

**Selected provisions  
about  
privacy intrusions and identification systems  
appearing in the  
Border Security, Economic Opportunity, and Immigration  
Modernization Bill  
(S. 744)**

*“Secretary” generally refers to the Secretary of the Department of Homeland Security.*

*“Commissioner” generally refers to the Commissioner of Social Security.*

Quotes are in regular font. *Comments are in italics.* All **highlights** have been added and were not in the original bill.

**Section 3(a)(2) COMPREHENSIVE SOUTHERN BORDER SECURITY STRATEGY.**—The term “Comprehensive Southern Border Security Strategy” means the strategy established by the Secretary pursuant to section 5(a) to achieve and maintain an effectiveness rate of 90 percent or higher in all high risk border sectors.

**Section 3(a)(3) EFFECTIVE CONTROL.**— The term “effective control” means the ability to achieve and maintain, in a Border Patrol sector—

(A) persistent surveillance; and

(B) an effectiveness rate of 90 percent or higher.

**Section 3(a)(4) EFFECTIVENESS RATE.**—The “effectiveness rate”, in the case of a border sector, is the percentage calculated by dividing the number of apprehensions and turn backs in the sector during a fiscal year by the total number of illegal entries in the sector during such fiscal year.

*Effectiveness rate =*  $\frac{\text{“number of apprehension and turn backs”}}{\text{“total number of illegal entries”}}$

*“total number of illegal entries”*

*None of these terms is defined. For example, are all “apprehensions” and “turn backs” necessarily “illegal entries”?*

**Section 3(c)(2)(A)** (A) IN GENERAL.—Except as provided in subparagraph (B), the Secretary may not adjust the status of aliens who have been granted registered provisional immigrant status, except for aliens granted agriculture card status under section 2201 of this Act or described in section 245D(b) of the Immigration and Nationality Act, until the Secretary, after consultation with the Comptroller General of the United States, submits to the President and Congress a written certification that—

- (iii) the Secretary has implemented a mandatory employment verification system to be used by all employers to prevent unauthorized workers from obtaining employment in the United States;

*Mandatory employment verification system will apply to everyone, not just immigrants.*

**Section 5(a)(2)** ELEMENTS.—The Comprehensive Southern Border Security Strategy shall specify—

- (C) the resources, including personnel, infrastructure, and technology that must be procured and successfully deployed to obtain the capabilities referred to in subparagraph (B), including—
  - (ii) **unarmed, unmanned aerial systems** and unarmed, fixed-wing aircraft and necessary and qualified staff and equipment to fully utilize such systems.

*Deployment of unarmed drones.*

## **Section 7**

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.).

## **Section 1105**

(b) SUPPORT FOR BORDER SECURITY NEEDS.—To achieve effective control of Federal lands—

(B) the deployment of **communications, surveillance, and detection equipment**;

*Could also be drones.*

### **Section 1106**

(a) ENHANCEMENTS.—The Commissioner of U.S. Customs and Border Protection, working through U.S. Border Patrol, shall—

(1) deploy additional mobile, video, and agent portable surveillance systems, and **unmanned aerial vehicles** in the Southwest Border region as necessary to provide 24-hour operation and surveillance;

*Drones. Here there is no requirement that they be unarmed.*

(2) operate **unarmed unmanned aerial vehicles** along the Southern border for 24 hours per day and for 7 days per week;

*Unarmed drones.*

### **Section 1109**

The Assistant Secretary of Defense for Research and Engineering shall collaborate with the Under Secretary of Homeland Security for Science and Technology to identify equipment and technology used by the Department of Defense that could be used by U.S. Customs and Border Protection to improve the security of the Southern border by—

(3) enhancing **wide aerial surveillance**; and

*Drones.*

## Section 1113

(a) ESTABLISHMENT.—

(2) DUTIES.—The DHS Task Force shall—

(C) evaluate how the policies, strategies, and programs of Federal agencies operating along the international borders between the United States and Mexico and between the United States and Canada **protect the due process, civil, and human rights of border residents, visitors, and migrants at and near such borders**; and

*No mention of the full range of Constitutional rights.*

## Section 2101

(a) AUTHORIZATION.—Chapter 5 of title II (8 U.S.C. 1255 et seq.) is amended by inserting after section 245A the following:

**“SEC. 245B. ADJUSTMENT OF STATUS OF ELIGIBLE ENTRANTS BEFORE DECEMBER 31, 2011, TO THAT OF REGISTERED PROVISIONAL IMMIGRANT.**

“(b) ELIGIBILITY REQUIREMENTS.—

“(1) IN GENERAL.—An alien is not eligible for registered provisional immigrant status unless the **alien establishes, by a preponderance of the evidence**, that the alien meets the requirements set forth in this subsection.

*Burden of proof is imposed on the alien. Because the court will not magically know that the person before the court is a citizen or not, as a practical matter, burden of proof will also be placed on all false positives (i.e., all citizens mistakenly believed to be aliens). Even worse, no false positive (i.e., a U.S. citizen) will have the type of proof that an alien could use to stay in the U.S.*

“(c) APPLICATION PROCEDURES.—

“(8) SECURITY AND LAW ENFORCEMENT CLEARANCES.—

“(A) BIOMETRIC AND BIOGRAPHIC DATA.—The Secretary may not grant registered provisional immigrant status to an alien or an alien dependent spouse or child under this section unless such alien submits biometric and biographic data in accordance with procedures established by the Secretary.

