parts of this contract which, in essence, if the contract says for 8 months, there's a 50% rule says at any time during the first part of that contract, in those four months, if a U.S. citizen or RPI applies for the job, you must give it to them. There's also a requirement if a worker is there working, but there's no work. . .you have to pay them at least three-fourths of that contract. There's also cost associated with bringing workers in that the employer has to bear. Some of those things disappear under the new proposed worker program.⁹⁷

Panel testimony before the Committee indicated that with respect to guest agricultural workers in Illinois and throughout the United States, current laws have created a separate and unequal class of workers, who are disproportionately immigrants and Latinos and who remain unprotected and vulnerable to labor abuses. While S. 744 attempts to remedy some of these concerns, the Committee heard testimony that critical attention must be given to considering the specific needs of such populations in future legislation.

LGBT immigrants. Immigrants who identify as lesbian, gay, bisexual, or transgender (LGBT), along with their U.S. citizen spouses were also identified by panel members as class of people facing unequal treatment under current law. Such disparities included the ability of citizens or legal permanent residents in same sex marriages to apply for family Visas for their noncitizen spouse, and protections against workplace discrimination for citizens who wish to apply for immigration status for their same sex spouse.

⁹⁴ Keberlein Testimony, *Transcript* p. 74 line 23 through p. 75 line 10.

⁹⁵ Keberlein Testimony, *Transcript* pp. 74 - 75; Palumbo Testimony, *Transcript* pp.55-56

⁹⁶ For 2014, the wage rate for Illinois is \$11.63. U.S. Department of Labor, [Adverse Effect Wage Rates for 2014](http://www.foreignlaborcert.doleta.gov/adverse.cfm), <http://www.foreignlaborcert.doleta.gov/adverse.cfm> (last accessed Nov. 22, 2014).

⁹⁷ Keberlein Testimony, *Transcript* p.72 line 15 through p.73 line 15; *For more information see also:* U.S. Department of Labor, [H-2A Temporary Agricultural Program Details](http://www.foreignlaborcert.doleta.gov/h_2a_details.cfm), http://www.foreignlaborcert.doleta.gov/h_2a_details.cfm (last accessed Nov. 22, 2014).

While Immigrations and Customs Enforcement (ICE) does recognize legal same sex marriages for the purposes of applying for spousal Visas,⁹⁸ marriage between same sex partners is, as of the writing of this report, legal in only thirty-three of the fifty United States.⁹⁹ This means that for those living in one of the seventeen states that do not allow same sex marriages, couples must travel to another state entirely in order to marry before they can apply for immigration relief on behalf of their spouse. Though as of June 1, 2014, same sex couples in Illinois gained the right to marry,¹⁰⁰ at the time of the panel discussion in September of 2013, such rights were not available in Illinois. In his testimony, Attorney Michel Jarecki noted that traveling out of state to marry in another jurisdiction before applying for a spousal Visa is a disparity in and of itself — “an extra burden that heterosexual couples do not have to do.”¹⁰¹

Mr. Jarecki also noted the lack of federal protection against discrimination based on sexual orientation in the workplace that leaves immigrants with temporary status as well as their families especially vulnerable. For example, under S. 744, immigrants with RPI status must prove continual employment for six years before they are eligible for a green card.¹⁰² If such individuals are fired from their jobs or are unable to get a job because of their sexual orientation, they will be unable to satisfy their immigration requirements and face risk of deportation.¹⁰³ Mr. Jarecki further noted that such discrimination could also extend to a U.S. citizen seeking to sponsor his or her same sex spouse for a Visa:

[I]f a U.S. citizen has to . . . show information of his employment; pay stubs, potentially an H.R. letter — if that person goes to H.R., unknowingly saying ‘I’m sponsoring my same sex partner for immigration benefits, this is the happiest day of my life. I need a letter from you saying I make X amount of money so I can prove to the federal government I can support this person.’ ‘Wait, same sex partner, what?’¹⁰⁴

In this situation, during the process of gathering the required documentation for a family Visa application, a U.S. citizen seeking to sponsor his or her same sex spouse could open himself or herself up to employment discrimination, up to and including termination, based on disclosure of

⁹⁸See U.S. Citizenship and Immigration Services “Same Sex Marriages” at: <http://www.uscis.gov/family/same-sex-marriages> (last accessed December 4, 2014)

⁹⁹ As of November of 2014, same-sex couples have the freedom to marry in: AK, AZ, CA, CO, CT, DE, HI, ID, IA, IL, IN, KS, ME, MD, MA, MN, NC, NH, NJ, NM, NV, NY, OK, OR, PA, RI, UT, VA, VT, WA, WV, WI, and WY, plus Washington, D.C. and St. Louis, MO. Retrieved from: <http://www.freedomtomarry.org/states/> (last accessed Dec. 2, 2014).

¹⁰⁰ Religious Freedom and Marriage Fairness Act, 750 ILCS 80/1 (2014), available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=098-0597> (last accessed December 2, 2014).

¹⁰¹ Jarecki Testimony, *Transcript*, p. 80 lines 03-04.

¹⁰² S. 744, 113th Cong. § 2101 `Sec. 245B(b)(9)(B) (2013)

¹⁰³ Jarecki Testimony, *Transcript*, p. 66 line 24 through p. 67 line 06.

¹⁰⁴ Jarecki Testimony, *Transcript*, p. 80 lines 16-23

his or her sexual orientation. In short, the lack of federal protection against sexual orientation discrimination leaves LGBT immigrants who live in a state where sexual orientation is not a protected category vulnerable not only to the same employment discrimination as their U.S. citizen counterparts, but also potential family separation, denial of immigration status, detention, and deportation.¹⁰⁵ Mr. Jarecki testified that due to these disparate vulnerabilities, future comprehensive reforms to immigration law should provide special consideration to this population.

Medical repatriation. Finally, panelists stated that current immigration law denies due process to noncitizens in U.S. hospitals through the practice of “medical repatriation.” Medical repatriation involves transferring critically ill or injured noncitizens who are unable to pay for medical care in the United States to another facility in their country of origin for treatment. Alonzo Rivas, Midwest Regional Counsel for the Mexican American Legal Defense and Education Fund, testified:

Medical repatriation is a problem that has been on the rise in the past 5 years and, just recently, has received the attention it deserves. Medical repatriation essentially allows private actors, such as border hospitals, to engage in deportations of uninsured, undocumented patients — many comatose, many paraplegic — without involving the minimum due process safeguards of the federal immigration system.¹⁰⁶

The Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA) requires that hospitals in the United States conduct an appropriate medical screening for any persons who present themselves to an emergency department and request care, or if a request is made on an individual’s behalf, to determine if an emergency medical condition exists.¹⁰⁷ If an emergency medical condition does exist, the hospital is further required to provide stabilizing treatment prior to transferring or discharging the patient, regardless of the individual’s ability to pay.¹⁰⁸ Since the enactment of EMTALA however, there has been ongoing disagreement as to the responsibility of hospitals to continue providing critical treatment after a patient has been admitted and is no longer under emergency department care.¹⁰⁹ In its 2014 Statutory Enforcement Report, *Patient*

¹⁰⁵ Under the Illinois Human Rights Act, sexual orientation and gender identities are protected categories. Accordingly, Illinois employers are prohibited from discriminating against employees based on the employee’s sexual orientation or gender identity. See (775 ILCS 5/) Illinois Human Rights Act.

