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Re: City Bar Immigration & Nationality Committee Opposes H.R. 2278, the "Strengthen and Fortify Enforcement Act" (SAFE Act), Which Expands Immigration Detention and Further Limits Due Process

The New York City Bar Association (the "City Bar") and its Committee on Immigration and Nationality Law (the "Committee") oppose H.R. 2278, the "Strengthen and Fortify Enforcement Act" (SAFE Act), because it contravenes principles of due process and reduced detention.

This analysis builds upon City Bar's prior positions on immigration reform. City Bar's prior April 24, 2013 letters praised the Senate's comprehensive immigration reform legislation (S. 744) for its advances in reducing detention and increasing due process and appointed counsel, and urged further steps.[1] Then, in two letters dated May 13 and May 29, 2013, City Bar opposed 15 amendments to S. 744 that rolled back its due process and detention reforms and proposed increased criminalization of immigration laws, among other things.[2] (City Bar, in a 2009 report,

[1] *See* New York City Bar Association, *City Bar Praises Senate Immigration Reform Bill for Right to Counsel, Due Process and Detention Advances and Urges Further Steps* (May 3, 2013) *available at* http://www.nycbar.org/media-aamp-publications/press-releases/press-archives-2013/1765-new-york-city-bar-association-praises-the-senates-immigration-reform-bill-for-right-to-counsel-due-process-and-detention-advances-and-urges-further-steps (citing New York City Bar Association, *Letter to Senate Judiciary Committee Advocating Appointed Counsel* (Apr. 24, 2013), *available at* http://bit.ly/105sqW0 and New York City Bar Association, *Letter to Senate Judiciary Committee Advocating Reduced Detention* (Apr. 24, 2013), *available at* http://bit.ly/101jk1Y).

[2] *See* New York City Bar Association, *City Bar Helps Defend Senate Immigration Reform Bill from Amendments Derailing Due Process and Detention Reforms* (June 10, 2013), *available at* http://www.nycbar.org/44th-street-blog/2013/06/10/city-bar-helps-defend-senate-immigration-reform-bill-from-

previously advocated for reforms to immigration detention, including the right to representation for detained immigrants.[3])

In this letter, City Bar **opposes** H.R. 2278 because (1) it provides for **indefinite mandatory detention** of immigrants without counsel, (2) it requires Federal **mandatory detention** of immigrants at **state** request, (3) it **increases funding for detention,** regardless of risk, rather than repealing the "bed quota," and (4) **expands criminal penalties** for illegal entry and reentry offenses, resulting in disproportional punishment that will increase the costs of immigration reform. Prior City Bar analysis on these issues is attached.

In a separate letter today, the City Bar's Criminal Courts Committee opposed other provisions within the SAFE Act that would restrict the efforts of New York City and other localities to limit the use of immigration detainers.[4] This Committee supports that position, as it did in a prior Jan. 9, 2013 letter.[5]

I. City Bar Opposes Indefinite Mandatory Detention Without Counsel

H.R. 2278, at Section 310(b), proposes to expand indefinite mandatory detention before a deportation hearing can be held, even for individuals released from criminal incarceration years ago. The legislation also worsens the burden on immigrants to prove their release, now by "clear and convincing" evidence, even though "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[6] The language of Section 310(b) resembles Senator James Inhofe's (R-OK) Amendment 1203 to S. 744, as well as Senator Charles Grassley's (R-IA) Amendment 53 ("Grassley 53"), previously introduced and defeated in the Senate Judiciary Committee.[7]

City Bar opposes these provisions as a step in the wrong direction. In its May 13th letter, City Bar cautioned that these provisions would frustrate crucial "reforms [reducing] cruel, costly, and unnecessary over-detention of immigrants and families who pose little risk" by expanding mandatory detention "regardless of risk or cost."[8] The provisions also are likely unconstitutional. City Bar's prior analysis of Grassley 53 is attached.