*The Secretary is not only allowed to use biometric data, the Secretary is required to do so.*

“(B) ALTERNATIVE PROCEDURES.—The Secretary shall provide an alternative procedure for applicants who cannot provide the standard biometric data required under subparagraph (A) because of a physical impairment.

“(C) CLEARANCES.—

“(i) DATA COLLECTION.—The Secretary shall collect, from each alien applying for status under this section, biometric, biographic, and other data that the Secretary determines to be appropriate—

“(I) to conduct national security and law enforcement clearances; and

“(II) to determine whether there are any national security or law enforcement factors that would render an alien ineligible for such status.

“(d) TERMS AND CONDITIONS OF REGISTERED PROVISIONAL IMMIGRANT STATUS.—

“(5) ASSIGNMENT OF SOCIAL SECURITY NUMBER.—

“(A) IN GENERAL.—The Commissioner of Social Security, in coordination with the Secretary, shall implement a system to allow for the assignment of a Social Security number and the issuance of a Social Security card to each alien who has been granted registered provisional immigrant status under this section.

**SEC. 2103. THE DREAM ACT.**

- (b) ADJUSTMENT OF STATUS FOR CERTAIN ALIENS WHO ENTERED THE UNITED STATES AS CHILDREN.— Chapter 5 of title II (8 U.S.C. 1255 et seq.) is amended by inserting after section 245C, as added by section 2102 of this title, the following:

**“SEC. 245D. ADJUSTMENT OF STATUS FOR CERTAIN ALIENS WHO ENTERED THE UNITED STATES AS CHILDREN.**

- “(b) ADJUSTMENT OF STATUS FOR CERTAIN ALIENS WHO ENTERED THE UNITED STATES AS CHILDREN.—

“(1) REQUIREMENTS.—

- “(D) SUBMISSION OF BIOMETRIC AND BIOGRAPHIC DATA.—The Secretary may not adjust the status of an alien to lawful permanent resident status unless the alien—

“(i) submits biometric and biographic data, in accordance with procedures established by the Secretary; or

“(ii) complies with an alternative procedure prescribed by the Secretary, if the alien is unable to provide such biometric data because of a physical impairment.

“(E) BACKGROUND CHECKS.—

- “(i) REQUIREMENT FOR BACKGROUND CHECKS.—The Secretary shall utilize biometric, biographic, and other data that the Secretary determines appropriate—

“(I) to conduct security and law enforcement background checks of an alien applying for lawful permanent resident status under this section; and

“(II) to determine whether there is any criminal, national security, or other factor that would render the alien ineligible for such status.

*Biometric data is required.*

## SEC. 2104. ADDITIONAL REQUIREMENTS

- (a) IN GENERAL.—Chapter 5 of title II (8 U.S.C. 1255 et seq.) is amended by inserting after section 245C, as added by section 2102 of this title, the following:

### “SEC. 245E. ADDITIONAL REQUIREMENTS RELATING TO REGISTERED PROVISIONAL IMMIGRANTS AND OTHERS.

#### “(d) PRIVACY AND CIVIL LIBERTIES.—

- “(1) IN GENERAL.—The Secretary, in accordance with subsection (a)(1), shall require appropriate administrative and physical safeguards to protect the security, confidentiality, and integrity of personally identifiable information collected, maintained, and disseminated pursuant to sections 245B, 245C, and 245D.

*The Secretary has both privacy (based on the word “confidentiality”) and security obligations.*

- “(2) ASSESSMENTS.—Notwithstanding the privacy requirements set forth in section 222 of the Homeland Security Act (6 U.S.C. 142) and the E Government Act of 2002 (Public Law 107-347), the Secretary shall conduct a privacy impact assessment and a civil liberties impact assessment of the legalization program established under sections 245B, 245C, and 245D during the pendency of the interim final regulations required to be issued under section 2110 of the Border Security, Economic Opportunity, and Immigration Modernization Act.”.

*Note that privacy is separated out from civil liberties. Again no reference to the full range of Constitutional rights.*

## SEC. 2211. REQUIREMENTS FOR BLUE CARD STATUS

#### (b) APPLICATION.—

#### (6) SECURITY AND LAW ENFORCEMENT CLEARANCES.—

- (A) BIOMETRIC AND BIOGRAPHIC DATA.— The Secretary may not grant blue card status to an alien or an alien dependent spouse or child under this section unless such alien submits biometric and biographic data in accordance with procedures established by the Secretary.

*Again, biometric data is required.*

- (B) ALTERNATIVE PROCEDURES.—The Secretary shall provide an alternative procedure for applicants who cannot provide the standard biometric data required under subparagraph (A) because of a physical impairment.
- (C) CLEARANCES.—
  - (i) DATA COLLECTION.—The Secretary shall collect, from each alien applying for status under this section, **biometric**, biographic, and other data that the Secretary determines to be appropriate—
    - (I) to conduct national security and law enforcement clearances; and
    - (II) (II) to determine whether there are any national security or law enforcement factors that would render an alien ineligible for such status.