¹⁰⁶ Rivas Testimony, *Transcript* p. 128 lines 05-12

¹⁰⁷ 42 U.S. CODE § 1395DD, EXAMINATION AND TREATMENT FOR EMERGENCY MEDICAL CONDITIONS AND WOMEN IN LABOR (EMTALA). (EMTALA APPLIES TO ANY HOSPITAL THAT HAS AN EMERGENCY DEPARTMENT AND PARTICIPATES IN THE MEDICARE PROGRAM.) AVAILABLE AT: [HTTP://WWW.LAW.CORNELL.EDU/USCODE/TEXT/42/1395DD](http://www.law.cornell.edu/uscode/text/42/1395DD). (LAST ACCESSED DEC. 2, 2014).

¹⁰⁸ 42 U.S.C. § 1395dd. *Note:* Under EMTALA, the term “stabilize” is defined as “to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility...”

¹⁰⁹ Black, Lee. Defining Hospital’s Obligations to Stabilize Patients Under EMTALA. Virtual Mentor. American Medical Association Journal of Ethics. Nov. 2006, Vol. 8, Number 11: 752-755.

Dumping, the U.S. Commission on Civil Rights explored the issue of hospitals admitting uninsured emergency department patients into a non-emergency unit (where they are exempt from EMTALA requirements) and then immediately discharging them without proper follow up care due to an inability to pay.¹¹⁰ In this report, the Commission included a recommendation to revisit the definition of “stabilization” under EMTALA, to “ensure that people are not released from hospital care before they are able to properly care for themselves or have arrangements for assisted and/or recuperative care.”¹¹¹

For noncitizens living and working in the United States the stakes are especially high. A 2014 article published in the *New England Journal of Medicine* chronicles this issue, opening with the story of Quelino Jimenez — an undocumented immigrant from Mexico who suffered a 20-foot fall while working on a construction job in Chicago, resulting in quadriplegia.¹¹² After receiving emergency care at a Chicago hospital, and with no local long term care facility willing to accept him for proper follow up treatment due to his uninsured status, Jimenez was discharged and transferred against his will to a hospital in Oaxaca, Mexico. In the Oaxaca hospital, which was ill equipped to manage his condition, Jimenez suffered bed sores, two cardiac arrests, pneumonia, and sepsis. He later died on January 3, 2012.

According to a 2012 study conducted by the Seton Hall Law School and New York Lawyers for the Public Interest (NYLPI), despite the lack of formal, coordinated record keeping on such cases, the practice of medical repatriation appears to be pervasive. “Overall, hospitals, non-governmental organizations (NGOs), journalists, and advocates have been able to document more than 800 cases of attempted or successful medical repatriations across the United States.”¹¹³ For uninsured patients who are noncitizens such as Jimenez, this practice essentially place them into *de facto* deportation without any due process of law.¹¹⁴ In the words of panelist Rene David Luna, Community Organizer with Access Living: “. . . about medical repatriation: I would call it medical deportation because, in effect, that’s what they’re doing.”¹¹⁵ What is more, the authors of the Seton Hall and NYLPI study raised concern that absent additional protections, the Patient Protection and Affordable Care Act (PPACA)¹¹⁶ may increase the incidence of

¹¹⁰*Patient Dumping*. U.S. Commission on Civil Rights, September 2014. Available at: http://www.usccr.gov/pubs/2014PATDUMPOSD_9282014-1.pdf (last accessed Dec. 2, 2014)

¹¹¹ *Id.*

¹¹² Hamel, Mary Beth; Young, Michael J.; Soleymani Lehmann, Lisa. *Undocumented Injustice? Medical Repatriation and the Ends of Health Care*. *New England Journal of Medicine*. Vol. 370 Issue 7. February 13, 2014.

¹¹³ *Discharge, Deportation, and Dangerous Journeys: A Study on the Practice of Medical Repatriation*. A joint Project from The Center For Social Justice At Seton Hall Law School And the Health Justice Program at New York Lawyers for the Public Interest. December 2012 available at: <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/final-med-repat-report-2012.pdf>. (last accessed Dec. 2, 2014).

¹¹⁴ *Ibid.*

¹¹⁵ Luna Testimony, *Transcript*, p. 163 lines 06-08

¹¹⁶ 42 U.S.C. § 18001 (2010). Available at <https://www.congress.gov/bill/111th-congress/house-bill/3590> (last accessed December 2, 2014).

medical repatriation. This is because undocumented immigrants are specifically excluded from the PPACA's health insurance mandate,¹¹⁷ and simultaneously prohibited from accessing premium tax credits and cost sharing reductions associated with the law.¹¹⁸ At the same time, the law reduces the pool of payments available to help hospitals provide treatment for uninsured patients.¹¹⁹ As such, the authors determine: "many hospitals that provide care to uninsured undocumented patients may be tempted to turn to medical repatriation as a means to reduce costs."¹²⁰ The study concludes:

These deficiencies have very real and sometimes fatal consequences for immigrant patients, who find themselves back in their native countries, separated from their families, and in need of critical care they are unable to access.¹²¹

The Committee heard testimony that the practice of medical repatriation creates a disparity in equal protection for ill and/or injured noncitizen patients in the U.S. — separating them from their families and social support systems, circumventing due process protections for those facing removal from the country, and subjecting those from developing countries to a high risk of transfer into a medical system ill equipped to provide necessary continuing care for their complex medical needs. For these reasons, panelists raised the concern "that the immigration bill [S.744] is silent on the issue of medical repatriation."¹²² Citing these issues, scholars have urged that in order to protect the basic civil rights of all residing in the United States to (1) due process of law and (2) life and the preservation of health and wellbeing, any future immigration reform should include clear and protective requirements around the practice of medical repatriation. A February 2014 report on the topic published in the *New England Journal of Medicine* states, "Policies governing medical repatriation should ideally be developed in tandem with immigration and insurance reforms that establish streamlined paths to citizenship and insurance coverage for vulnerable immigrants."¹²³

¹¹⁷ PPACA Sec. 1101(d)(1), Sec. 1312(f) and Sec. 1411(b)(2)

¹¹⁸ PPACA Sec. 1401(a) and Sec. 1402(f)

¹¹⁹ Michael K. Gusmano, Undocumented Immigrants in the United States: U.S. Health Policy and Access to Care, UndocumentedPatients.org (Garrison, NY: The Hastings Center), last updated: October 3, 2012. Available at <http://www.undocumentedpatients.org/issuebrief/health-policy-and-access-to-care/>. (last accessed Dec. 3, 2014)

¹²⁰ Discharge, Deportation, and Dangerous Journeys: A Study on the Practice of Medical Repatriation. A joint Project from The Center For Social Justice At Seton Hall Law School And the Health Justice Program at New York Lawyers for the Public Interest. (p. 20) December 2012 available at:

<http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/final-med-repat-report-2012.pdf>.

