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## Policy Brief: Building America's Trust Act (S. 1757)

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“[Building America's Trust Act](#)” – introduced by Senator Cornyn on August 3, 2017 – is a heavy-handed, enforcement-driven bill that is unnecessary, cruel, and expensive. It also includes provisions that may not be legally defensible. The bill calls for a combination of President Trump's wall, an unnecessary increase in enforcement resources, and the creation of new grounds of inadmissibility and deportability. If enacted, the number of government attorneys, judges, and border prosecutions would significantly increase, as would the number of fast track removals. The bill would subject more people to mandatory detention, and decrease people's opportunity for bond. It strips protections for unaccompanied children and sponsors, and imposes unnecessary restrictions on visa applicants. The bill also circumvents due process protections by creating bars to litigation and exemptions to normal rule making. The following are just a few of the bill's most troubling provisions.

### PRESIDENT TRUMP'S BORDER WALL

**Mandates border wall construction:** Mandates the Secretary to take actions necessary to detect “illegal entrants” including construction, installation, deployment, operation, and maintenance of the border wall system, fencing, levee walls, checkpoints, lighting, roads, etc.

### ENFORCEMENT

#### *ICE Resources*

**Directs ICE to hire more officers:** Directs ICE to increase the number of Enforcement and Removal (ERO) officers, so that there are at least 8,500 in active duty status at any given time. It also directs ICE to hire additional Homeland Security Investigations (HSI) agents, so that there are 1,500 agents in active duty status.

#### *CBP Resources*

**Directs Customs and Border Protection (CBP) to hire more agents and officers:** Directs CBP to increase the number of Border Patrol agents to 26,370 (an increase of 5,000 agents from current funding levels) and Office of Field Operations officers to 27,725 (a 4,000 officer increase from current funding levels). It also directs CBP to hire an additional 1,675 Air and Marine agents.

**Authorizes deployment of the National Guard to assist CBP:** Allows the DHS Secretary or Governor of a State with approval from the Secretary of Defense to deploy the National Guard to the southern border “as necessary” to assist CBP in performing operations and missions, including constructing fencing and other barriers, conducting ground based surveillance, operating unmanned and manned aircraft, and constructing checkpoints along the southern border. DOD is required to reimburse States for the cost of the deployment which may not exceed \$35 million for any fiscal year.

**Requires CBP Air and Marine Operations to directly support Border Patrol:** Requires the CBP Commissioner to ensure that the primary mission for Air and Marine Operations is to directly support U.S. Border Patrol activities along the southern border. Border Patrol Sector Chiefs must identify critical flight hour requirements and direct Air and Marine to support the requests.

**Allows CBP to pay out hiring bonuses, retention incentives, and large increases in salaries:** For employees whose job activities “are critical to border security or customs enforcement,” CBP could pay new

employees \$10,000 hiring bonuses, or pay a “retention incentive” to certain employees who have been with CBP longer than two years. CBP is also authorized to increase the pay of CBP employees who have completed a year of service to at least a GS-12 level. For many employees, this would represent a more than 50% increase in pay. The bill also increases the overtime limitation from \$25,000 to \$45,000.

**Waives polygraph requirements for certain populations:** The bill includes H.R. 2213, which passed the House of Representatives on June 7, 2017. This legislation would allow CBP to waive the polygraph examination for an individual applying for a law enforcement position if they are a current, full-time law enforcement officer employed by a state or local law enforcement agency, a member of the armed forces or a veteran, or employed by federal law enforcement and meet certain criteria.

### ***Local Law Enforcement Entanglement***

**Establishes “Operation Stonegarden”:** Provides \$110 million (double the current funding for the program) to local law enforcement agencies to assist in CBP operations to “enhance border security.”