**SEC. 3101. UNLAWFUL EMPLOYMENT OF UNAUTHORIZED ALIENS.**

(a) IN GENERAL.—Section 274A (8 U.S.C. 1324a) is amended to read as follows:

**“SEC. 274A. UNLAWFUL EMPLOYMENT OF ALIENS.**

“(a) MAKING EMPLOYMENT OF UNAUTHORIZED ALIENS UNLAWFUL.—

“(1) IN GENERAL.—It is unlawful for an employer—

“(A) to hire, recruit, or refer for a fee an alien for employment in the United States knowing that the alien is an unauthorized alien with respect to such employment; or

“(B) to hire, recruit, or refer for a fee for employment in the United States an individual without complying with the requirements under subsections (c) and (d).

“(2) CONTINUING EMPLOYMENT.—

“(A) PROHIBITION ON CONTINUED EMPLOYMENT OF UNAUTHORIZED ALIENS.—It is unlawful for an employer, after hiring an alien for employment, to continue to employ the alien in the United States knowing that the alien is (or has become) an unauthorized alien with respect to such employment.

“(3) USE OF LABOR THROUGH CONTRACT.— For purposes of this section, any employer that uses a contract, subcontract, or exchange to obtain the labor of an alien in the United States while knowing that the alien is an unauthorized alien with respect to performing such labor shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

“(7) PRESUMPTION.—After the date on which an employer is required to participate in the System under subsection (d), the employer is presumed to have acted with knowledge for purposes of paragraph (1)(A) if the employer hires, employs, recruits, or refers an employee and fails to make an inquiry to verify the employment authorization status of the employee through the System.

“(c) DOCUMENT VERIFICATION REQUIREMENTS.— Any employer hiring an individual for employment in the United States shall comply with the following requirements and the requirements under subsection (d) to verify that the individual has employment authorized status:

“(1) ATTESTATION AFTER EXAMINATION OF DOCUMENTATION.—

“(A) IN GENERAL.—

“(i) EXAMINATION BY EMPLOYER.— An employer shall attest, under penalty of perjury on a form prescribed by the Secretary, that the employer has verified the identity and employment authorization status of the individual—

“(I) by examining—

“(aa) a document specified in subparagraph (C);  
or

“(bb) a document specified in subparagraph (D)  
and a document specified in subparagraph  
(E); and

“(II) by utilizing an identity authentication mechanism described in clause (iii) or (iv) of subparagraph (F).

“(B) REQUIREMENTS.—

“(ii) ATTESTATION.—Each such form shall require the employer to sign an attestation with a handwritten, electronic, or digital pin code signature, according to standards prescribed by the Secretary.

“(C) DOCUMENTS ESTABLISHING IDENTITY AND EMPLOYMENT AUTHORIZED STATUS.—A document is specified in this subparagraph if the document is unexpired (unless the validity of the document is extended by law) and is 1 of the following:

“(i) A United States passport or passport card issued to an individual pursuant to the Secretary of State’s authority under the Act entitled ‘An Act to regulate the issue and validity of passports, and for other purposes’, approved July 3, 1926 (22 U.S.C. 211a).

“(ii) A document issued to an alien evidencing that the alien is lawfully admitted for permanent residence or another document issued to an individual evidencing the individual’s employment authorized status, as designated by the Secretary, if the document—

“(I) contains a photograph of the individual, or such other personal identifying information relating to the individual as the Secretary determines, by regulation, to be sufficient for the purposes of this subparagraph;

“(II) is evidence of employment authorized status; and contains security features to make the document resistant to tampering, counterfeiting, and fraudulent use.

*The Secretary could require biometric information for all citizens under this standard.*

“(iii) An enhanced driver’s license or identification card issued to a national of the United States by a State or a federally recognized Indian tribe that—

“(I) meets the requirements under section 202 of the REAL ID Act of 2005 (division B of Public Law 109-13; 49 U.S.C. 30301 note); and

*REAL ID already requires one form of biometrics. That is facial biometric information in the form of a digital photograph that is of sufficient detail to allow computerized facial recognition techniques. The facial biometric required by REAL ID is designed to allow automated computer*

*searches to serve two purposes—identification (comparing an unknown face [e.g., a street photo] to a national database to learn who the person in the street photo is) and authentication (e.g., to prove that someone claiming to be a particular person is actually that person). An enhanced driver’s license could be used for both.*

- “(II) the Secretary has certified by notice published in the Federal Register and through appropriate notice directly to employers registered in the System 3 months prior to publication that such enhanced license or card is suitable for use under this subparagraph based upon the accuracy and security of the issuance process, security features on the document, and such other factors as the Secretary may prescribe.