(last accessed Dec. 4, 2014)

¹²¹ *Ibid.* at p. 8.

¹²² Rivas Testimony, *Transcript* p. 128 lines 03-04

¹²³ Hamel, Mary Beth; Young, Michael J.; Soleymani Lehmann, Lisa. Undocumented Injustice? Medical Repatriation and the Ends of Health Care. *New England Journal of Medicine*. Vol. 370 Issue 7. February 13, 2014.

Civil Rights Concerns with Proposed Immigration Law

Panelists identified several aspects of S. 744 that may either exacerbate or raise additional civil rights concerns if the bill is adopted as drafted. These aspects include the required expansion of the employment eligibility verification system (E-Verify); the expanded border enforcement provisions; and the manner in which “points” are assigned to Visa applicants under the new merit based point system. The Committee heard testimony that outlined specific concerns in relation to each of these provisions, primarily focused on equal protection in the administration of justice.

1. Employment Eligibility Verification System

The employment eligibility verification system known as E-Verify is an internet based system that allows employers to verify their employee’s eligibility to work in the United States by comparing their individual eligibility documentation to other U.S. government records.¹²⁴ Currently, E-Verify is not mandatory, and as such, only about seven percent of U.S. employers participate.¹²⁵ However, under S. 744 the E-Verify system is set to become mandatory for all employers, in a phased implementation over a five year period.¹²⁶ The Committee heard testimony of several civil rights concerns related to E-Verify, specifically around its accuracy and potential misuse.

Accuracy. With respect to the accuracy of the E-Verify system, Mr. Rivas testified that errors in the system disproportionately impact women and certain immigrants with “foreign sounding” names:

It has been our experience, as an organization, and collectively of labor rights organizations, that errors in the E-Verify system currently is [dis]proportionately impacting women and immigrants about whom the database have incorrect information due; for example, to marriage related name changes, hyphenated last names or foreign names that are more likely to be misspelled or have variant spellings.¹²⁷

A recent analysis of the system by the American Civil Liberties Union in May of 2013 raises similar concerns.¹²⁸ Such accuracy problems have significant implications for workers who may face costly defenses and job loss in order to correct erroneous charges of expired or unauthorized

¹²⁴ A Guide to S. 744: Understanding the 2013 Senate Immigration Bill. Special Report, Immigration Policy Center of the American Immigration Council. July 2013. (p. 13), available at <http://www.immigrationpolicy.org/special-reports/guide-s744-understanding-2013-senate-immigration-bill>. (last accessed Dec. 4, 2014) [Hereafter cited as: *AIC Guide to S. 744*]

¹²⁵ *Id.*

¹²⁶ S.744, 113th Cong. § 3101 `Sec. 274(A)(d)2 (2013)

¹²⁷ Rivas Testimony, *Transcript*, p. 130 lines 05-12

¹²⁸ Prove Yourself to Work: the 10 Big Problems with E-Verify. *American Civil Liberties Union* (2013). Available at: https://www.aclu.org/files/assets/everify_white_paper.pdf (last accessed Dec. 4, 2014)

work status. S. 744 does provide for individuals to be able to self-verify their own status in the system and to petition for changes to any errors.¹²⁹ It also provides for compensation for workers who were negatively impacted by the system in the case of gross negligence or intentional misconduct,¹³⁰ and it requires regular accuracy and privacy audits.¹³¹ However, these provisions do not lay out minimum accuracy requirements for the system (only that an annual accuracy audit be conducted, along with recommendations for reducing error rates). Mr. Rivas suggested that such safeguards “regarding database accuracy, lower error rates, privacy, and measurable employer compliance” should be in place *before* any expansion of the E-Verify system is implemented.¹³² If such protections are not in place, the Committee heard testimony that a mandatory, universal implementation of E-Verify may create or exacerbate equal protections concerns whereby women and certain groups of immigrants are disproportionately affected.

Misuse. In addition to concerns regarding accuracy, panelists also cited concerns about the potential misuse of the E-Verify system, specific to its use as a method of circumventing applicable labor protections. In his testimony, Mr. Rivas raised concern that some employers may use the E-Verify system as a way to disrupt the activity of employees who are “most involved in labor issues.”¹³³ The mandatory expansion of E-Verify under S. 744 to nearly all employers within 4-5 years may alleviate some such concern because all employees would be screened within three days of beginning employment¹³⁴ — in effect creating a fairer and more standardized process that is equally applied to all. This would prevent employers from being able to use the system selectively to disrupt collective bargaining or circumvent other labor protections.

At the same time, some also raised concern that the expanded implementation of E-Verify could exacerbate other civil rights concerns for those already living and working in the United States who will not gain status under S. 744. As panelist R. Linus Chan, Clinical Instructor at DePaul University College of Law noted, an estimated three to five million immigrants already living in the U.S. will either be ineligible for status under S.744 or will be otherwise unable to take advantage of the law.¹³⁵ For such individuals, panelist Fred Tsao, Policy Director for the Illinois Coalition for Immigration and Refugee Rights, raised concern that expanding E-Verify would exacerbate violations of basic employment and labor protections:

¹²⁹ S.744, 113th Cong. § 3101 (a) `Sec. 274A(d)4(I) (2013)

¹³⁰ S.744, 113th Cong. § 3101 (a) `Sec. 274A (d)(7)(F) (2013)

¹³¹ S.744, 113th Cong. § 3101 (a) `Sec. 274A (d)(8)(C) (2013)

¹³² Rivas Testimony, *Transcript*, p. 130 lines 18-23

¹³³ Rivas Testimony, *Transcript*, p. 141 lines 19-24

¹³⁴ S.744, 113th Cong. § 3101 `Sec. 274A(d)(4)(B)(i) (2013)

¹³⁵ R.L. Chan Testimony, *Transcript*, p. 08 line 10 through p. 09 line 09

The complete rolling out of E-Verify that S. 744 would mandate will also make it much more difficult for these excluded individuals to seek employment.¹³⁶ Unable to get work with most employers, who must participate in E-Verify within five years, these immigrants will be driven further underground, relying on off-the-books jobs and subject to all manner of exploitation.¹³⁷

Basic wage, health, and safety standards apply to all workers in the United States regardless of immigration status,¹³⁸ and indeed, S. 744 provides some protection for “victims of serious violations of labor and employment law or crime.”¹³⁹ However, because most undocumented workers also live in fear of their immigration status, Mr. Rivas noted: “E-Verify compounds workers’ vulnerability, and the program should explicitly prohibit the use of . . . E-Verify to undermine workers’ rights under labor and employment law.”¹⁴⁰

2. Increased Enforcement

Among other provisions, S. 744 calls for increased enforcement of current immigration law including additional border patrol and customs enforcement officers;¹⁴¹ the construction of additional fencing;¹⁴² increasing surveillance including aircraft surveillance;¹⁴³ authorizing individual border states to use the National Guard to help secure the southern border;¹⁴⁴ and hiring additional prosecutors and judges.¹⁴⁵ However, panelists raised two specific concerns with respect to such security enhancements. The first is related to the potential for an increase in law enforcement profiling; the second is regarding recent incidents of excessive use of force by border patrol and immigration officials near the U.S. southern border.