**Includes “S.3100 – Stop Dangerous Sanctuary Cities Act”:** Authorizes state and local law enforcement agents (LEA) to act as agents of DHS, and grants them all of the enforcement authority available to DHS officers and employees when taking action to comply with detainers. Seeks to indemnify and immunize state and local LEAs from any challenges to the legality of a seizure or detention that was a result of a detainer. Essentially renders 287(g) national and mandatory. Defunds sanctuary jurisdictions by making them ineligible for public works, economic development, and community block grants.

**Reinstates and expands the Secure Communities program:** Requires DHS to permanently reinstate the Secure Communities program. Authorizes \$150 million to be appropriated to reinstate and operate the program.

**Allows CBP or ICE into local police departments:** Allows DHS to enter into written agreements with any state or local LEA authorizing temporary placement of CBP or ICE agents at LEAs to determine immigration status, issue charging documents, enter info into the National Crime Information Center (NCIC), collect biometrics for IDENT, and arrange for transfer to DHS custody regardless of release status from State custody.

## **NEW CRIMES, ENHANCED PENALTIES, AND GROUNDS OF INADMISSIBILITY AND DEPORTABILITY**

**Creates a new crime where unlawful status is the only additional element of already-existing crimes:** Requires “any alien unlawfully present” that committed, attempted to commit, or conspired to commit a crime in which physical force or drug trafficking was an element be given a mandatory minimum sentence of 5 or 15 years depending on prior removal history. Mandates that any sentence of imprisonment imposed under this new section be consecutive to *any other sentence imposed for any other offense*. This section adds immigration status as the only new element to one of the offenses listed. (The legality of this provision may be questionable.)

**Creates a new crime for conduct committed while in Mexico:** Anyone who *seeks* to construct, excavate, or make any structure (i.e. ladder or tunnel) that is intended to evade any fence or technology used by the government to control the border or port of entry faces a maximum penalty of 10 years. This would criminalize acts committed on the Mexico side of the border. (The legality of this provision may be questionable.)

**Increases the penalty for unlawful entry, creates mandatory minimum for unlawful reentry, and bars relief:** Creates enhanced penalties for unlawful entry and reentry. Also includes the version of Kate’s Law that imposes a 5-year mandatory-minimum prison sentence for immigrants who have been charged twice with unlawfully re-entering the country or have a prior aggravated felony conviction. Adds “crosses” or “attempts to cross” the border to conduct criminalized, thus seeking to codify the prosecution of individuals for unlawful

entry who present themselves at the border to seek protection. Makes everyone who entered without inspection ineligible for relief, except certain fear-based protections.

**Creates mandatory minimum sentences for misuse of documents and other document fraud:** Sets mandatory minimum sentences for anyone who knowingly forges or alters immigration documents to be used as evidence of employment authorization.

**Adds many new criminal grounds for inadmissibility:** Adds the following to the list of crimes that would make someone inadmissible: anyone who attempts to or violates any statute relating to the Social Security Act (relating to social security account numbers or social security cards) or any statute relating to fraud and related activity in connection with identification documents or information; anyone who has been convicted of an aggravated felony; anyone who has been convicted of a crime involving the use of physical force or domestic violence (possible waiver for domestic violence); and anyone who is subject to penalties for failure to leave the United States after receiving a final order of removal. Strikes the court's authority to suspend someone's sentence for failing to depart and order that person's release from incarceration for good cause.

**Bars individuals with convictions for driving while intoxicated:** Makes a second conviction for driving while intoxicated an aggravated felony, regardless of whether or not the conviction is a misdemeanor or felony under state law. Renders an individual inadmissible and deportable if they were convicted of driving while intoxicated and were unlawfully present in the U.S.

**Adds inadmissibility and deportability provision for participation in "gang" activities:** Codifies broad definition of 'criminal gang.' Adds provisions that an individual is inadmissible or deportable if consular officer or DHS has "reason to believe" (with no conviction requirement) that the individual participated in a gang activities or has been a member of a gang. Prevents individuals from adjusting status who DHS or Attorney General (AG) *has reason to believe* have been a member of a criminal gang or participated in criminal gang activities.