*If the Secretary decides that a REAL ID license is not accurate or secure enough, the Secretary can impose additional requirements, likely including biometrics, (e.g., fingerprints or hand scans) before the REAL ID driver’s license will be accepted by the Secretary for employment purposes. Although a REAL ID state could issue two types of licenses—one enhanced and one not, the non-enhanced version would not meet the requirement of this section.*

- “(iv) A passport issued by the appropriate authority of a foreign country accompanied by a Form I-94 or Form I-94A (or similar successor form), or other documentation as designated by the Secretary that specifies the individual’s status in the United States and the duration of such status if the proposed employment is not in conflict with any restriction or limitation specified on such form or documentation.

- “(v) A passport issued by the Federated States of Micronesia or the Republic of the Marshall Islands with evidence of nonimmigrant admission to the United States under the Compact of Free Association between the United States and the Federated States of Micronesia or the Republic of the Marshall Islands.

“(D) DOCUMENTS ESTABLISHING IDENTITY OF INDIVIDUAL.—A document is specified in this subparagraph if the document is unexpired (unless the validity of the document is extended by law) and is 1 of the following:

- “(i) A driver’s license or identity card that is not described in subparagraph (C)(iii) and is issued to an individual by a State or an outlying possession of the United States, a federally recognized Indian tribe, or an agency (including military) of the Federal

Government if the driver's license or identity card includes, at a minimum—

*If Illinois does not meet the Secretary's requirements (a REAL ID driver's license that requires at least one biometric and probably two), its drivers and worker would fall under this provision and would also be required to provide a second form of identification under (E) (unless the Illinois driver produces a passport instead of a driver's license).*

“(I) the individual's photograph, name, date of birth, gender, and driver's license or identification card number, and

“(II) security features to make the license or card resistant to tampering, counterfeiting, and fraudulent use.

*Even under this approach, the Secretary still has the power to impose additional requirements on a non-REAL ID driver's license. That would not directly force a state to comply with either REAL ID or any additional enhancements, but if any state chooses not to comply with the Secretary's directive, that state's citizens would not be able to use their driver's licenses to prove identity. This may finally be the tool that the federal government has been seeking to get around the 10<sup>th</sup> Amendment and force states to adopt REAL ID (as well as any additional enhancements that the Secretary demands). In effect, the federal government could say to the recalcitrant states, “If you want your driver's licenses to enable your residents to get jobs, adopt the enhanced driver's license now. Otherwise, your residents will have to submit an enhanced social security card issued by the Commissioner, along with your noncompliant driver's license.” Unlike the old 55 mile per hour speed limit, which merely imposed a penalty on a State if it did not comply, this imposes a penalty on all of a State's citizens if the State does not comply.*

“(ii) A voter registration card.

*This may be the best alternative in some states, but it won't help anyone who is old enough to get a job, but not old enough to vote.*

“(iii) A document that complies with the requirements under section 7209(b)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108-458; 8 U.S.C. 1185 note).

“(iv) For individuals under 18 years of age who are unable to present a document listed in clause (i) or (ii), documentation of personal identity of such other type as the Secretary determines will provide a reliable means of identification, which may include an attestation as to the individual's identity by a person 21 years of age or older under penalty of perjury.

*This may address those under 18, but there is nothing that prohibits the Secretary from requiring biometrics.*

“(E) DOCUMENTS EVIDENCING EMPLOYMENT AUTHORIZATION.—A document is specified in this subparagraph if the document is unexpired (unless the validity of the document is extended by law) and is 1 of the following:

“(i) A social security account number card issued by the Commissioner, other than a card which specifies on its face that the card is not valid to evidence employment authorized status or has other similar words of limitation.

*This may require re-issuance of social security cards that meet the new requirements. Interestingly this one does not require approval by the Secretary.*

“(ii) Any other documentation evidencing employment authorized status that the Secretary determines and publishes in the Federal Register and through appropriate notice directly to employers registered within the System to be acceptable for purposes of this subparagraph if such documentation, including any electronic security measures linked to such documentation, contains security features to make such documentation resistant to tampering, counterfeiting, and fraudulent use.

*This requires approval by the Secretary, who can require “electronic security measures” and who can determine what is “resistant to tampering, counterfeiting, and fraudulent use,” which could include biometrics in addition to the biometrics already required by REAL ID.*

“(F) IDENTITY AUTHENTICATION MECHANISM.—

“(i) DEFINITIONS.—In this subparagraph:

“(I) COVERED IDENTITY DOCUMENT.—The term ‘covered identity document’ means a valid—

“(aa) United States passport, passport card, or a document evidencing lawful permanent residence status or employment authorized status issued to an alien;

“(bb) enhanced driver’s license or identity card issued by a participating State; or

“(cc) photograph and appropriate identifying information provided by the Secretary of State pursuant to the granting of a visa.

“(II) PARTICIPATING STATE.— The term ‘participating State’ means a State that has an agreement with the Secretary to provide the Secretary, for purposes of identity verification in the System, with photographs and appropriate identifying information maintained by the State.

*This too requires agreement by the Secretary. It also requires that the State provide “photographs and appropriate identifying information.”*

“(ii) REQUIREMENT FOR IDENTITY AUTHENTICATION.—In addition to verifying the documents specified in subparagraph (C), (D), or (E) and utilizing the System under subsection (d), each employer shall use an identity authentication mechanism described in clause (iii) or provided in clause (iv) after it becomes available to verify the identity of each individual the employer seeks to hire.