Law Enforcement Profiling. During the panel discussion, the Committee heard testimony regarding the increased enforcement provisions of S. 744, and specifically, concern that such provisions are not accompanied by sufficient prohibitions against profiling. Without stronger prohibitions against profiling, testimony suggested that increased immigration law enforcement may seriously exacerbate already existing problems with racial profiling.¹⁴⁶ Section 3305 of S.

¹³⁶ Reference to noncitizens who are not eligible for RPI status, such as those arriving after December 31, 2011 and those who have been convicted of felonies or multiple misdemeanors. See Tsao Testimony, *Transcript*, p. 135 lines 15-23.

¹³⁷ Tsao Testimony, *Transcript*, p. 136 lines 01-07

¹³⁸ U.S. Department of Labor, Wage and Hour Division. Facts Sheet #48 “Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division” Available at: <http://www.dol.gov/wecanhelpp/whdfs48.pdf> (last accessed December 4, 2014)

¹³⁹ S. 744, 113th Cong. § 3201 (2013)

¹⁴⁰ Rivas Testimony, *Transcript*, p. 131 lines 17-20

¹⁴¹ S. 744, 113th Cong. § 1102 (2013)

¹⁴² S. 744, 113th Cong. § 5(b)1 (2013)

¹⁴³ S. 744, 113th Cong. § 1106 (2013)

¹⁴⁴ S. 744, 113th Cong. § 1103 (2013)

¹⁴⁵ S. 744, 113th Cong. § 1104 (2013)

¹⁴⁶ For more information, see Restoring a National Consensus, the Need to End Racial Profiling in America, The Leadership Conference, March 2011, available at <http://www.civilrights.org/publications/reports/racial->

744 provides: “In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity if a specific suspect description exists.”¹⁴⁷ However, panelist Ami Gandhi, an attorney and the Executive Director of South Asian American Policy and Research Institute of Chicago, testified that such prohibitions are insufficient as they do not ban profiling on the basis of national origin and religion, and they include exemptions¹⁴⁸ that could permit profiling in matters of national security and border enforcement:

While tightening border and interior, other enforcement, the Senate bill and other legislative proposals fail to create a meaningful prohibition on profiling as they do not ban profiling based on national origin or religion. They only ban profiling based on race or ethnicity. At the same time, the Senate bill and other legislative proposals create a large border and national security loophole. The Senate bill also requires additional screening for individuals on the pathway to citizenship, based on their country or region of origin, which essentially mandates the ineffective profiling that our community members have already been enduring, especially in the aftermath of the tragic events of September 11, 2001.¹⁴⁹

Ms. Gandhi also noted that the lack of a ban on perceived religion and national origin profiling has a disproportionate, negative effect on Americans of South Asian descent:

Many of our community members are viewed by law enforcement, media, and the general public in terms of not only our race, but our real or perceived religion or country of origin. Individuals in the South Asian community are likely to be stopped or asked about their status at disproportionate frequency, based on stereotypes regarding those that are foreign or un-American. Community members have been profiled and stopped for minor violations that are later dismissed. But only after removal proceedings have commenced, sometimes separating families for over a year.¹⁵⁰

She further testified that law enforcement practices which “encourage or require officers to focus on identity based characteristics” are “detrimental to civil rights,” and ultimately make

[profiling2011/racial_profiling2011.pdf](#); [The 287\(g\) Program: A Flawed and Obsolete Method of Immigration Enforcement](#), The American Immigration Council, November 2012, available at

<http://www.americanimmigrationcouncil.org/just-facts/287g-program-flawed-and-obsolete-method-immigration-enforcement>; and, Kohli, Aarti; Markowitz, Peter L.; Chavez, Lisa. [Secure Communities by the Numbers: An Analysis of Demographics and Due Process](#). University of California Berkeley School of Law Chief Justice Earl Warren Institute on Law and Social Policy, October 2011, available at

[http://www.law.berkeley.edu/files/Secure Communities by the Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf). (last accessed Dec. 2, 2014)

¹⁴⁷ S. 744, 113th Cong. § 3305(a) (2013).

¹⁴⁸ Id. at §3305(b)(2): “In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation’s borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.”

¹⁴⁹ Gandhi Testimony, *Transcript*, p. 91 line 15 through p. 92 line 04

¹⁵⁰ Gandhi Testimony, *Transcript*, p. 94 lines 08-18

communities less safe by sowing mistrust and lessening cooperation between community members and law enforcement. She also stated that such practices ultimately detract from law enforcement's ability to focus on "real signs of criminal activity."¹⁵¹

Ms. Gandhi concluded, "Unless we ban not only racial profiling in immigration enforcement, but also profiling based on religion and national origin, our immigration system will be fundamentally unfair and threaten the civil rights of all Americans. Government policies can fuel public perception, and fuel individual prejudices as well."¹⁵² She urged, "As we reform our immigration system, we must not allow racial or religious groups to be unfairly targeted in the name of national security."¹⁵³

Excessive Use of Force. Panelists also noted that the provisions for increased enforcement at the border may exacerbate current problems regarding the excessive use of force, especially when considered in the context of the previously mentioned concern about racial profiling. In the words of panelist Fred Tsao, "Deploying 20,000 more agents on the border amounts to bringing in a bunch of hammers all looking for nails to pound, making racial profiling against Latinos and others perceived to be unlawful border crossers all the more likely."¹⁵⁴ On this topic, panelist R. Linus Chan, Clinical Instructor at DePaul University College of Law stated:

There was a recent report from the Independent Inspector General's Office of Homeland Security¹⁵⁵ that found that many border patrol agents do not understand the use of force or threatened use of force such that there have been 19 people have been killed since 2010 at the border. Many different incidents have been shown, as a recent "LA Times" article talked a little bit more about that.¹⁵⁶

While S. 744 does provide for additional training and oversight to improve these conditions,¹⁵⁷ panelists voiced concern that significantly increasing border enforcement without first addressing the current problems related to the use of force at the border raises further civil rights concerns. Panelists felt that the excessive use of force, especially that which is targeted at immigrants or perceived immigrants and those near the southern U.S. border, should be addressed before any additional enforcement provisions are implemented in future legislation.

¹⁵¹ Gandhi Testimony, *Transcript*, p. 93 lines 05-24

¹⁵² Gandhi Testimony, *Transcript*, p. 94 lines 18-24

¹⁵³ Gandhi Testimony, *Transcript*, p. 94 lines 03-05

¹⁵⁴ Tsao Testimony, *Transcript*, p. 139 lines 02-06

¹⁵⁵ See Department of Homeland Security Office of Inspector General Report, [CPB Use of Force Training and Actions to Address Use of Force Incidents \(Redacted\)](http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf), Sept. 2013, available at http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf. (last accessed Dec. 3, 2014)

¹⁵⁶ R.L. Chan Testimony, *Transcript*, p.14 lines 7-14

¹⁵⁷ S. 744, 113th Cong. §§ 1111, 1112 (2013).