**Allows other evidence related to a conviction to be considered:** Amends the criminal grounds of inadmissibility and deportability to completely eliminate the categorical approach. This would render "all statutes or common law offenses" divisible and allow DHS and the AG to consider "other evidence related to the conviction," including witness statements, when determining if crimes that are grounds for inadmissibility or removal are convictions for immigration purposes. This is intended to overrule decades of Supreme Court jurisprudence and will lead to exactly the type of "mini-trials" the justices have warned against.

**Allows other information to be considered when determining if a crime is a CIMT:** When considering inadmissibility or deportability, the act allows DHS to consider "other evidence related to the conviction" when determining whether an offense is a crime of moral turpitude (CIMT). This eliminates the categorical approach and, as drafted, removes the determination authority from the IJs and gives it to DHS.

**Amends definition of "conviction":** Provides that a "reversal, vacatur, expungement, or modification of a conviction, sentence, or conviction record" pursued for purposes of limiting immigration consequences will have no effect on the immigration consequences resulting from the original conviction. This provision eliminates post-conviction relief for failure to advise a noncitizen client of immigration consequences, as provided by the Supreme Court in *Padilla v. Kentucky*.

## ATTORNEYS, JUDGES, AND PROSECUTIONS

**Directs ICE to hire additional trial attorneys:** Directs ICE to more than double the number of ICE attorneys in the Office of the Principal Legal Advisor (OPLA) by hiring at least 1,200 new attorneys. The current number of attorneys in OPLA is just over 1,100.

**Directs USCIS to hire additional attorneys, some of which will be used by DOJ:** Directs USCIS to hire at least an additional 250 attorneys to primarily handle national security, public safety, denaturalization, and legal

sufficiency reviews of immigration benefit decisions. At least 50 of these attorneys will go on detail to DOJ as Assistant United States Attorneys (AUSA) to assist in immigration related litigation. Also increases the number of Fraud Detection and National Security (FDNS) officers by at least 100.

**Increases DOJ hiring of immigration judge teams and other attorney positions:** The DOJ must increase the hiring of AUSAs by at least 100, hire at least 50 additional Special Assistant United States Attorneys to litigate denaturalization and other immigration cases in Federal Court, and hire at least 200 additional immigration judges along with a support staff.

**Calls for an extreme increase in border prosecutions:** Bill mandates an increase in border prosecutions (the Criminal Consequence Initiative, formerly Operation Streamline) by at least 80 percent per day, when compared to the average number of prosecutions during the 12 months before enactment.

### **FAST TRACK REMOVALS**

**Requires emergency and rapid scale up of immigration judges:** Within 14 days after the enactment, the AG is required to designate 100 immigration judges (by either hiring new judges or reassigning current judges) to conduct expedited inspection and screening for UACs. Requires the AG to ensure there are adequate resources for IJs to do these proceedings within 7 days of enactment. Judges can also be used to reduce the backlog in immigration court proceedings. Authorizes \$10 million for every year from 2018 through 2022 to implement this.

**Expands use of expedited removal:** Authorizes DHS to use expedited removal procedures for any individual who is inadmissible due to a criminal offense if the individual has not been admitted or paroled, has not been found to have a credible fear of persecution, and is not eligible for relief from removal.

### **DETENTION AND BOND**

**Increases number of detention beds:** Increases immigration detention to average daily capacity of *at least* 48,879 (“subject to the availability of appropriations”).

**Vastly expands mandatory no-bond detention:** Requires DHS to detain individuals who have not been admitted or paroled and who are apprehended within 100 miles of the border, or who present a flight risk or threat to national security. Also requires DHS to detain any individual convicted for illegal entry or reentry, or for any crime that carries a maximum penalty of more than 30 days. Contemplates mandatory no-bond detention for the duration of proceedings for individuals arrested but not convicted of any criminal offense, even if the individual was transferred for a criminal proceeding, not convicted, and then returned to immigration custody.

