



## IJN Analysis on H.R. 2278 “SAFE” Act

- **The Bill unnecessarily expands immigration enforcement, an area that has resulted in record numbers of deportations:** The costly rise in immigration enforcement has already led a record number of deportations, 409,849 in 2012 with projected figures for 2013 even higher. Last year, the federal government spent \$18 billion on federal immigration enforcement measures. This is more than what was spent on FBI, DEA, Secret Service, and all other federal criminal law enforcement agencies combined. The bill also calls for increasing the number of immigrants detained while in deportation proceedings. This is similarly misguided since immigration offenses are civil in nature and people should not be incarcerated for civil violations. One of the major actors in this detention scheme is the private prison industry, which receives large government contracts to house immigrant detainees due to federal lobbying efforts.
- **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 that 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, violates constitutional rights, and harms community trust:** The Bill contains several provisions which promote and nearly mandate racial profiling. Allowing local law enforcement departments to enforce federal immigration laws, with the same authority as ICE, will 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, despite receiving trainings from ICE, a recent court found that Sheriff Arpaio from Maricopa County, Arizona engaged in egregious racial profiling practices. Additionally, effective law enforcement is premised partially on community trust, where the community cooperates with local law enforcement. If local law enforcement and immigration enforcement become one and the same, collaboration with local law enforcement, particularly in areas with high immigrant populations, will virtually cease. The more likely scenario is that this will spawn more racial profiling and will ultimately result in years of litigation.

- **The Bill will result in legal liability for local governments:** Enforcing immigration law will continue to result in legal and financial 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. As stated above, a court found that Sheriff Arpaio from Maricopa County, Arizona engaged in racial profiling when attempting to enforce federal immigration law. Under the proposed bill, the potential for similar lawsuits nationwide only increases. Also, localities will be responsible for the financial settlements and costs of litigation, 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:** The bill provides local law enforcement the authority to act as full-fledged ICE agents, forcing local law enforcement to dually enforce local criminal laws and federal immigration laws. This is irresponsible at a time when local law enforcement departments across the country are already strapped for resources. While the bill claims to provide for financial assistance by offering training and funding sources, this will inevitably fall short. Financially, it is unlikely that any federal reimbursement will make any locality whole. Finally, the bill makes ICE detainers mandatory, which many local jurisdictions have already decided not to enforce in order to preserve local resources.
- **Unnecessary expansion of the criminal deportation offenses, including old, minor misdemeanors:** The immigration law already includes insurmountable barriers due to criminal conduct that prevent people from obtaining or strip them of legal status. These include minor offenses, mistakes that occurred years ago, and offenses for which people they have already served their sentences. This bill will also add additional offenses, including the use of false Social Security Numbers and identity documents, to an already overly broad list of deportable offenses. Thus, many more individuals will become ineligible for legal status and subject to deportation.
- **Further expansion of the “aggravated felony” ground that deprives 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. For example, 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. Additionally, 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 and 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 individuals 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 cases of refugees and asylees, people who fled their home countries out of fear of persecution. An offense that falls within the aggravated felony category will not allow an immigration judge to consider an individual's circumstances exposing refugees and asylees to the risk of persecution after deportation. Aggravated felonies will also prevent individuals from joining their U.S. citizen family members in the U.S., resulting in permanent exile.
- **Overburdens an immigration court system that is already in crisis:** The Bill requires a new fact-finding hearing before immigration officials and eliminates a core evidentiary rule in most deportation cases. Currently for most cases, the immigration officials must rely on certain readily available and official criminal records to deport someone. This rule that has been applied in immigration proceedings for a century is crucial to judicial efficiency, in both criminal and immigration courts, and fairness to defendants. The bill would reverse this rule by having immigration officials "re-try" the criminal case. Consequently, the immigration officials will be required to expend their limited resources holding mini-hearings to determine the underlying criminal conduct in deportation proceedings.
- **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 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 a constitutional or legal error cannot be used as a basis for

deportation. 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 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 categorizes additional offenses as aggravated felonies and increases the bars to obtaining legal status. With competent advice from criminal defense counsel, a noncitizen defendant could only have negotiated a plea in reliance on the existing law at the time of conviction. The provisions in the Bill reach back in time to apply to all crimes no matter when they were committed. Changing the rules in the middle of game not only undermines the criminal justice process, but also violates basic notions of justice.