S. 744 — The Comprehensive Identification Requirements Bill

Four Basic Concerns

The lack of due process

In those circumstances in which governmental action threatens a citizen's fundamental human right, U.S. citizens have generally been able to rely on the promise that they will be presumed to be innocent until proven guilty through proceedings in which they are accorded full due process of law. In the few circumstances where that promise has been broken (*e.g.*, Japanese internment camps), the decision to break that promise has subsequently been recognized as a national disgrace.

Even before the ratification of the U.S. Constitution, the right to seek and take employment was a fundamental right of every U.S. citizen. The Articles of Confederation confirmed it. A few years later, the Privileges and Immunities Clause of the U.S. Constitution confirmed it a second time. Since then, the U.S. Supreme Court has consistently held that the right to seek and take employment is a fundament right of a U.S. citizen and is a right that is enshrined in the Privileges and Immunities Clause in Article IV of the U.S. Constitution. The employment verification system imposed by S. 744 attempts to eliminate that long-held fundamental right. Under S. 744, no applicant get a job unless the applicant can prove "employment authorized status."

S. 744 assumes that every worker and every applicant for a job is "unauthorized" (*i.e.*, not a U.S. citizen) unless and until the worker or applicant can prove otherwise. S. 744 states that an employee can keep a job until the employee exhausts all administrative appeals, but once the administrative appeals process is over, any employee who has not been able to prove to the satisfaction of the Secretary of Homeland Security that he or she is a U.S. citizen must be summarily fired. S. 744 gives neither the employee nor the employer any choice. There is no provision in S. 744 for continued employment during judicial proceedings. This is no provision for a right to counsel. There is no provision for damages or legal fees if the U.S. citizen ultimately prevails. There is no right to either back wages or reinstatement if the government is wrong. That is not due process. It is the elimination of a right that the Framers found so fundamental that there was no real debate about it back when the U.S. Constitution was adopted. It was simply treated as an accepted fact. For that reason alone, S. 774 is unconstitutional.

The elimination of the right to seek and take employment is costly on both a theoretical and practical level. On a theoretical level, seeking and taking employment is how most Americans have supported themselves for hundreds of years. Taking that right away drastically alters the balance between the rights of the governed and the power of those who govern. If the ability to seek and accept employment becomes a mere privilege that the government can offer or rescind, the balance of power will shift sharply in favor of those who govern. The power of the

federal government to snatch away a citizen's ability to work at any time puts far too much power in the hands of government bureaucrats.

On a practical level, the closest analog to the employment verification system is E-Verify. The only differences are that:

1. E-Verify imposes fewer burdens on employers and employees than the proposed system, and

2. E-Verify only applies to a limited number of jobs. The proposed system will apply to all jobs

E-Verify is already causing U.S. citizens to lose jobs and job opportunities based on things as silly as innocent data entry errors by the prospective employer. Estimates of false positives (U.S. citizens being treated as if they were non-citizens) vary, but the number may be (or has been) in the low percents (*e.g.*, 1%, 2% or 3%). Moreover, the number may be far higher for those in various suspect classifications (*i.e.*, the ones who are least likely to have birth certificates, passports or driver's licenses). Even if the error rate is only 1%, 1.5 million U.S. citizens would lose their jobs under S. 744 and would not be able to seek a new one until they could prove that they are U.S. citizens. An additional 1.5 million citizens who do not currently have a job would not be able to seek one until they can prove that they are U. S. citizens.

No U.S. citizen should be required to prove citizenship. His or her right to work should never be stolen from him or her by legislative or administrative fiat. In a country in which over 95% of all workers and job applicants are U.S. citizens, it is both wrong and unconstitutional to assume that every job applicant is an alien masquerading as a citizen.

The numbers, fundamental human rights and the U.S. Constitution require the federal government and every employer to assume that every job holder and every job applicant is a U.S. citizen. That assumption should only change after it can be proven the person is not a U.S. citizen, and then only after the job holder or job applicant has fully exhausted his or her full due process rights. S. 744 does not come close.