**Permits unreviewable detention and indefinite detention:** Permits DHS to detain an individual even after a court, the BIA, or an immigration judge orders a stay of removal. Authorizes DHS to detain individuals beyond the expiration of the removal period, without limitations in an effort to change the ruling of *Zadvydas*. Leaves the DHS Secretary with the sole, unreviewable discretion on detention and strips detainees of their habeas corpus protections. Prohibits individuals whose removal is reinstated from seeking to have their case reopened or reviewed. For individuals who are released, DHS may impose conditions of release and may choose to re-detain any individual subject to discretion.

**Strips IJs of the authority to grant bond:** Revises INA § 236, including substituting DHS for AG (appears aimed at stripping IJs of the authority to grant bond). For certain cases, the act increases the minimum bond amount to be set from \$1,500 to \$5,000. Also, at any time, DHS may revoke bond or parole without justification, rearrest individuals under the original warrant, and detain them.

### **VISAS AND IMMIGRATION BENEFITS**

**Bars nonimmigrant visa overstays from obtaining immigration benefits:** Renders any immigrant who overstays a visa ineligible for all immigration benefits or relief except for asylum, withholding of removal, or protection under the Convention Against Torture. Minor exceptions can apply, but require exigent humanitarian circumstances.

**Overhauls the confidential records provision:** DOS may provide information in the DOS database on individual noncitizens to a foreign government, at any time, on a case-by-case basis, for the purpose of determining a person's deportability or eligibility for a visa or other immigration benefit.

**Gives DHS authority over visa interviews and determination:** A visa interview may be waived if DHS determines that it is unnecessary because the individual is ineligible for a visa. Adds that in-person visa interviews are required for individuals who are within a class of people that DHS determined may pose a threat to national security/public safety. Grants DHS authority to refuse or revoke any visa if it determines that such refusal or revocation is in the security interests of the U.S. Makes clear that no court can review the decision to grant or deny a visa.

## CHILDREN AND SPONSORS

**Amends the TVPRA and removes protection for children:** Amends the TVPRA to treat Unaccompanied Children (UAC) from the Northern Triangle countries like UACs from Canada and Mexico (contiguous countries). DHS will place UACs in expedited removal proceedings if it determines or "has reason to believe" that a UAC has been convicted of an offense designated in the bill. (Note that the list of offenses in the bill is expansive- includes having more than one offense (other than minor traffic), having more than one illegal entry, driving while intoxicated, being a member of a criminal gang, etc.). UACs will be placed in expedited hearings in front of an IJ, child may not have to be present, and hearing can be conducted by video/telephone. If a UAC claims asylum or fear of persecution and DHS determines there is no credible fear, the UAC child can be removed from the U.S. without further hearing. Allocates 100 IJs to handle UAC expedited removal proceedings (\$10 million is authorized for every year from 2018 through 2022 to implement this.).

**Significantly amends TVPRA and alters the definition of SIJ status:** Amends TVPRA to change the eligibility criteria for Special Immigrant Juvenile (SIJ) status. Requires the child to be declared dependent by the state court prior to reaching the age of 18 rather than 21. Grants protection only to children who suffered abuse, neglect, or abandonment at the hands of both parents (as opposed to one parent) and who cannot be reunified with either one.

**Requires status check of sponsors and ATDs:** Directs DHS to provide HHS with the immigration status of each potential sponsor prior to the placement of the UAC, and – upon request – HHS must share with DHS or the AG any information relating to the child including their location, and any information relating to the transfer of custody of child for any purpose including enforcement of the immigration laws. In the case of a child who is 17 years of age or younger and placed with a nongovernmental sponsor, the sponsor must be placed in the ICE Alternative Detention (ATD) program and continuously wear electronic monitoring devices while child is in removal proceedings. United States citizens and other parents or legal guardians legally present in the U.S. will need to wear these devices.