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amendments-derailing-due-process-and-detention-reforms/ (citing New York City Bar Association, *Letter: City Bar Immigration & Nationality Committee Opposes Amendments to S. 744 Reversing Detention and Due Process Advances in Immigration Reform* (May 13, 2013), *available at* http://bit.ly/16ftsYm and New York City Bar Association, *Letter: City Bar Immigration & Nationality Committee Opposes Six Additional S. 744 Amendments Reversing Advances in Immigration Reform* (May 29, 2013), *available at* http://bit.ly/13xUmqg).

[3] Association of the Bar of the City of New York, Committee on Immigration & Nationality Law, *Report on the Right to Counsel for Detained Individuals in Removal Proceedings* (August 2009), *available at* http://www.nycbar.org/pdf/report/uploads/20071793-ReportontheRighttoCounsel.pdf.

[4] *See* New York City Bar, *Opposition to Provisions of the SAFE Act that Would Restrict Local Efforts to Limit the Impact of Immigration Detainers on Criminal Justice Resources* (June 17, 2013), *available at* http://www2.nycbar.org/pdf/report/uploads/SAFEActImmigrationDetainersCrimCtsLetterFINAL6.17.13.pdf.

[5] *See* New York City Bar, *Legislation on Persons Not to Be Detained With Respect to Collaboration with Immigration and Customs Enforcement (ICE)* (Jan. 9, 2013) ("Jan. 9 Letter"), *available at* http://www2.nycbar.org/pdf/report/uploads/20072375-PersonsNottoBeDetainedICECollaboration.pdf.

[6] *Salerno v. United States*, 481 U.S. 739, 755 (1987) (Rehnquist, C.J.).

[7] City Bar previously expressed its opposition to both Inhofe's 1203 and Grassley 53.

[8] New York City Bar Association, *Letter: City Bar Immigration & Nationality Committee Opposes Amendments to S. 744 Reversing Detention and Due Process Advances in Immigration Reform* (May 13, 2013), *available at* http://bit.ly/16ftsYm

Rather, City Bar supports the alternatives to detention and due process protections included in the Senate reform legislation, S. 744. Indeed, City Bar urged Congress to go further and repeal mandatory "detention or custody" entirely.[9] City Bar advocated the requirement that each custody decision be reviewed by an "individualized judge …with specific, transparent criteria and no artificial minimum bond amount," as in criminal courts.[10]

II. City Bar Opposes Federal Mandatory Detention at State Request

H.R. 2278, at Section 108(a), mandates federal Department of Homeland Security detention of noncitizens at the recommendation of state or local law enforcement. (Separately, H.R. 2278 proposes a nationwide system, like that in Arizona, of local law enforcement of immigration laws). Section 108(a) requires that DHS "take the alien into custody not later than 48 hours after" apprehension by state or local police. DHS' further discretion to release the noncitizen or employ alternatives to detention may be restricted as well.[11]

For the same reasons as above, City Bar opposes this provision, which appears to require mandatory detention, regardless of risk. Moreover, it is troubling to shift federal immigration detention authority to states with Arizona-like enforcement policies against immigrants.

III. City Bar Opposes Increased Immigration Detention Funding

H.R. 2278, at Section 107, provides that DHS "shall construct or acquire" more immigration detention facilities "in addition to existing facilities," and provides an open-ended grant of funds to do so "as may be necessary." Sections 502 and 506 then authorize the hiring of 2,500 specialized "detention enforcement officers" specifically to oversee detention, as well as another 5,000 deportation officers and 700 support staff. (Currently, ICE employs 5,000 immigration enforcement officers *total*).[12]

City Bar opposes this open-ended increase in detention as a step in the wrong direction. As City Bar pointed out in its April 24 letter, the U.S. immigration detention system has already exploded into America's largest system of incarceration, detaining a record 429,247 individuals in 2011—more than any federal or state prison system.[13] The U.S. government spends $2 billion a year on immigration detention—$164 per detainee per day—when lesser restrictive alternatives

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[9] New York City Bar Association, *Letter to Senate Judiciary Committee Advocating Reduced Detention* (Apr. 24, 2013), *available at* http://bit.ly/101jk1Y.

[10] *Id*.

