



IJN Analysis on H.R. 2278 “SAFE” Act

- **The Bill unnecessarily expands immigration enforcement, an area that is already robust and has resulting in record numbers of deportations:** The bill wrongly calls for additional funds for immigration enforcement. However, the costly rise in immigration enforcement has already seen a record number of deportations, 409,849 in 2012 with projected figures for 2013 even higher. Last year, the federal government spent 18 billion dollars in federal immigration enforcement, more than on FBI, DEA, Secret Service, and all other federal criminal law enforcement agencies combined. To additionally add local resources into the mix is duplicative and wasteful. The bill also calls for increased immigration detention beds for noncitizens in deportation proceedings. This is similarly misguided. Immigration offenses are civil in nature and many of those incarcerated have little to no criminal history. Indeed, the only actors who benefit in this situation are the private industry, whose lobbying efforts have played a large role in recent government expenditures.
- **The Bill undermines the federal government’s plenary power in an area that is clearly within the control of the federal government:** The Bill ignores established case law and legal doctrine which make clear the federal immigration laws are in the exclusive control of the federal government. By allowing states to create civil and criminal penalties for immigration violations, the bill allows states to legislate federal immigration law, an act which has been found to be unconstitutional time and time again.
- **The Bill results in the “Arizonafication” of the federal government, promotes racial profiling and violates constitutional rights:** The Bill contains several provisions which promote and nearly mandate racial profiling. Allowing local law enforcement to enforce federal immigration with the same authority as though they were ICE agents, in an area in which they have no familiarity, will surely result in racial profiling and violations of constitutional rights. The bill attempts to guard against this by providing trainings and access to federal technology. However, the potential racial profiling as in the recent court ruling against Sheriff Arpaio out of Maricopa County, Arizona, is endless. Local law enforcement cannot be expected to become experts in two areas of law. The more likely scenario is that this will spawn a wave of racial profiling and will ultimately only result in years of litigation and further distrust between communities and law enforcement and years of litigation. Moreover, this creates a two tiered system of justice in which immigrants are treated differently in the criminal justice system based on their immigration status alone.

- **The Bill harms community Trust:** Moreover, the bill will harm community trust. Effective law enforcement is premised partially on community trust, where the community reports and cooperates with local law enforcement. If local law enforcement and immigration enforcement are one and the same, cooperation with local law enforcement, particularly in areas with high immigrant populations, will virtually cease.
- **The Bill will result in legal liability for local governments:** Enforcing immigration law at the local level has not worked in the past and will only continue to result in legal liability for counties and localities in the future. Racial profiling and violations of people's constitutional rights as a result of local immigration enforcement has already spawned lawsuits. For example, several counties have been sued over their practices surrounding ICE detainers. More recently, Sheriff Arpaio out of Maricopa County was found to have engaged in racial profiling when attempting to enforce federal immigration law. Under the proposed bill, the potential for similar lawsuits nationwide is endless and the cost will be shouldered solely by localities, since ICE has stated that it will not reimburse for such legal liability.
- **The Bill will be costly and difficult for local governments to administer and places local law enforcement on double-duty, enforcing both local and federal laws:** Local law enforcement at the local county and city level are already strapped for resources. To task local law enforcement with enforcing federal immigration law will burden already stretched law enforcement resources and is a misuse of local resources since it is duplicative of already extensive, existing federal resources. The bill provides local law enforcement the authority to act as full-fledged ICE agents, forcing local law enforcing to be on double-duty as they dually enforce local criminal laws and federal immigration laws. Additionally, the bill makes ICE detainers mandatory, which many local jurisdictions have already decided not to enforce in order to preserve local resources. While the bill claims to provide for these financial pitfalls by providing training and funding sources, this too falls short. Immigration law is notoriously complex, and to expect local law enforcement to become experts in two areas of law is burdensome and unrealistic. Financially, it is unlikely that any reimbursement will come close to fully making any locality whole, particularly when the administration and training surrounding the enforcement of an entirely new area of law, become clear.
- **Unnecessarily expands the criminal offenses, including minor misdemeanors from long ago,** that could result in deportation and permanent separation from one's family. The current immigration law already has in place insurmountable barriers that prevent many individuals from obtaining legal status or strips them of legal status they already have for broad categories of criminal offenses. These categories include minor offenses,

mistakes that occurred years ago, and offenses for which they have already been held accountable for. This bill will add additional overlapping offenses, including those involving false Social Security Numbers and identity documents, to an already overly broad list of offenses that will make individuals ineligible for legal status and subject to deportation.