3. Merit Based Points System

A new “merit based point system” that lays out plans to provide an avenue for noncitizens who are not able to apply through the existing family based or employment based systems to seek an immigrant Visa¹⁵⁸ is also included in S. 744. Under this new merit based system, noncitizens would be able to accumulate points based on criteria such as employment history, education, occupation, civic involvement, English language proficiency, family ties, age, and nationality.¹⁵⁹ Depending on the number of Visas requested the previous year and the unemployment rate, between 120,000 and 250,000 Visas would be allocated each year to applicants with the highest number of points.¹⁶⁰ During the panel discussions, the Committee heard concerns that the way in which the merit based points are to be distributed under S. 744 may create a discriminatory effect on the basis of national origin, sex, disability, and age.

National Origin. Under the current system, the limited number of available immigrant Visas each year are distributed, in part, according to an applicant’s country of origin. That is, a certain number of Visas are reserved for applicants from countries with traditionally low numbers of immigrants (“undersubscribed” countries), and the number of Visas issued to applicants from countries with traditionally high numbers of applicants is restricted (“oversubscribed” countries).¹⁶¹ While some may feel that such preferences are important to ensure a diverse distribution of Visas to immigrants from various countries, others feel that these practices amount to discrimination against applicants from “oversubscribed” countries. Attorney Tejas Shah testified: “On [its face], the immigration system affords fairness and equality to members of different countries by giving an equal number of Visas to nationals of different countries. In practice, this quota system often tends to play out and have a discriminatory impact on nationals of different countries.”¹⁶² Mr. Shah continued, “Nationals of oversubscribed countries, such as India and China, in the employment based immigration system must often wait 10 years or longer for green cards to become available. By comparison to the nationals of other countries who do not spend a similar amount of time waiting for permanent residency.”¹⁶³ Mr. Shah also noted that such disparities exist among applicants for family based Visas as well: “We see the same impact in the family based category. . .whether it be nationals of the Philippines, or

¹⁵⁸ *AIC Guide to S. 744*

¹⁵⁹ S. 744, 113th Cong. § 2301 (2013) *See also: Family Based Immigration: Now and Under S. 744*. Immigrant Legal Resource Center, 2013. Available at: http://www.ilrc.org/files/documents/family-based_immigration_-_now_and_under_s.744.pdf. (last accessed Dec. 2, 2014)

¹⁶⁰ S. 744, 113th Cong. § 2301(a)(1)(e) (2013), *see also AIC Guide to S. 744*

¹⁶¹ American Immigration Council, *Why don't they just get in line?* Available at: <http://www.immigrationpolicy.org/just-facts/why-don%E2%80%99t-they-just-get-line> (last accessed December 4, 2014).

¹⁶² Shah Testimony, *Transcript*, p. 106 lines 04-10

¹⁶³ Shah Testimony, *Transcript*, p. 106 lines 10-16

nationals of Mexico or other countries that have traditionally had high levels of family based immigration to the United States.”¹⁶⁴

The merit based point system proposed by S. 744 preserves the preference for issuing immigration Visas to nationals of “undersubscribed countries” by allocating additional points to applicants from these countries.¹⁶⁵ However, testimony before the committee suggested that the potential discriminatory impact of such policies should be considered in future legislation.

Aside from directly allocating points based on national origin, some panelists suggested that the new merit based point system could also have more subtle discriminatory impact on the basis of national origin, by eliminating some previously available family based categories. Specifically, S. 744 proposes to eliminate the immigration category for siblings of U.S. citizens, and it imposes an age restriction of thirty one to married adult children of U.S. citizens.¹⁶⁶ According to the testimony of Tuyet Le, the Executive Director of Asian Americans Advancing Justice Chicago, such restrictions will have a disparate and negative impact on the Asian American community. Ms. Le stated:

In 2012, eighty six percent of Visas issued for Asian countries were family based. For most Asian Americans, our immigrant story in America is unthinkable without our aunts, uncles, brothers and sisters. These family members serve as caretakers, partners in running our small businesses, and built-in safety networks as our families slowly integrate and adjust to life in the U.S. By eliminating this category, future Asian immigrants will be deprived of these vitally important loved ones, and be forced to completely rethink their concepts of family.¹⁶⁷

The concerns discussed above suggest that before eliminating any previously available path to citizenship, legislators ought to consider whether or not applicants from the targeted category disproportionately represent those of a particular national origin. Without such due consideration, eliminating these categories could have the unintended impact of discriminating against a class of people trying to reunite their families and set down productive roots in the United States.

Sex. Panelists suggested that the merit based points system proposed under S. 744 could also have a disparate and negative impact on women applicants. Again, according to Ms. Le:

¹⁶⁴ Shah Testimony, *Transcript*, p. 106 line 20 – p. 107 line 01

¹⁶⁵ S. 744, 113th Cong. § 2301 (c)(4)(J) and (c)(5)(I) (2013)

¹⁶⁶ S. 744, 113th Cong. § 2307 (2013) *See also* :Immigrant legal resource center, “Family-Based Immigration: now and under S. 744” Available at: http://www.ilrc.org/files/documents/family-based_immigration_-_now_and_under_s.744.pdf (last accessed December 3, 2014)

¹⁶⁷ Le Testimony, *Transcript*, p. 101 line 22 through p. 102 line 08

This new point based mechanism will potentially disadvantage women and many family members who are not able to accumulate enough points for a Visa. In fact, under the current H1B Visa system, evidence suggests that gender gap already exists. About seventy percent of women currently attain legal status through family based Visas. Only a quarter of all employment Visas are given to women as primary workers. Although data is hard to come by from the Department of Homeland Security, some media sources have studied this issue and have reported that an estimated seventy percent of H1B Visa holders are male.¹⁶⁸ Among the professional and management workers, only thirty seven percent of green card holders in ... fiscal year 2011, were women. So, why is this important to note? It highlights the fact that many girls and young women in so many countries overseas, including Asian countries, still face a great amount of unequal access to education and job skills, which our country has now decided are priority over family relationships.¹⁶⁹

Panelist Alonzo Rivas from the Mexican American Legal Defense and Education Fund shared such concerns:

The system also raises concerns about potential gender bias. The system makes an attempt to acknowledge this situation by allowing, by giving points to caregivers who, for the most part, tend to be women. Under tier 2,¹⁷⁰ the maximum number of the points available to primary caregivers is ten. The playing field is, for these women, is anything but level. If they have to compete with applicants who have been employed in the labor market and can accumulate up to forty points through different categories. They're not going to be able to compete at all.¹⁷¹

Aside from caregiving responsibilities, panelist Maria Pesqueria, President and CEO of Mujeres Latinas en Acción noted, that “Approximately 60 percent of undocumented women are in the labor force, and they enjoy working in professions where the employment is informal...”¹⁷² Ms. Pesqueria testified that sometimes such informal and flexible working environments make it difficult for workers to verify their hours and roles which “presents a challenge for many women to even demonstrate the history for immigration purposes.”¹⁷³ Without consideration of such

¹⁶⁸ H1B holders are specialty occupation visa holders. More information about these visas is available at U.S. Citizen and Immigration Services, *Understanding H-1B Requirements*: <http://www.uscis.gov/eir/visa-guide/h-1b-specialty-occupation/understanding-h-1b-requirements>. (last accessed December 3, 2014).