Even worse, the inability to prove citizenship is not evenly distributed across economic, ethnic and racial lines. The easiest way to prove citizenship is with a U.S. passport. The wealthy and the powerful are more likely to have a passport than the poor and the weak. The next easiest way is with a driver's license. Again, people at the bottom end of the economic spectrum are less likely to have driver's licenses than others. Finally, the easiest path to obtain passports and driver's licenses is to have a government-issued birth certificate. Yet again, the elderly, the poor and some racial minorities are all less likely to have government-issued birth certificates than others.

Therefore, not only does S. 744 take away a fundamental right of citizenship and turn it into a privilege that can be taken away at any time, but it does it in a way the disproportionately harms a number of constitutionally protected groups.

The lack of a reliability requirement makes S. 744 unconstitutionally vague

No verification system will ever be perfect. It will always have some level of false positives (*e.g.*, treating a U.S. citizen as a non-citizen) and some level of false negatives (*e.g.*, treating an alien as a U.S. citizen). Moreover, there is usually some type of inverse relationship between the number of false positives and number of false negatives. For example, if the emphasis is to make certain that no alien gets a job, the number of false positives will grow, and an increasing number of U.S. citizens will be denied jobs of any kind. Alternatively, if the emphasis is to make certain that no U.S. citizen is prevented from getting a job, the number of false negatives will grow, and a greater number of aliens will get jobs in the U.S. No system is immune to the foregoing rules and constraints. At some point, the builder of any system will have to decide what the acceptable levels of false positives and false negatives are. The builder will, of course, know that there is an inverse relationship between the two and will almost certainly have some thoughts about what that relationship will be.

Even if the U.S. Supreme Court chooses to review the constitutionality of the system without requiring heightened scrutiny (which is unlikely), it will still be required to weigh benefits and costs of the system. Such a weighing would require an initial determination about the reliability of the system. There are two ways to do that. First, the Supreme Court could try to make an educated guess about how a system that is still a work in progress might operate after it gets fully implemented. Alternatively, the legislation itself could require a minimum level of reliability so that the Supreme Court could safely assume that neither false positives nor false negatives would rise above an agreed level. If a statute contains a minimum level of reliability, in its analysis of the statute the Supreme Court could rely on the fact that if that level isn't met, the system would not be put into service. If the stature has no reliability standard, it is unconstitutionally vague because without a clear standard there is no way for the Supreme Court to perform an accurate cost benefit analysis.

A reliability requirement's impact on a future Supreme Court review is not the only reason that S. 744 should contain a reliability requirement. Before the employment verification system is built, implemented and imposed on the American people, everyone should know how many Americans will be frozen out of the U.S. job market. For example, if the maximum number of false positives is 1%, 1.5 million U.S. citizens would lose their jobs, and another 1.5 million would be prevented from getting one, for a total of 3,000,000 U.S. citizens being denied employment. Even if the number went down to 0.1%, the number would be 300,000 U.S. citizens. Finally, even if the system met one of the highest industry standards for excellence, 99.999% or "five nines," the number of U.S. citizens deprived of their right to work would still be 3,000.

A third reason requiring a statutory reliability standard is cost. Members of the surveillance industry are gleefully estimating the cost of the proposed systems will be in the low billion dollar range to many billions range. The recent history of complex electronic systems sold to government buyers is that many don't work. In cases in which minimum levels of reliability and accuracy were not built into the authorizing legislation (and therefore, not built into the contracts), contractors got paid for systems that didn't work. Even if there were no other reason for a reliability standard, S. 744 should require it to ensure that the government gets what it pays for.

The same reliability analysis can be applied to jobs being given to alien workers. Assuming that there around 5 million such workers in the U.S., 1% false negatives would be 500,000, and five nines would be 50.