- **Further expands the category of offenses that deprive immigrants of due process rights and results in mandatory deportation.** An offense classified as an “aggravated felony” has the harshest immigration consequences. It results in automatic deportation without any opportunity for an immigration judge to consider the individual’s circumstances. The judge cannot consider how long the individual has lived here, family ties in the U.S., service in the military, positive contributions to the community or what the individual has done with their life since the conviction. The term aggravated felony is a misnomer that includes non-violent offenses and misdemeanors for which no jail time was served. Minor offenses that have been found to be aggravated felonies under the current definition include misdemeanor theft of a \$10 video game, sale of \$10 worth of marijuana. Under this bill, offenses such as consensual sex between a 17-year old and an 18-year old or a second misdemeanor driving under the influence would also be aggravated felonies resulting in permanent banishment from the U.S.
- **Eliminates judicial discretion in certain cases involving vulnerable populations and individual with U.S. citizen family members.** The current immigration law severely curtails the criminal and immigration judges’ discretion to consider an individual’s circumstances to grant a pardon from deportation. For instance, immigration judges cannot cancel the deportation of a long-time permanent resident with a conviction classified as an aggravated felony, no matter how minor or old the conviction. Under this bill, an aggravated felony will eliminate judicial discretion in the case of refugees and asylees, who fled their home countries out of fear of persecution and sought refuge in the U.S. An offense that falls within this category will tie an immigration judge’s hands from considering the individual’s circumstances exposing refugees and asylees to the risk of deportation. A similar offense will prevent individuals hoping to join their U.S. citizen family members here from ever doing so resulting in permanent separation from their families.
- **Overburdens an immigration court system that is already in crisis,** by requiring a new fact-finding hearing before immigration officials. It eliminates a core evidentiary rule in certain immigration cases. The current rule in general is that the immigration officials must rely on certain readily available and official criminal court records, including findings by the criminal court judge and the plea agreement. This rule that has been applied in immigration proceedings for 100 years is crucial to judicial efficiency in

criminal and immigration courts, and to fairness to defendants. The bill would reverse this rule by having immigration officials “re-try” the criminal case. The immigration official will be required to expend its limited resources to hold mini-hearing and review other outside evidence, such as allegations in the police report, to determine the underlying criminal conduct that lead to the criminal charge.

- **Undermines Supreme Court Precedent.** In *Padilla v. Kentucky*, the Supreme Court held that a noncitizen has a constitutional right under the Sixth Amendment to be advised of the immigration consequences of a criminal conviction before entering a plea. In reaching its decision, the Court recognized that deportation is a “particularly severe penalty” that is “intimately related” to the criminal process. A conviction vacated for lack of competent advice from a criminal defense attorney is constitutionally invalid. Under the Gowdy bill, a vacated conviction that no longer exists because it is constitutionally void can remain a basis for deportation. A long-standing rule in immigration law is that convictions vacated based on constitutional or legal error will no longer have immigration effect. This provision will impose an unduly harsh and punitive consequence for a criminal judgment rendered legally void.
- **Retroactively applying harsh immigration penalties is unfair and un-American.** Many of the proposed changes in the Gowdy bill will apply retroactively to even decade-old offenses even though at the time of conviction, the offense could not have resulted in deportation. For example, the bill makes additional offenses aggravated felonies and bars to legal status. With competent advice from criminal defense counsel, a noncitizen defendant would have negotiated a plea in reliance on the existing law at the time of conviction. The provisions in the Gowdy bill reach back in time to apply to all crimes no matter when they were committed. Changing the rules in the middle of game in this way not only undermines the criminal justice process, but is also violates basic notions of justice. This will also have devastating consequences on families and our communities by making thousands of immigrants with roots in the U.S. deportable and individuals with U.S. citizen family members ineligible to obtain legal status.