¹⁶⁹ Le Testimony, *Transcript*, p. 103 lines 05-24

¹⁷⁰ The merit-based point system under S. 744 is split into two tiers. Tier 1 is for immigrants with a high level of education and specific skills, while tier 2 is reserved for those with less formal skills. More information about these tiers is available at: <http://www.immigrationpolicy.org/special-reports/guide-s744-understanding-2013-senate-immigration-bill>. (last accessed Dec. 3, 2014).

¹⁷¹ Rivas Testimony, *Transcript*, p. 128 lines 05-12

¹⁷² Pesqueria Testimony, *Transcript*, p. 159 lines 02-05

¹⁷³ Pesqueria Testimony, *Transcript*, p. 159 lines 07-08

factors as more informal working arrangements, the requirements of the merit based point system to document consistent work hours could place a disproportionate burden on women. Another panelist, Stephanie Comba, described this burden from a more personal perspective:

My mother, she's a domestic worker. She's had periods of times where she'd be removed from work. She has had countless employers that have been, have discriminated against her, have been racist, have been abusive. She can't report those things. There's no labor inclusion for people that are domestic workers.¹⁷⁴

Overall, the committee heard testimony that the merit based point system proposed under S. 744 is “overwhelmingly preoccupied with economic criteria rather than human rights concerns, such as family reunification.”¹⁷⁵ Panelists suggested that such a focus discriminates against women, who across the globe have less access to higher education and specialized employment training, and are more likely to be represented in caretaking roles which, while equally important in our society, do not receive equal value under the proposed merit system.

Disability. Stemming from similar problems regarding the merit based point system proposed under S. 744 and its focus on economic criteria, panelists also raised concerns regarding the bill's potential impact on noncitizens with disabilities. Those who receive RPI status under S. 744 may not have any lapse in employment lasting longer than sixty days without jeopardizing their eligibility to renew their RPI status and later apply for a green card.¹⁷⁶ As such, panelist Rene David Luna, Community Organizer with Access Living stated: “you could imagine the fear of someone who is on the list, provisional access, and been working for two years, suddenly has an illness, suddenly gets hurt on the job, maybe hopefully wanting to return before the 60 days are up. Well, if that doesn't, the employer doesn't allow him to return, what happens? So, you could think about how difficult it might be for a worker to even disclose he has a disability, or she has a disability.”¹⁷⁷ Especially in light of the previous discussion regarding medical repatriation, Mr. Luna noted that without explicit protection for those who become disabled during their stay in the U.S., many immigrants may risk further injury or exacerbation of chronic conditions that they are afraid to disclose. Mr. Luna reminded the Committee that, “[d]isability can happen to anybody, and that's unfortunately, I think the problem with the immigration law, that it doesn't recognize this.”¹⁷⁸ Again, Ms. Comba provided a personal example from her family: “My dad has Crohn's disease. He's blind in one eye. He wouldn't qualify under the disability restrictions of being able to become a citizen.”¹⁷⁹

¹⁷⁴ Comba Testimony, *Transcript*, p. 167 lines 09-14

¹⁷⁵ Rivas Testimony, *Transcript*, p. 128 lines 14-16

¹⁷⁶ S. 744, 113th Cong. §2101 `Sec. 245B (c)(B)(9) (2013)

¹⁷⁷ Luna Testimony, *Transcript*, p. 162 lines 07-15

¹⁷⁸ Luna Testimony, *Transcript*, p. 160 lines 16-24

¹⁷⁹ Comba Testimony, *Transcript*, p. 167 lines 06-09

To add to this discussion, panelist Alonzo Rivas also noted that many undocumented immigrants are disproportionately represented in “low income, physically demanding industry; construction, agriculture, manufacturing, that are related to high rates of work related injuries.”¹⁸⁰ Mr. Rivas stated that such conditions are more likely to contribute to undocumented workers developing high rates of acquired disabilities and chronic health conditions over time.

Overall Mr. Luna reported to the Committee that:

The merit issue and the fact that people have to be able to be productive, that people have to have economic value sometimes is a problem for people with disabilities because disabled people are being seen as unproductive and not contributing, only as taking from the society. But, the reality is that disabled workers, in particular, have already given a lot to society.”¹⁸¹

Given such considerations, panelists felt that S. 744 or any future immigration reform legislation should include specific protections for those confronted with chronic illness and injury while living and working in the United States. Specifically, noncitizens with disabilities that live and work among us should be offered the same protections as citizens with disabilities with respect to workplace accommodations and other social supports. Moving forward, Mr. Luna suggested the following: “we could be working together with our state government to work with hospitals, to work with social service agencies, the NGOs, so that we all cooperate with one another. Give more awareness to the employers, not just the big corporations, but small businesses as well because, as you know, many immigrants work for the small businesses.”¹⁸²

Age. Finally, Mr. Rivas also raised concern about the assignment of points in the merit based system based on age. He stated, “We believe the assignment of points based on age also raises concerns about age discrimination because the system privileges younger immigrants.”¹⁸³ Indeed, S. 744 provides the maximum allowable eight points for those between the ages of eighteen and twenty-four, six points for those between the ages of twenty-five and thirty-two, four points for those aged thirty-three to thirty-seven, and no additional points for those over the age of thirty-seven.¹⁸⁴ Mr. Rivas noted, “. . . if you're an older immigrant . . . that's another strike against you. You're going to be viewed less favorable than someone who is younger”¹⁸⁵

In summary, the concerns raised during panel testimony regarding S. 744’s proposed merit based point system all centered around the bill’s focus on economic criteria, which panelists felt was

¹⁸⁰ Rivas Testimony, *Transcript*, p. 129 line 16 through p. 130 line 02

¹⁸¹ Luna Testimony, *Transcript*, p. 161 lines 02-08

¹⁸² Luna Testimony, *Transcript*, p. 164 line 23 through p. 165 line 05

¹⁸³ Rivas Testimony, *Transcript*, p.129 lines 12-15

¹⁸⁴ S. 744, 113th Cong. § 2301(c)(4)(I) (2013).

¹⁸⁵ Rivas Testimony, *Transcript*, p.140 lines 17-20

disproportionate. Not only did panelists purport the heavy consideration of economic factors to devalue the importance of family reunification and the rights of families to be together, they also raised concern about related inherent discrimination on the basis of several protected classes; including national origin, sex, disability, and age. While the merit based points system may be a step toward developing more clear and objective criteria for prioritizing immigrant Visas moving forward, future legislation should take care to consider the potential impact of the proposed criteria, and how each is weighted.

Findings and Recommendations

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.¹⁸⁶ The Illinois Advisory Committee heard testimony that the proposed federal comprehensive immigration bill S. 744 may not adequately address the discrimination concerns nor the denial of equal protection of the law under the Constitution concerns that diverse immigrant communities face. Panelists also expressed numerous concerns about discrimination and equal protection issues that this or a similar future bill may create if enacted into law. A summary of those concerns is listed below as Committee findings.