“(iii) PHOTO TOOL. —

“(I) USE REQUIREMENT.—An employer seeking to hire an individual who has a covered identity document shall verify the identity of such individual using the photo tool described in subclause (II).

“(II) DEVELOPMENT REQUIREMENT.—The Secretary shall develop and maintain a photo tool that enables employers to match the photo on a covered identity document provided to the employer to a photo maintained by a U.S. Citizenship and Immigration Services database.

[Sec. 3101(a), Sec274A(c)(1)(F)(iii)(II)]

*The nature of the photo will be controlled by the Secretary. Also, the fact that the comparison is to be made between the photo in the federal database and what is incorporated into the ID carried by the individual strongly implies that the comparison will be digital file (DHS database) to digital file (pulled from ID document), which confirms that the entire contemplated scheme is based on biometrics, probably multimodal.*

*The use of high-resolution digital photographs, already embodied in passport photos and REAL ID driver’s licenses, allows facial recognition techniques and digital comparisons that make the photographs a biometric. By requiring yet another photo system that “enables” matching*

*against a DHS database, the photo tool is an additional biometric that is similar to, but distinct from, the one that is already embedded in an REAL ID driver's license and from any others that the Secretary might impose.*

*If the use of multiple biometric IDs sounds ridiculous, it is worth noting that the FBI is already talking about "multimodal biometric identification capabilities" on its website. The FBI has said, "The FBI is developing an automated, interoperable multimodal biometric system."*

“(iv) ADDITIONAL SECURITY MEASURES.–

“(I) USE REQUIREMENT.–An employer seeking to hire an individual whose identity may not be verified using the photo tool described in clause (iii) shall verify the identity of such individual using the additional security measures described in subclause (II).

“(II) DEVELOPMENT REQUIREMENT.–The Secretary shall develop, after publication in the Federal Register and an opportunity for public comment, specific and effective additional security measures to adequately verify the identity of an individual whose identity may not be verified using the photo tool described in clause (iii). Such additional security measures–

*Although this provision may apply to only a limited number of people, it too could be a second form of biometric.*

“(aa) shall be kept up-to-date with technological advances; and

“(bb) shall provide a means of identity authentication in a manner that provides a high level of certainty as to the identity of such individual, using immigration and identifying information that may include review of identity documents or background screening verification techniques using publicly available information.

“(G) AUTHORITY TO PROHIBIT USE OF CERTAIN DOCUMENTS.–If the Secretary determines, after publication in the Federal Register and an opportunity for public comment, that any document or class of documents specified in subparagraph (B), (C), or (D) does not reliably establish identity or that

employment authorized status is being used fraudulently to an unacceptable degree, the Secretary—

- “(i) may prohibit or restrict the use of such document or class of documents for purposes of this subsection; and
- “(ii) shall directly notify all employers registered within the System of the prohibition through appropriate means.

*The Secretary can withdraw approval of a document.*

- “(2) INDIVIDUAL ATTESTATION OF EMPLOYMENT AUTHORIZATION.—An individual, upon commencing employment with an employer, shall—
  - “(A) attest, under penalty of perjury, on the form prescribed by the Secretary, that the individual is—
    - “(i) a national of the United States;
    - “(ii) an alien lawfully admitted for permanent residence;
    - “(iii) an alien who has employment authorized status; or
    - “(iv) otherwise authorized by the Secretary to be hired for such employment;
  - “(B) provide such attestation by a handwritten, electronic, or digital pin code signature; and
  - “(C) provide the individual’s social security account number to the Secretary, unless the individual has not yet been issued such a number, on such form as the Secretary may require.
- “(6) PROTECTION OF CIVIL RIGHTS.—
  - “(A) IN GENERAL.—Nothing in this section may be construed to diminish any rights otherwise protected by Federal law.

*Although the title is “Civil Rights,” the language of the bill is “any rights.”*

- “(8) NO AUTHORIZATION OF NATIONAL IDENTIFICATION CARDS.—Nothing in this section may be construed to directly or indirectly authorize the issuance, use, or establishment of a national identification card.

*The problem with this provision is that it does not define a national identification card. Therefore, it is impossible to see what it prohibits, if anything. Many would argue that an enhanced driver's license combined with the proposed photo tool and digital comparisons is a superset of a national identification card. In many respects, the proposed system is worse than a national identity card. Because it is highly likely that the federal government will retain a log of all queries against its database, the federal government will not only control the issuance of the enhanced driver's license, but it will also have a lifetime log of how many times each citizen applied for a job, along with data about the potential employer and the date and time of each inquiry.*

*In addition, the FBI has already stated that one of its goals is to be a "global biometrics leader." There is no question that giving the FBI access to the DHS database of driver's licenses would help the FBI meet that goal*

"(d) EMPLOYMENT VERIFICATION SYSTEM.—

"(1) IN GENERAL.—

"(A) ESTABLISHMENT.—The Secretary, in consultation with the Commissioner, shall establish the **Employment Verification System**.