[11] *See* Section 108(a)(1), creating new Section 240D(b) (DHS "shall ensure that an alien arrested under this title shall be held in custody, pending the alien's examination under this section, in a Federal, contract, State, or local prison, jail, detention center, or other comparable facility.").

[12] Statement by Chris Crane, President, National Immigration and Customs Enforcement Council 118 of the American Federation of Government Employees, Before the House Committee on the Judiciary (June 13, 2013), *available at* http://judiciary.house.gov/hearings/113th/06132013_2/Crane%2006132013.pdf.

Section 503 also proposes funding for "enough body armor… to cover every agent in the field," and "weapons that are reliable and effective to protect" agents from the "threats posed by armed criminals." This is troubling as well given that immigration violations are civil violations, and immigrant violators are typically less dangerous than criminal violators. *See* New York City Bar Association, *Letter to Senate Judiciary Committee Advocating Reduced Detention* at 3.

[13] New York City Bar Association, *Letter to Senate Judiciary Committee Advocating Reduced Detention* at 2, *citing* John Simanski and Lesley M. Sapp, Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2011* 4 (September 2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

to detention cost $14 per day or less.[14] All of this occurs without appointed counsel, which renders it nearly impossible for detainees to litigate their deportation cases.

Rather, City Bar supports alternatives to detention, such as those that S. 744 would provide. Alternatives to detention, such as tracking bracelets and community supervision, would let thousands avoid unnecessary incarceration and remain with families pending their deportation hearing, which they may more meaningfully prepare for and participate in.[15] Risk assessment practices, such as basing detention decisions by evaluating flight or public safety risk[16], show promise as well (although practices should be transparent).[17] Moreover, City Bar urged Congress to repeal the "bed quota" requiring DHS to detain 34,000 immigrants at any one time. Otherwise, DHS will continue to unnecessarily detain immigrants who pose little risk at great taxpayer cost.[18]

IV. City Bar Opposes Increased Criminal Penalties for Immigration Offenses

H.R. 2278, at Sections 315 and 316, also seeks to expand criminal penalties regarding crimes of illegal entry and reentry. These sections are similar to Senator Grassley's Amendment 45 to S. 744 in the Senate Judiciary Committee ("Grassley 45"),[19] which City Bar previously opposed. For example, like Senator Grassley's Amendment 45, H.R. 2278 Section 315(a) would criminalize re-entry after an order of voluntary departure (as well as a prior criminal conviction for illegal entry). Additionally, Section 315(a) goes even further to criminalize a student or tourist visa overstay of 90 days.[20]

In its May 29, 2013 letter, City Bar called Amendment 45 "unnecessary," and noted increased criminal enforcement would disproportionately increase the costs of immigration reform.[21] For the same reasons, City Bar opposes these provisions of H.R. 2278. City Bar's prior analysis of Grassley 45 is attached.

Respectfully submitted,

Prof. Lenni Benson
Chair

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[14] *Id.* at 2, *citing* National Immigration Forum, *The Math of Immigration Detention* 1 (August 2012), *available at* http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf; *Building an Immigration System Worthy of American Values, Hearing Before the* S. *Comm. On the Judiciary,* 113th Cong. 19 (2013) (Statement of Ahilan T. Arulanantham, ACLU), *available at* http://www.judiciary.senate.gov/pdf/3-20-13ArulananthamTestimony.pdf.

[15] *Id.* at 3.

[16] *Id.*

[17] *Id.* at 4.

[18] *Id.*

[19] Unlike Senator Grasslev's Amendment 45, H.R. 2278 Sec. 315 does not eliminate the intent requirement to the offense of illegal entry under INA § 275 (8 U.S.C. 1325).

[20] *See* Section 315(a), adding INA § 275(a)(1)(D) (criminal penalties apply if one "knowingly violates for a period of 90 days or more the terms or conditions of the alien's admission or parole into the United States.").

[21] New York City Bar Association, *Letter: City Bar Immigration & Nationality Committee Opposes Six Additional S. 744 Amendments Reversing Advances in Immigration Reform* (May 29, 2013), *available at* http://bit.ly/13xUmqg.