S. 744 has no minimum standards of reliability for false positives or false negatives. Therefore, it is impossible for the U.S. Supreme Court, any member of Congress, the President, any U.S. voter, or any contract officer to make a responsible decision about whether such a system is proper or worth the cost. Equally important, no politician who supports or votes for the bill will be held accountable. As long as a politician can say, "When I voted for the bill, no one told me that 3,000,000 U.S. citizens would be kicked out of the job market. What can I do now?", no one can be held responsible at the polls.

In order to allow U.S. citizens to make an informed decision and to keep U.S. politicians accountable, S. 744 should contain an explicit reliability requirement for both false positives and false negatives. There is simply no reason to leave an explicit standard of reliability out of S. 744 unless the goal is to:

- Mislead the politician voting for and against the bill by making reliability statements and promises that do not have the force of law.
- Create an escape hatch of plausible deniability for anyone who votes for the legislations by leaving the reliability issue fuzzy.

Neither is acceptable.

The national ID requirement

The combination of:

(i) state-issued driver's licenses that meet all requirements that DHS chooses to impose;

(ii) a national DHS-owned database that includes a biometric photo of every citizen in the U.S., and additional biometric information about everyone that DHS wants; and

(iii) a "photo tool" that does an electronic comparison between each image in the DHS database and each state-issued driver's license (or between a universal DHS-owned fingerprint database and an encrypted fingerprint file on each driver's license);

is a national biometric ID card.

In its simplest form, a biometric national ID must be three things:

1. It must be national.

2. It must be biometric.

3. It must be a card.

It is national. The state-issued driver's licenses will be national because they must meet the requirements that DHS imposes. The infamous identity cards that Germany required its citizens to carry during WWII were the same thing. They were issued by the local town (*e.g.*, signed by the mayor), but they had to meet federal requirements, just like the driver's licenses required by S. 744.

In addition, the system is supported by a single DHS-owned database that will be based on driver's licenses.

Moreover, S. 744 effectively requires that every state "provide the Secretary, for purposes of identity verification in the System, with photographs and appropriate identifying information maintained by the State." Otherwise, the only practical way for its residents to get a job is to have a passport.

Finally, the "photo tool" will be a single DHS-developed tool that will be imposed on employers throughout the country.

In all respects, the proposed system is national.

It is biometric. The required driver's license carries a digital high-resolution photograph which is of sufficient detail to support automated facial recognition technologies. In the words of the FBI, such photographs are a biometric. In addition, the Secretary is empowered to add a digital fingerprint or a vein pattern from a driver's hand. Either is an additional biometric.

It is a card. No one would argue that a driver's license is anything other than a card.

Therefore, the combination of the driver's license, the DHS database and the photo tool is a national ID card. It is also possible that the driver's license required by S. 744 and DHS alone will become a national biometric ID card. It will certainly be necessary to drive, work, and enter government buildings. It is highly likely that it will also be required for a number of other constitutionally protected activities.

Some get comfort from Section 274A(d)(9) in S. 744, which states:

> 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.

They have argued that the quoted section limits the use of the IDs and database to "employment verification" and, therefore, they are not a national biometric ID. However, that isn't true for a number of reasons. First, the quoted section doesn't limit anything. It only says that there is nothing in subsection (d) of the proposed legislative provision that "permits or allows" the information to be used for other purposes, but it neither limits nor prevents such a use.

Second, the quoted section only applies to "information, database, or other records assembled under this subsection." It is not clear that any significant database will actually be assembled under subsection (d). In all probability, the key databases will be assembled under other subsections and statutes before the system authorized under subsection (d) is rolled out.

Third, at least one other subsection of the proposed legislative provisions [Section 274A(c)] not only allows the use of biometric IDs and national databases, it requires it. Under that subsection, the primary identification card is a driver's license with a biometric photograph, and the DHS database will include all of those photographs. Under that subsection, the federal government will finally have what the Tenth Amendment said it couldn't have under the REAL ID Act of 2005—a national database of biometric photographs and a matching federal government-dictated ID that is needed to travel, to vote, to open a bank account and to get a job.[1] In short, it will be a national biometric ID. The U.S. Constitution prevents that under REAL ID. Resurrecting it under the guise of "immigration reform" should not change the result.