In addition to these findings, the Committee notes that the U.S. Commission on Civil Rights intends to hold a briefing on civil rights at immigration detention facilities on January 30, 2015, and another briefing on workplace discrimination against LGBT communities on March 16, 2015. The findings listed below in some instances relate to the matters to be discussed at these upcoming Commission briefings. Therefore, the Illinois Advisory Committee presents the findings and recommendations in this report to the Commission as a matter of mutual concern.

Findings

1. Civil Rights Concerns with Current Immigration Law in Relation to Proposed Legislation.

1.1. Administration of Justice: The Right to Equal Protection and Due Process of Law

- 1.1.1. **The right to an attorney.** Because immigration is considered a “civil” rather than a “criminal” matter, respondents are not entitled to representation in proceedings (though they may hire private counsel if they choose to and can afford to do so). The lack of access to competent counsel for many in immigration proceedings was a civil rights issue raised throughout the public meeting. While it may be partially remedied by some provisions of S. 744 or a similar future bill, concern remains for noncitizens who do not fall into one of the “vulnerable” categories (such as children and people with mental disabilities) identified in the bill.

¹⁸⁶ 45 C.F.R. § 703.2

- 1.1.2. **The right to an informed defense.** The denial of access to pertinent information about a noncitizen respondent's own case in a timely manner is a continued civil rights concern. While S. 744 makes strides toward addressing this concern by compelling the release of a respondent's file at the onset of proceedings, the testimony heard suggested that without any judicial oversight of government claims of "privilege," such provisions may prove insufficient.
- 1.1.3. **The right to a fair and speedy trial.** Panelists testified that the problem of immigrants who are subject to removal not receiving a fair and speedy trial is significant and disproportionately denies noncitizens their equal protection in the administration of justice. They noted that S.744 does provide measures to help cut down on the inordinate delays in immigration trials by requiring timely custody and bond determinations and increasing the number of immigration judges and their resources, and stated that such considerations should be included in future legislation.

1.2. Special Populations

- 1.2.1. **Noncitizen children.** Testimony to the committee indicated the existence of disparities in the administration of justice for noncitizen children, who are denied many of the protections afforded to U.S. citizen children involved in the court system. S. 744 makes some effort to remedy these disparities by requiring counsel be provided to noncitizen children facing removal proceedings, setting safety standards for deportation, and revisiting policies that separate families with children at the border. While such provisions were described as positive, there was notable room for additional measures to protect the rights of noncitizen children. The most common recommendation from presenters for responding to each of these concerns is to ensure a "best interest" standard of protection for noncitizen children similar to that which is available to their U.S. citizen peers.
- 1.2.2. **Migrant and farm workers.** The Advisory Committee heard testimony that current laws have created a separate and unequal class of workers, who are disproportionately immigrants and Latinos, and who remain unprotected and vulnerable to labor abuses. While S. 744 attempts to remedy some of these concerns, the Committee heard testimony that critical attention must be given to considering the specific needs of such populations, including extending the filing period for Blue Card applications, and addressing some of the gaps in current workplace protections for this group.
- 1.2.3. **LGBT immigrants.** In its meeting, the Committee heard testimony that the lack of federal protection against sexual orientation discrimination leaves LGBT immigrants vulnerable not only to the same employment discrimination as their U.S. citizen counterparts, but also potential family separation, denial of immigration status, detention, and deportation. Panelists noted that legally

married same sex couples can apply for spousal Visas under the current immigration system, however, those living in states that do not allow same sex marriage must travel out of state to do so — a burden that heterosexual couples do not have to face.

1.2.4. **Medical repatriation.** The Committee heard testimony that the practice of medical repatriation creates a disparity in equal protection for ill and/or injured noncitizen patients in the U.S. — separating them from their family and social support systems, circumventing due process protections for those facing removal from the country, and subjecting those from developing countries to a high risk of transfer into a medical system ill equipped to provide necessary continuing care for their complex medical needs. For these reasons, panelists raised concern that current proposals to reform immigration laws have been silent on this issue.

2. Civil Rights Concerns with Proposed Immigration Law

2.1 Expansion of the Employment Verification System “E-Verify.”

2.1.1 *Accuracy.* The Committee heard testimony from immigrant and labor advocates regarding errors in the E-Verify system. Panelists stated that errors in E-verify may have a disparate impact on women because women are more likely to change or hyphenate their last names. Such errors may also disproportionately impact immigrants with “foreign sounding” last names, who may be faced with the additional burden of correcting such errors before returning to work.

2.1.2 *Misuse.* Panelists also raised concern about the potential misuse of E-Verify as a way for employers to intimidate undocumented workers and circumvent labor laws. While S. 744 sets forth some protections in place to address these concerns, testimony suggested that such protections should explicitly be in place before the proposed expansion of the E-Verify system takes effect.

2.2 Increased enforcement.

2.2.1 *Law Enforcement Profiling.* The Committee heard testimony regarding the increased enforcement provisions of S. 744 and, specifically, concerns that such provisions do not include prohibitions against profiling on the basis of perceived national origin or religion. Without such prohibitions, testimony suggested that increasing enforcement may seriously exacerbate already existing problems with racial profiling.

2.2.2 *Excessive Use of Force.* While S. 744 does provide for additional training and oversight to improve concerns regarding the excessive use of force at the border, panelists voiced concern that significantly increasing enforcement without first addressing the incidence of excessive force raises

further civil rights concerns, particularly in light of the profiling concerns stated in finding 2.2.1.

- 2.3 **Merit based point system.** During the panel discussions, the Committee heard concern that the way in which the merit based points are to be distributed under S. 744 may create a discriminatory effect on the basis of national origin, sex, disability, and age. Specifically, the Committee heard testimony about examples of adverse impact in the following areas:

2.3.1 *National Origin.* The merit based point system proposed by S. 744 preserves the preference for issuing immigration Visas to nationals of “undersubscribed countries” by allocating additional points to applicants from these countries. In addition to directly allocating points based on national origin, some panelists suggested that the new merit based point system could also have more subtle discriminatory impact on certain national origin groups by eliminating some previously available family based categories.

2.3.2 *Sex.* The Committee heard testimony that the proposed merit based system ignores the reality that many girls and young women in foreign nations face a great amount of unequal access to education and job skills. In addition, women are more likely to be represented in caretaking roles which do not receive equal value in the proposed merit based point system.

2.3.3 *Disability.* The Committee heard testimony that immigrants with RPI status under S. 744 could not have any lapse in employment lasting longer than sixty days without jeopardizing their eligibility to later apply for Legal Permanent Resident (LPR) status. Presenters stated that future legislation should provide explicit protection for those who become disabled during their stay in the U.S.

2.3.4 *Age.* The Committee heard testimony that S. 744 provides the maximum allowable eight points for those between the ages of eighteen and twenty-four; it provides six points for those between the age of twenty-five and thirty-two, and four points for those ages thirty-three to thirty-seven. Those over the age of thirty-seven receive no additional points, amounting to age discrimination being written into the system.

Recommendations

1. The Illinois Advisory Committee recommends that the U.S. Commission on Civil Rights undertake a study of the primary civil rights issues confronting diverse immigrant communities and consider legislative provisions that may address these issues in the future.
2. The Illinois Advisory Committee recommends that when future legislation on immigration reform is introduced, the U.S. Commission on Civil Rights conduct a civil rights review and

offer comment in an effort to ensure no immigrant is discriminated against or denied equal protection of the laws under the Constitution if the legislation is enacted.