Grassley 47 and 53:[13] Eliminates Detention Reforms – *i.e.* Due Process Protections, Bond Hearings, and Limits on Detention – and Expands Mandatory Detention

Short Summary: Amendment 47 strikes the new Section 3717, which provides due process protections for detainees such as bond hearings and time limits. Amendment 53 replaces it with a new Section 3720 that expands mandatory detention of immigrants regardless of risk or cost.

Analysis:

Grassley 53 Expands Mandatory Detention Regardless of Risk or Cost.

- Provides for unlimited detention before a deportation hearing.
- Worsens the burden on immigrants to be released.
- Provides for mandatory detention even of individuals released from criminal incarceration years ago, even those with families and jobs whom have since committed no crimes.
- Eliminates the ability of immigration judges to review custody status.
- Expands mandatory detention after a removal order.

Bipartisan Support of S.744's Improvements to Due Process and Efficiency.

- Nine in ten Americans, of all parties, support a "time limit on how long someone can be held in jail for immigration violations before they see a judge."[14]

Huge Taxpayer Expense if Sen. Grassley's Amendments are Adopted:

- Immigrants with families who pose no risk will unnecessarily remain in taxpayer supported detention, instead of DHS focusing resources on truly high risk.
- More detention will exacerbate inefficient and backlogged court.

Amendments Are Unconstitutional and Will Create Unnecessary Litigation.

- Unlimited detention without any judicial review violates due process and fundamental American presumptions of liberty, and raises "serious constitutional concerns."[15]
- Sen. Grassley's amendments for unlimited detention,[16] without bond hearings,[17] or with hearings imposing an incredibly high burden for release,[18] even for immigrants with long-ago convictions that pose no risk,[19] will likely be struck down by courts.

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[13] *See* http://www.judiciary.senate.gov/legislation/immigration/amendments/Grassley/Grassley47-(EAS13355).pdf; http://www.judiciary.senate.gov/legislation/immigration/amendments/Grassley/Grassley53-(MDM13469).pdf.

[14] Belden Russonello Strategists LLC, *American attitudes on immigration reform, worker protections,due process and border enforcement* 3 (April 2013), *available at* http://cambio-us.org/wp-content/uploads/2013/04/BRS-Poll-for-CAMBIO-APRIL-16-2013-RELEASE.pdf.

[15] *See Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

[16] Even *Demore v. Kim*, 538 U.S. 510 (2003), which upheld mandatory pre-hearing immigration detention, assumed detention would be short and limited.

[17] *See* http://www.aclu.org/immigrants-rights/rodriguez-et-al-v-robbins-et-al.

ANALYSIS OF GRASSLEY AMENDMENT 45

Short Summary of Grassley Amendment 45:

The amendment alters the language of S. 744 and its revisions of the criminal penalties for illegal entry, reentry, passport fraud, and a few other provisions by **expanding the penalties** and **reducing the intent elements** of the crimes.

In S. 744, Sections 3704 to 3707 revise existing criminal penalties in the INA and in a rigorous manner expand the potential criminal sanctions of many border or document violations. The severity of the criminal sanctions and the increase in many penalties is balanced in some sections of S. 744 by requiring specific thresholds or more than a single offense to trigger the stiffer penalties. Almost all of the Grassley amendments eliminate those balancing factors.

Analysis:

Grassley 45 goes much further than S. 744's proposed expansion of civil and criminal penalties.

- Grassley 45 narrows exceptions, expands the scope of the crimes, and lengthens sentences for some offenders due to past criminal convictions, even if those convictions were relatively minor violations. Grassley 45 is unnecessary given the tools provided in the INA and the expanded criminal sanctions in S. 744 as introduced.

Grassley 45 would increase the costs of the bill disproportionally to the impact sought.

- Criminal prosecution of immigration violations is one of the most expensive elements of immigration law enforcement.[18]
- In recent years the U.S. Attorneys have increased the number of criminal prosecutions. Last year immigration criminal prosecutions represented 27% of all federal criminal cases.[19]
- When the government acts under its criminal authority, the U.S. attorneys' offices, federal public defenders, and federal district courts must devote substantial resources to these prosecutions. S. 744 already expands the tools of criminal enforcement, but Grassley 45 expands it even further.
- Grassley 45 will lead to increased and costly litigation about the vagueness of its terms. S. 744 has clearer adjudication standards.