[1] Because one of the government's goals is to share information with other countries, it has already subscribed to international protocols that support cross-border information sharing. Therefore, S. 744 not only mandates a national biometric ID, but it also paves the way for an international biometric ID. In order to get a job in the U.S., U.S. citizens will be giving the U.S. government the ability to give foreign governments biometric photographs of U.S. citizens. Those photographs can be used by the foreign government to run automated facial recognition searches that include U.S. citizens. For example, if the U.S. shares data with Russia, Russian authorities would have the ability to determine whether a U.S. citizen who visits Russia in 2015 attended a 1995 rally in Chicago criticizing Russia. Russia has imprisoned people for less.

The border security trigger adds a second level of vagueness

Some of S. 744's triggers depend on meeting one of two requirements:

a. Achieving and maintaining "effective control" in all high risk border sectors

b. Achieving and maintaining an "effectiveness rate" of 90 percent or higher in all high risk border sectors

The two requirements are related but different.

"Effectiveness rate" of 90 percent or higher for a sector means that the "number of apprehensions and turn backs in the sector during a fiscal year" divided by the "total number of illegal entries in the sector during such fiscal year" must be 90% or more.

"Effective control" requires an effectiveness rate of 90 percent or higher, but it also requires "persistent surveillance."

Given the importance of the trigger, it should be precisely defined, but it isn't. A few of the more obvious ambiguities are:

1. "High risk border sector" is defined, but the definition's reference to "most recent fiscal year" does not make it clear what year that is. Is it the year before the S. 744 is passed? It is the year before a commission is formed? Or, is it the year before the calculation is being made?

2. "Sector" is not defined. There are references to "Border Patrol sectors," "border sectors," and simply "sectors." None is defined. Nothing prevents them from being redefined later.

3. "Apprehensions" is not defined.

4. "Turn backs" is not defined.

5. "Illegal entries" is not defined. It is unclear how the Secretary will determine whether there has been an illegal entry. Is it enough to estimate how many must have crossed the border? Or, must the Secretary have documentary evidence of each crossing? If it is an estimate, how is the estimate allocated among sectors? If someone crosses the border will a valid visa and overstays, has there been an "illegal entry"? If so, where did the "illegal entry" take place?

6. "Persistent surveillance" is not defined.

The ambiguities in the definitions can lead to a number of surprising results. For example, suppose a sector qualified as a high risk border sector in an earlier year, but now that the security system has been improved, only ten people crossed the border the prior year in that sector. Suppose further that seven of the ten were apprehended and one was turned back. On those facts, only two people in that sector were able to cross the border and stay in the U.S., but based on S. 744, the drop would not flip the trigger because 8 divided by 10 is less than 90%. This is despite the fact that apprehensions will have dropped from over 30,000 down to 7.

To the extent that the border security triggers affect a constitutionally-required balancing of costs and benefit, the ambiguity of the triggers will add a second level of impermissible vagueness to the analysis. Even if the triggers somehow pass constitutional muster, the ambiguities will remain, litigation over whether they have actually been met will be expensive and interminable.

The triggers are important and are a key part of the bill. Undoubtedly, the ambiguities played a key role in reaching a compromise. They allowed disagreements to be swept under the rug and helped create the appearance of compromise when none actually existed. The mantra seems to be, "Let the Secretary of Homeland Security decide."

The U.S. Constitution requires more. Moreover, anyone trying to evaluate the impact of S. 744 as a whole deserves more. Those who crafted the ambiguous standards should go back to the drawing board and come back with a true compromise that leaves no key issue to the reader's imagination or to the unfettered discretion of future bureaucrats.