"(B) MONITORING.—The Secretary shall create the necessary processes to monitor—

"(i) the functioning of the System, including the volume of the workflow, the speed of processing of queries, the speed and accuracy of responses;

"(ii) the misuse of the System, including the prevention of fraud or identity theft;

"(iii) whether the use of the System results in wrongful adverse actions or discrimination based upon a prohibited factor against nationals of the United States or individuals who have employment authorized status; and

*(iii) is not necessarily a general accuracy requirement. (B) only requires "processes to monitor" and has no actual standards.*

"(iv) the security, integrity, and privacy of the System.

“(2) PARTICIPATION REQUIREMENTS.—

(A) **FEDERAL GOVERNMENT.**—Except as provided in clause (ii), all agencies and departments in the executive, legislative, or judicial branches of the Federal Government shall participate in the System beginning on the **earlier** of—

“(i) the date of the enactment of the Border Security, Economic Opportunity, and Immigration Modernization Act, to the extent required under section 402(e)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208; 8 U.S.C. 1324a) and as already **implemented** by each agency or department; or

“(ii) the date that is **90 days** after the date of the enactment of the Border Security, Economic Opportunity, and Immigration Modernization Act.

“(B) **FEDERAL CONTRACTORS.**—Federal contractors shall participate in the System as provided in the final rule relating to employment eligibility verification published in the Federal Register on November 14, 2008 (73 Fed. Reg. 67,651), or any similar subsequent regulation, for which purpose references to EVerify in the final rule shall be construed to apply to the System.

“(C) **CRITICAL INFRASTRUCTURE.**—

“(i) **IN GENERAL.**—Beginning on the date that is **1 year** after the date on which regulations are published implementing this subsection, the Secretary may authorize or direct any employer, person, or entity responsible for granting access to, protecting, securing, operating, administering, or regulating part of the critical infrastructure (as defined in section 1016(e) of the Critical Infrastructure Protection Act of 2001 (42 U.S.C. 5195c(e))) to participate in the System to the extent the Secretary determines that such participation will assist in the protection of the critical infrastructure.

“(ii) **NOTIFICATION TO EMPLOYERS.**—The Secretary shall notify an employer required to participate in the System under this

subparagraph not later than 90 days before the date on which the employer is required to participate.

- “(D) EMPLOYERS WITH MORE THAN 5,000 EMPLOYEES.—Not later than 2 years after regulations are published implementing this subsection, all employers with more than 5,000 employees shall participate in the System with respect to all newly hired employees and employees with expiring temporary employment authorization documents.
  - “(E) EMPLOYERS WITH MORE THAN 500 EMPLOYEES.—Not later than 3 years after regulations are published implementing this subsection, all employers with more than 500 employees shall participate in the System with respect to all newly hired employees and employees with expiring temporary employment authorization documents.
  - “(F) AGRICULTURAL LABOR OR SERVICES.—With respect to an employee performing agricultural labor or services (as defined for purposes of section 101(a)(15)(H)(ii)(a)), this paragraph shall not apply with respect to the verification of the employee until the date that is 4 years after the date of the enactment of the Legal Workforce Act. An employee described in this clause shall not be counted for purposes of subparagraph (D) or (E).
  - “(G) ALL EMPLOYERS.—Except as provided in subparagraph (I), not later than 4 years after regulations are published implementing this subsection, all employers shall participate in the System with respect to all newly hired employees and employees with expiring temporary employment authorization documents.
  - “(J) VOLUNTARY PARTICIPATION.—The Secretary may permit any employer that is not required to participate in the System under this section to do so on a voluntary basis.
- “(4) PROCEDURES FOR PARTICIPANTS IN THE SYSTEM.—
- “(A) IN GENERAL.—An employer participating in the System shall register such participation with the Secretary and, when hiring any individual for employment in the United States, shall comply with the following:
    - “(i) REGISTRATION OF EMPLOYERS.— The Secretary, through notice in the Federal Register, shall prescribe procedures that employers shall be required to follow to register with the System.

- “(ii) UPDATING INFORMATION.—The employer is responsible for providing notice of any change to the information required under subclauses (I), (II), and (III) of clause (v) before conducting any further inquiries within the System, or on such other schedule as the Secretary may prescribe.
- “(iii) TRAINING.—The Secretary shall require employers to undergo such training as the Secretary determines to be necessary to ensure proper use, protection of civil rights and civil liberties, privacy, integrity, and security of the System. To the extent practicable, such training shall be made available electronically on the U.S. Citizenship and Immigration Services’ website.
- “(iv) NOTIFICATION TO EMPLOYEES.—The employer shall inform individuals hired for employment that the System—
- “(I) will be used by the employer;
  - “(II) may be used for immigration enforcement purposes; and
  - “(III) may not be used to discriminate or to take adverse action against a national of the United States or an alien who has employment authorized status.
- “(v) PROVISION OF ADDITIONAL INFORMATION.—The employer shall obtain from the individual (and the individual shall provide) and shall record in such manner as the Secretary may specify—
- “(I) the individual’s social security account number;
  - “(II) if the individual does not attest to United States citizenship or noncitizen nationality under subsection (c)(2), such identification or authorization number established by the Department as the Secretary shall specify; and
  - “(III) such other information as the Secretary may require to determine the identity and employment authorization of an individual.