Grassley 45 is an unprecedented effort to charge children with federal crimes

- Removes **any** exception for minors.
- Given the long statute of limitations, could subject a person over 18 (such as the Dream Act children) to criminal prosecution for illegal entry as a child.

Further Detailed Analysis by INA Section Amended in S. 744 and Grassley 45:

Analysis of Grassley 45 impact on Sec. 275:

Casts too wide a net and will be very expensive.

- Increasing sentences tied to unrelated past criminal conduct, not the immigration violation, will have unintended consequences of potentially long incarceration for immigration violators with relatively minor state or federal criminal records. For example, in New York, a Class A

[18] *See* Appendix 1 (illustrating the growth of the use of criminal prosecutions related to immigration violations.) *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx

[19] *See* Appendix 2 http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/D04Sep12.pdf (summarizing data from federal courts regarding actual prosecutions and the immigration crimes charged.). *See also* http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx

misdemeanor can include a sentence of one year. Under S. 744 definitions for "felony,"—this misdemeanor could be a felony. But S. 744 balanced that problem by requiring a minimum predicate crime sentence of 30 months before imposing higher sanctions of up to 15 years. Grassley 45 instead makes all "felony" convictions subject to this higher sentence.

- Prosecutions under existing INA Sec. 275 are already at a very high level and represent one of the largest categories of federal criminal prosecution. Expanding the conduct that can be sanctioned and the prosecution and incarceration for immigration violators will be an expensive operation. As S. 744 was introduced the sanctions were already broadened and heightened. This amendment may actually increase litigation because defendants may be incentivized to challenge the categorization of misdemeanors as felonies.

The Proposed Revision to INA 275 in Sec. 3704 Has a Severe Impact.

- S. 744's Expansions
  - Increases penalties and the scope of the criminal sanction by going beyond "entry" to include a person who "crosses a border" in an undesignated location. Other provisions of S. 744 expand the border by 100 miles into the interior. Potentially the existing S. 744 language could greatly expand the number of people who could be criminal charged with illegal entry.

  - S. 744 also expands penalties for illegal entry to those who illegally enter after an order of voluntary departure. This greatly expands the ability of the federal government to prosecute violators who now may face a three-year sentence. In the existing INA, illegal reentry after a voluntary departure can only be punished as a misdemeanor.

- **Specifically, Grassley 45 adds** "attempts to enter" to this category of criminal entry. The amendment goes further by eliminating the willfulness element in INA 275 subsection (c) that punished entry willfully making a knowing false or misleading representation or the willful concealment of a material fact. Grassley 45 eliminates some of the quantity and severity measures and makes convictions for any 3 misdemeanors or any felony a basis to raise the sanction to up to ten years from one year. (S. 744 requires the 3 misdemeanors to have occurred on three separate dates and requires the felony conviction to have required a period of incarceration as a prerequisite to the longer sentence.) In Grassley 45 the qualifications are stripped out and any felony conviction with incarceration now triggers a 15-year sentence for illegal entry.

- **Grassley adds** to this category of criminal entry -- "attempts to enter." The amendment goes further by eliminating the willfulness element in subsection (c) that punished entry willfully making a knowing false or misleading representation or the willful concealment of a material fact. In line 21 of the amendment concerning subsection (2)(C), the amendment eliminates some of the quantity and severity measures and makes convictions for any 3 misdemeanors or any felony a basis to raise the sanction to up to ten years from one year. S. 744 also has the increase in sentence but requires the 3 misdemeanors to have occurred on three separate dates and requires the felony conviction to have required a period of incarceration as a prerequisite to the longer sentence. Similarly in subsection (2)(D) the qualifications are stripped out and any felony conviction for any period of incarceration now triggers a fifteen-year sentence for illegal entry.

- This amendment also restates two sections of the existing INA Sec. 275 but does not materially alter the provisions other than retitling one of the subsections.