3. In its forthcoming briefing on the state of civil rights at immigration detention facilities to be held on January 30, 2015, the U.S. Commission on Civil Rights should consider the findings of this report, particularly related to administration of justice concerns, and raise questions among presenters related to the findings in the report when appropriate.
4. In its forthcoming briefing on examining workplace discrimination against LGBT communities to be held on March 16, 2015, the U.S. Commission on Civil Rights should consider the findings of the Illinois Advisory Committee regarding immigrant LGBT members and raise questions among presenters related to the findings when appropriate.

Appendix A: Panel Agenda

AGENDA

Civil Rights Implications of Comprehensive Immigration Reform on Illinois' Immigrant Communities

Monday, September 23, 2013
DePaul North Café Room
1 E. Jackson Blvd., 11th Floor
Chicago, IL 60604

ILLINOIS ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS and
DEPAUL COLLEGE OF LAW ASYLUM AND IMMIGRATION CLINIC

Welcome and Introductions (10:30 a.m. – 10:40 a.m.)

- Barbara Abrajano, Chair, Illinois Advisory Committee

Panel 1 (10:40 a.m. – 11:40 a.m.)

- R. Linus Chan, Clinical Instructor, DePaul University College of Law
- Geoffrey Heeren, Assistant Professor of Law, Valparaiso University Law
- Maria Woltjen, Director of The Young Center for Immigrant Children's Rights, University of Chicago Law School

Panel 2 (11:45 a.m. – 12:45 p.m.)

- Michael Jarecki, Law Office of Michael R. Jarecki
- Lisa Palumbo, Supervisory Attorney Immigrants and Workers' Rights Practice Group, Legal Assistance Foundation of Metropolitan Chicago
- Miguel Keberlein, Supervisory Attorney of the Migrant Project, Legal Assistance Foundation of Metropolitan Chicago

Lunch Break (12:45 – 1:15)

Panel 3 (1:20 p.m. – 2:20 p.m.)

- Ami Gandhi, Executive Director, South Asian American Policy & Research Institute
- Tuyet Le, Executive Director, Asian Americans Advancing Justice Chicago
- Tejas Shah, Kriezelman Burton & Associates, LLC

Panel 4 (2:30 p.m. – 3:30 p.m.)

- Jennifer Chan, Associate Director of Policy, National Immigrant Justice Center
- Alonzo Rivas, Midwest Regional Counsel, Mexican American Legal Defense and Educational Fund
- Fred Tsao, Policy Director, Illinois Coalition for Immigrant and Refugee Rights

Panel 5 (3:35 p.m. – 4:30 p.m.)

- Stephanie Comba, Organizer, Immigrant Youth Justice League
- Rene David Luna, Community Organizer, Access Living
- Maria Pesqueira, President & CEO, Mujeres Latinas en Acción

Open Session (4:30 p.m. – 5:00 p.m.)

Adjournment (5:00 p.m.)

Appendix B: Non-Concurring Opinions

William Howard, Abstaining

I object to an unstated premise of this report that I think needed to be directly addressed because it is central to the state and national debate on immigration. The report *assumes* that illegal/undocumented immigrants should be afforded the same civil rights and constitutional protections as legal immigrants and citizens. This point cannot be glossed over. Constitutional scholars and a good portion of the public make a distinction between these two classes of immigrants, a distinction the report does not acknowledge. To that segment of the country, phrases in the report such as “the civil rights of non-citizens” are paradoxical. That public believes, with Constitutional justification, that full civil rights belong to citizens, and it objects to civil rights being conferred absent the status of citizenship.

The report also fails to analyze the costs of its recommendations, costs not only imposed upon native-born citizens but also upon immigrant citizens. In the search for disparities and inequalities, lawyers and activists have found a goldmine in comparing citizens’ and non-citizens’ conditions. A whole new vocabulary, with phrases such as “disparate vulnerabilities,” has been discovered. However, in the perfecting of the world, let us not make more inequities. To ask a country \$18 trillion in debt to rectify the problems of both citizens and non-citizens creates a moral hazard because clearly it will cost citizens and their institutions a great deal more than the non-citizens for whom these panelists are advocating. Yet, I do not see any testimony from organizations that have calculated these costs.

Although the report could not have reconciled the deep divisions in public opinion about this issue, it seems to me that it needed to nod in the direction of the “other half” of the country to whom illegal status and financial costs are still contested issues.

Jonathan Bean, Dissenting

"War is too important to be left to the generals," the saying goes. Similarly, the issue of civil rights is too important to be left to those who make a career of racial, ethnic and religious advocacy. There is another America, diverse in opinion, which influenced the provisions of this Senate Bill. The Illinois State Advisory Committee Report fails to even acknowledge, much less explain, the provisions that it criticizes for having a real or hypothetical "disparate impact" on groups whose advocates appeared before our hearing.

We value the testimony of those witnesses but community organizers, racial and ethnic activists, and like-minded professors took up nearly the entire hearing. Where were the Senate staffers (or others) who could explain and justify the provisions? (*Both* senators from Illinois voted for this bill; Durbin was one of several cosponsors). What general welfare objectives did provisions —

such as the H1B expansion — purport to serve? The Senate vote was bipartisan (68-32) and represented a considered effort to reform immigration law. The report almost reads as if provisions of the law were made in bad faith, if only because it fails to offer a legislative history.

The lopsided composition of the witness list, combined with the unreflective reading of the bill's basis, contributed to the following problems:

First, the Report criticizes what it does not explain. For, example, the elimination of some family-based categories in favor of more merit-based visas reflects a longstanding criticism of U.S. immigration law: that it overemphasizes family and underemphasizes meritorious applications critical to American economic competitiveness. There is no acknowledgement of this legitimate public policy concern, one voiced by both candidates Obama and Romney in 2012.

Second, the Report, based on the testimony of its witnesses, stretches itself to find fault with highly speculative and hypothetical "disparate impacts" on LBGQT, women, and others. At one point, the Report faults the merit-based visa provision because women do not have the same access to educational opportunities in other parts of the world. The Report thus burdens any immigration reform with the impossible task of overcoming the world's civil rights problems — a task that is beyond this Committee's purview. This "disparate impact" logic would nix *any* bill reforming immigration given such impossible standards.

In the future, I recommend that this Committee reach out and gather a more representative list of witnesses on any topic we examine. This is imperative, since the Committee seems to base its findings and recommendations on the testimony of witnesses. Furthermore, any examination of legislation must, in my view, offer a legislative history explaining — from the viewpoint of the bills' sponsors — the intent and reasoning behind the law. Discussing a law without any consideration of its origin, intent, or public policy concerns is not a useful pursuit of our time or that of the U.S. Civil Rights Commission.

**Advisory Committee to the
U. S. Commission on Civil Rights**



U.S. Commission on Civil Rights Contact

USCCR Contact David Mussatt, RPCU Chief
 55 West Monroe Street
 Suite 410
 Chicago, Illinois 60603
 Tel: (312) 353-8311
 TTY: (312) 353-8362

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