*This is a blank check. Employers could be asked to require anything the Secretary wants.*

“(vi) PRESENTATION OF DOCUMENTATION.—The employer, and the individual whose identity and employment authorized status are being confirmed, shall fulfill the requirements under subsection (c).

“(B) SEEKING CONFIRMATION.—

“(i) IN GENERAL.—An employer shall use the System to confirm the identity and employment authorized status of any individual during—

(I) the period beginning on the date on which the individual accepts an offer of employment and ending 3 business days after the date on which employment begins; or

“(II) such other reasonable period as the Secretary may prescribe.

“(C) CONFIRMATION OR NONCONFIRMATION.—

“(iii) FURTHER ACTION NOTICE AND 15 LATER CONFIRMATION OR NONCONFIRMATION.—

“(II) CONTEST.—Not later than 10 business days after receiving notification of a further action notice under subclause (I), the individual shall contact the appropriate Federal agency and, if the Secretary so requires, appear in person for purposes of verifying the individual’s identity and employment eligibility.

“(VI) EMPLOYEE PROTECTIONS.—An employer may not terminate employment or take any other adverse action against an individual solely because of a failure of the individual to have identity and employment eligibility confirmed under this subsection until—

“(aa) a nonconfirmation has been issued;

“(bb) if the further action notice was contested, the period to timely file an administrative appeal has expired without an appeal; or

“(cc) if an administrative appeal has been filed, the nonconfirmation has been upheld.

*This implies that if an employee appeals to a court, termination can take place at the end of the administrative process. This places a huge cost on a citizen who is the victim of a mistake. The employer is required to fire the employee at the end of the administrative process. Even if the employee ultimately prevails in court, the job will be long gone. In addition, for the entire length of the court proceeding, the employee will not be able to get a job anywhere else in the United States. Until now, prohibitions against an employer hiring someone have been extremely limited (e.g., felons for certain jobs, child molesters for other jobs, known aliens). Under the bill, for anyone who is a victim of a mistake, the prohibition is for all jobs without a single court proceeding. This sounds like “guilty until proven innocent” and “deprived of life, liberty or property, without due process of law.”*

“(D) CONSEQUENCES OF NONCONFIRMATION.

“(i) TERMINATION OF CONTINUED EMPLOYMENT.—Except as provided in clause (iii), an employer that has received a nonconfirmation regarding an individual and has made reasonable efforts to notify the individual in accordance with subparagraph (C)(iv) shall terminate the employment of the individual upon the expiration of the time period specified in paragraph (6)(A) for filing an administrative appeal and paragraph (7)(A) for requesting a hearing before an administrative law judge.

“(ii) CONTINUED EMPLOYMENT AFTER NONCONFIRMATION.—If the employer continues to employ an individual after receiving nonconfirmation and exhaustion of all appeals or expiration of all rights to appeal if not appealed, in violation of clause (i), a rebuttable presumption is created that the employer has violated paragraphs (1)(A) and (2) of subsection (a). Such presumption shall not apply in any prosecution under subsection (k)(1).

“(E) OBLIGATION TO RESPOND TO QUERIES AND ADDITIONAL INFORMATION.—

“(ii) ACTION BY INDIVIDUALS.—

“(I) IN GENERAL.—Individuals being verified through the System may be required to take further action to address questions identified by the Secretary or the Commissioner regarding the documents relied upon for purposes of subsection (c).

*This is another blank check that allows the Secretary of DHS or the Commissioner of Social Security to ask anything else that either chooses to ask.*

“(6) ADMINISTRATIVE APPEAL.—

“(D) PREPONDERANCE OF EVIDENCE.— Administrative appeal under this paragraph shall be limited to whether a nonconfirmation notice is supported by a preponderance of the evidence.

*This is a low standard and could prevent a citizen from being employed.*

(8) MANAGEMENT OF THE SYSTEM.—

“(B) DESIGN AND OPERATION OF SYSTEM.—The System shall be designed and operated—

“(i) to maximize its reliability and ease of use by employers consistent with protecting the privacy and security of the underlying information, and ensuring full notice of such use to employees;

*Nothing is said specifically about limiting false positives and false negatives or what number or percentage is acceptable.*

(viii) to confirm electronically the issuance of the employment authorization or identity document and—

“(I) if such photograph is available, to display the digital photograph that the issuer placed on the document so that the employer can compare the photograph displayed to the photograph on the document presented by the employee; or

“(II) if a photograph is not available from the issuer, to confirm the authenticity of the document using such alternative procedures as the Secretary may specify; and

*A digital photograph will be a minimum requirement. Nothing is said here how the original photograph gets into the federal system. Presumably that would be included in the process by which the Secretary approves state-issued ID.*

“(C) SAFEGUARDS TO THE SYSTEM.—

“(i) REQUIREMENT TO DEVELOP.— The Secretary, in consultation with the Commissioner and other appropriate Federal and State agencies, shall develop policies and procedures to ensure protection of the privacy and security of personally identifiable information and identifiers contained in the records accessed or maintained by the System. The Secretary, in consultation with the Commissioner and other appropriate Federal and State agencies, shall develop and deploy appropriate privacy and security training for the Federal and State employees accessing the records under the System.