Recommendation: No on Grassley 45 proposed new Sec. 3704.

Grassley 45 Sec. 3705: Proposed Revision to Section 276 Reentry of Removed Alien,

In the existing INA 276, an individual can be criminally prosecuted for illegal reentry after an order of removal. S. 744 increases the penalties, but links the severity of any past criminal convictions to the penalty for illegal reentry after removal. Further, S. 744 adds a severe penalty for those who repeatedly enter illegally after removal even if they have no criminal convictions.

Grassley 45 strikes the S. 744 proposed Sec. 3705 and offers an alternative that authorizes increased criminal sanctions **even for minor crimes or for a single unlawful reentry**. There are also problems in the technical drafting within this Sec. 3705. The language inserts a possible exception into subsection (c) that is identical to the affirmative defense articulated in subsection (e). The existing language of S. 744 is much clearer and while it gives prosecutors tremendous authority to charge individuals with felony reentry, it tempers that expansion by requiring more than one violation or particularly serious prior criminal conduct. Grassley 45 subsection (c) is entitled "reentry after repeated removal" but creates a sanction for a single reentry after removal.

As we mentioned above, we do urge a clarification of the definition of "felony" found in S. 744 Sec. 3705 (i). The proposed language could allow many state misdemeanor convictions to be characterized as felonies whenever the **possible** sentence for the crime could exceed one year. This will undoubtedly lead to litigation over the proper interpretation of the Act. By changing the definition to measure the actual sentence served by the individual rather than any possible sentence, it is less likely that minor crimes would trigger the higher sanctions in the immigration statutes and it may reduce litigation over the definitions.

Recommendation: No on Grassley 45 Section 3705

Proposed Revision to INA Sec. 243(c) Penalties Relating to Vessels and Aircraft, Sec. 3706

In S. 744, Sec. 3706 raises existing penalties for the vessels and aircraft that violate immigration statutes and regulations. The Grassley 45 provision adopts the same penalty increases but omits a section of existing Sec. 243 and S. 744 subsection "(C) Compromise." The Grassley amendment would eliminate the ability of the U.S. government to negotiate the amount of the sanctions. S. 744 allowed the compromise in limiting sanctions for stowaways. Grassley 45 removes that flexibility.

In S. 744, a humanitarian aid exception is provided in subsection D. Grassley 45 retains the subsection but narrows the exception from "humanitarian aid" to only providing emergency medical care or food or water. This narrow exception might mean that people, including law enforcement personnel, who chose to provide medical care that may be characterized as "not an emergency" could face criminal sanctions. Moreover, the provision of dry or warm clothing could lead to violations of the act without the humanitarian exception.

There is also a housekeeping amendment in this section that clarifies that the Secretary of Homeland Security, rather than the Attorney General, has the sole authority to issue these sanctions. The Grassley amendment has the same language. We note, however, that the Board of Immigration Appeals, part of the Department of Justice, currently hears appeals of these vessel and carrier fines. The Senate may well want to consider where any administrative appeals should be heard and if the current assignment to the BIA is appropriate as opposed to creating an internal administrative process within DHS components. Transportation companies generally do not appeal too many cases. In the EOIR Yearbook of 2012, the agency reports only 3 cases in this category.[20]

Recommendation: No on Grassley 45 Section 3706 – preserve the humanitarian aid exception and the limited compromise option.

[20] *See* http://www.justice.gov/eoir/statspub/fy12syb.pdf at Table 17.

Proposed revision to Section 1541 of Title 18 Passport Trafficking, Sec. 3707

In S. 744 Section 3707 significantly changes the criminal statute governing the production of false passports. The existing statute limits the criminal sanctions to the production of a passport "under U.S. authority." S. 744 appears to cover any false passport. This could have a very significant impact on people fleeing persecution who often have to rely on false documents to escape the country of persecution. We would recommend restoring the phrase "under U.S. authority" as it appears in the current statute. Moreover there is a separate existing criminal statute that has been used when an individual tries to use a false or forged **foreign** passport. *See* 18 U.S.C. Sec. 1543. This statute is not amended in S. 744. Cases have held it applies to foreign passports. *See, e.g., U.S. v. Dangdee,* 616 F.2d 1118 (9th Cir. 1980).