## REPATRIATION

**Adds severe sanctions for countries that delay or prevent repatriation:** If DHS determines that a noncitizen is removable or inadmissible and the noncitizen's foreign country denies or delays accepting that individual, DHS may deny admission to any citizens, nationals, and residents from that "noncompliant" country. The Secretary of State must order consular officers to discontinue granting nonimmigrant visas to certain classes of nonimmigrants. DHS may impose additional limitations, conditions, or additional fees on issuance of visas or travel form that country and other sanctions.

**Expands Criminal Alien Repatriation Program:** Mandates DHS to increase the number of "criminal and illegal alien" repatriation flights by at least 15%. Requires \$10,000,000 for each fiscal year from 2018-2021.

## PAROLE

**Alters parole authority:** Creates a distinction between advance parole and parole, and states that entry into the U.S. on advance parole does not constitute parole for the purpose of qualifying for adjustment of status to lawful permanent residence. Permits DHS to revoke a grant of advance parole at any time regardless of whether the individual is inside or outside the United States. Eliminates parole for certain categories which would impact current programs such as the Cuban Family Reunifications Parole Program; Commonwealth of the Northern Mariana Islands (CNMI), Parole in Place (Military), Haitian Family Reunification Program (HFRP), and Parole for the Families of Filipino Veterans.

## BARS TO LITIGATION

**Dictates how the courts will handle immigration litigation:** States that no court may certify a class under rule 31 of the FRCP in any civil action that is filed after the date of enactment of this Act and pertains to the administration/enforcement of the immigration laws. If a court determines that prospective relief should be ordered against the Government in a civil action pertaining to the administration/enforcement of the immigration laws, the court shall limit the relief to the minimum necessary to correct the violation and must adopt the least intrusive means to correct the violation. Preliminary injunctive relief shall automatically expire 90 days after the date on which such relief is entered, with some exceptions. (The legality of this provision may be questionable.)

## RULEMAKING

**Allows for an exemption from the Administrative Procedure Act:** States that the Administrative Procedure Act and any other law relating to rulemaking, info collection, or publication in the federal registrar will not apply if DHS, DOS, or DOJ determine that complying will slow down the implementation of this bill.

## FEDERAL LANDS AND LEASEHOLDS

**Allows DHS to acquire leaseholds:** Gives DHS the authority to acquire a leasehold interest in real property (notwithstanding any other provision of law) and to build on the property or modify any facility on the property if he determines that it is necessary to implement the Act. (The legality of this provision may be questionable.)

**Allows CBP unfettered access to federal lands:** The Secretary of Agriculture or Secretary of Interior cannot impede, prohibit or restrict CBP access to Federal land within the 100 mile zone if CBP is “preventing unlawful entries into the US”. CBP can use vehicles on this land to patrol/apprehend “illegal entrants” and can construct, install, operate and maintain tactile infrastructure (border wall, fence, checkpoints, etc.). CBP is exempted from a myriad of laws including many environmental and wild life acts.

## BIOMETRICS AND PERSONAL DATA

**Requires creation of a system for iris scans and voice prints:** Requires DHS to create a system or upgrade an existing system to allow for storage of iris scans or voice prints of noncitizens that can be used by DHS, other federal agencies, and state and local law enforcement for identification, remote authentication and verification of noncitizens.

**Directs the expansion of biometric exit system:** Requires a biometric exit data system be established at the 15 highest volume airports, seaports, and land ports of entry not later than two years after enactment; expansion of the biometric data system to non-pedestrian outbound traffic at all land ports of entry not later than five years after enactment; and expansion of the biometric exit data system to all air and sea ports of entry and to all land ports of entry for pedestrians not later than five years after enactment.

**Mandates the collection of DNA samples:** Requires DHS to collect DNA samples from any noncitizen detained during credible fear or reasonable fear processing, the pendency of removal proceedings, or post-order

custody, and to provide the DHA samples to the FBI. Failure to cooperate with the collection of a DNA sample is punishable as a class A misdemeanor.

**Allows DHS to use biometric data to aid in enforcement:** Permits DHS to use any such biometric information to conduct background checks, revoke or terminate immigration benefits or status, or engage in enforcement functions.