*There is nothing specific about reliability.*

“(ii) PRIVACY AUDITS.—The Secretary, acting through the Chief Privacy Officer of the Department, shall conduct regular privacy audits of the policies and procedures established under clause (i), including any collection, use, dissemination, and maintenance of personally identifiable information and any associated information technology systems, as well as scope of requests for this information. The Chief Privacy Officer shall review the results of the audits and recommend to the Secretary any changes necessary to improve the privacy protections of the program.

*Audits are limited to privacy. There is nothing about reliability.*

“(D) RESPONSIBILITIES OF THE SECRETARY.—

“(ii) PHOTOGRAPH DISPLAY.—As part of the System, the Secretary shall establish a reliable, secure method, which, operating through the System, displays the digital photograph described in subparagraph (B)(viii)(I).

*The Secretary will have a digital photograph of every worker in the country, and possibly every ID holder.*

“(ix) CIVIL RIGHTS AND CIVIL LIBERTIES ASSESSMENTS.—

“(I) REQUIREMENT TO CONDUCT.—The Secretary shall conduct regular civil rights and civil liberties assessments of the System, including participation by employers, other private entities, and Federal, State, and local government entities.

“(II) REQUIREMENT TO RESPOND.—Employers, other private entities, and Federal, State, and local entities shall timely respond to any request in connection with such an assessment.

“(III) ASSESSMENT AND RECOMMENDATIONS.—The Officer for Civil Rights and Civil Liberties of the Department shall review the results of each such assessment and recommend to the Secretary any changes necessary to improve the civil rights and civil liberties protections of the System.

*The Secretary is not required to follow the recommendations, nor are the recommendations necessarily public.*

“(E) GRANTS TO STATES. —

“(ii) CONSTRUCTION WITH THE DRIVER’S PRIVACY PROTECTION ACT OF 1994.— The provision of a photograph to the Secretary as described in clause (i) may not be construed as a violation of section 2721 of title 18, United States Code, and is a permissible use under subsection (b)(1) of that section.

“(9) LIMITATION ON USE OF THE SYSTEM.— Notwithstanding any other provision of law, nothing in this subsection may be construed to permit or allow any department, bureau, or other agency of the United States Government or any other entity to utilize any information, database, or other records assembled under this subsection for any purpose other than for employment verification or to ensure secure, appropriate and nondiscriminatory use of the System.

*Two things. First, this is neither a prohibition nor a limitation, despite its misleading title. It is merely a statement that it is not an affirmation or authorization. Second, it appears to only apply to subsection (d) and the System (photo tool) and not to enhanced driver’s licenses, which are outside of subsection (d) and the System.*

“(10) ANNUAL REPORT AND CERTIFICATION.— Not later than 18 months after the promulgation of regulations to implement this subsection, and annually thereafter, the Secretary shall submit to Congress a report that includes the following:

“(A) An **assessment of the accuracy rates** of further action notices and other System notices provided by employers to individuals who are authorized to be employed in the United States.

*There is no accuracy standard. Eighteen months is a long time. Should the regulations even take effect if the report does not give Congress sufficient comfort that the system will be accurate enough?*

## **SEC. 3102. INCREASING SECURITY AND INTEGRITY OF SOCIAL SECURITY CARDS**

(a) FRAUD-RESISTANT, TAMPER-RESISTANT, WEARRESISTANT, AND IDENTITY THEFT-RESISTANT SOCIAL SECURITY CARDS.—

(1) ISSUANCE.—

(A) PRELIMINARY WORK.—Not later than 180 days after the date of the enactment of this title, the Commissioner of Social Security shall begin work to administer and issue fraud-resistant, tamper-resistant, wear-resistant, and identity theft-resistant social security cards.

*This will almost certainly lead to more biometrics*

(B) COMPLETION.—Not later than 5 years after the date of enactment of this title, the Commissioner of Social Security shall issue only social security cards determined to be fraud-resistant, tamper-resistant, wear-resistant, and identity theft-resistant social security cards.

*This too.*

(b) MULTIPLE CARDS.—Section 205(c)(2)(G) of the Social Security Act (42 U.S.C. 405(c)(2)(G)), as amended by subsection (a)(2), is amended— (1) by inserting “(i)” after “(G)”; and (2) by adding at the end the following:

“(ii) The Commissioner of Social Security shall restrict the issuance of multiple replacement social security cards to any individual to 3 per year and 10 for the life of the individual, except that the Commissioner may allow for reasonable exceptions from the limits under this clause on a case-by-case basis in compelling circumstances.”

*Is someone prevented from working for life?*

## **SEC. 3103. INCREASING SECURITY AND INTEGRITY OF IMMIGRATION DOCUMENTS.**

Not later than 1 year after the date of the enactment of this Act, the Secretary shall submit a report to Congress on the feasibility, advantages, and disadvantages of including, in addition to a photograph, other biometric information on each employment authorization document issued by the Department.

*A direct avenue to even more biometrics.*

**SEC. 3305. PROFILING.**

- (a) PROHIBITION. – 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.
  
- (b) EXCEPTIONS.–
  - (1) In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful.
  
  - (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.