Grassley 45 Sec. 3707 is very similar to S. 744 but it creates liability for a single false passport rather than the S. 744 requirement of 3 false passports within 3 years. In subsection (c), S. 744 required ten instance of producing or selling or buying false passport materials but Grassley 45 eliminates that element making a single instance a violation. Thus this amendment alters potential prosecution from those who might be engaged in commercial fraud to a single instance of passport fraud or possessing, using, buying false materials. While even a single instance of such fraud could result in prosecution under other statutes, this statute is really aimed at professional traffickers.

- Also in this Sec. 3707, both S. 744 and Grassley 45 amend **18 U.S.C. Sec. 1542 False Statement in an Application for a Passport.**

    - S. 744 Section 3707 amends existing 18 U.S.C. Sec. 1542 that criminalizes making material false statements in an application for a U.S. passport. Grassley 45 greatly expands this criminal statute by eliminating the materiality requirement and expanding the section to cover people who secure a U.S. passport for another person. Thus a parent who made a false statement, even a non-material one in order to secure a passport for his or her child, might violate this statute and could face a sentence of 15 years. If this statute needs to be expanded to cover situations where the passport is secured for another person, the materiality element should be retained. The Grassley 45 amendment of "any false statement" is very broad and could make listing an old address or changing the spelling of a name, a basis for serious criminal prosecution.

- Also in this Sec. 3707, both S. 744 and Grassley 45 amend **18 U.S.C. Sec. 1544 Misuse of a Passport.**

    Grassley 45 Language Covers "Attempts to use" Passports
    - Under existing law, people who misuse passports can face criminal sanctions. S. 744 requires the individual to misuse "for their own purposes." Grassley 45 covers "use" of another person's passport. The language goes further to include "attempts to use" these passports.
    - Grassley 45 deletes a provision included in S. 744 that also punished misuse of a "safe conduct" document. While the use of Safe Conduct documents are likely rare and limited to diplomatic or military context, it is unclear why Grassley 45 eliminated that provision in the criminal sanction.
    - As a general comment we note that there are other criminal statutes available to the U.S. Attorneys should people try to secure fraudulent documents. For example 18 U.S.C. § 1028 creates a ten-year penalty for people who fraudulently seek to secure identification documents.
    - 18 U.S.C. § 1001 is a general statute that prohibits any false statement in a form or document or uses any false document in an application to the federal government or federal agency, can be fined and imprisoned for five years. The sentence imposed is greater if the violation involved national security or abuse of children. There are also criminal sanctions for making a false claim of U.S. citizenship even when the individual is not presenting any false documents. *See* 18 U.S.C. Sec. 911.

- Grassley 45 mirrors S. 744 in Sec. 3707(d) that contains amendments to **18 U.S.C. Sec. 1545 Schemes to provide fraudulent immigration services.**
    - **There are no differences between S. 744 and Grassley 45 as to this section.**

- **Grassley 45 would leave the broader document fraud provisions.**
    - Grassley 45 omits S. 744 amendment to 18 U.S.C. Sec. 1546 Immigration and visa fraud provision found in S. 744 at page 624, line 13 to page 625, line 7.
    - The S. 744 provision strikes two subsections of the existing criminal statute and substitutes a provision aimed at people who traffic in false documents and have three or more instances of using or providing false documents.
    - Again, this appears to be an instance where S. 744 is aiming at professionals and individuals who go beyond a single mistake or misstep by using a false document a single time. Grassley 45 would authorize a **twenty-year sentence for a single mistake** of producing a false document to secure work.

Finally Sec. 3707 seeks to amend **18 U.S.C. Section 1547 and 1548** concerning the maximum imprisonment and an exception for authorized law enforcement activity. There is no difference between Grassley 45 and S. 744.

Recommendation: No on Grassley 45 Section 3707. The amendment expands harsh penalties and does not target enforcement on professionals and traffickers.