Unlocking the SAFE Act: U.S. Immigration Detention Policy and Reform in 2014

By Brian Comiskey

At the onset of 2013, the debate over immigration policy surged to the forefront of the national political dialogue when a bipartisan group of eight senators of the so-called “Gang of Eight” introduced a comprehensive reform bill to Congress. Despite the bill’s sweeping passage through the U.S. Senate in June of 2013, the bill ultimately stalled in the House of Representatives and faded into the background. However, while the public eye fixated on the error-ridden rollout of Obamacare this past November, legislative efforts to improve immigration policies have continued with renewed debate over a series of reform bills in the House.

Speaker of the House John Boehner, R-Ohio, proposed an alternative to the comprehensive Senate immigration reform bill, a piecemeal approach to immigration reform introduced a series of bills designed to target one particular issue area. Amongst this legal hodgepodge of bills, H.R. 2278, the Strengthen and Fortify Enforcement Act, or more commonly known as the SAFE Act, has emerged as a contentious legislative measure.

Introduced by Rep. Trey Gowdy, R-S.C., back in June of 2013, the SAFE Act seeks to “amend the Immigration and Nationality Act to improve immigration law enforcement within the interior of the United States, and for other purposes.” Although championed by its 33 Republican cosponsors in the House, critics of the bill argue that the bill’s increased enforcement measures will only place deeper stresses on an already flawed U.S. Immigration and Customs Enforcement (ICE) detention system. Carl Takei, an attorney for the National Prison Project of the American Civil Liberties Union says, “The SAFE Act is every terrible enforcement act rolled into one bill.”

In particular, the bill seeks to enhance border security by providing greater authority of state and local officials, increasing federal detention space and expanding the discretionary power of ICE to permit the indefinite detention of illegal immigrants who cannot be deported.

This capacity to institute an indefinite length of detention for an illegal immigrant draws pointed criticism towards the bill and, in fact, may even make the SAFE Act unconstitutional. As Michelle Brané, the director of the Migrants’ Rights & Justice Program at the Women’s Refugee Commission, explains, “The Supreme Court found that indefinite detention in unconstitutional so if the government cannot deport you in the foreseeable future after those 90 days, they are supposed to find a way to release you within 180 days.” Indeed, this legal precedent traces back to a 2001 Supreme Court case, Zadvydas v. Davis, in which the court ruled in favor of the release of a stateless detainee after it was reasonably demonstrated that he could not be deported.

According to a 2013 report from the National Immigration Law Center, the SAFE Act “attempts to overturn the Zadvydas decision, except for a narrow category of cases. Worse, the provision also appears to restrict court review of indefinite detention for individuals who cannot be removed and limits the decision to continue to detain solely to the discretion of DHS.” Passage of the SAFE Act would provide ICE a greater capacity to indefinitely detain immigrants who cannot be deported due to statelessness or the lack of diplomatic relations between the U.S. and their home countries.

In fact, the SAFE Act is only the latest legislative attempt to overturn the Zadvydas decision. In 2011, Rep. Lamar Smith, R-Texas, and co-sponsor of the SAFE Act, proposed H.R. 1932, better known as the Keep our Communities Safe Act of 2011. H.R. 1932 sought “to amend the
Immigration and Nationality Act to provide for extensions of detention of certain aliens ordered removed, and for other purposes.” Although this bill ultimately failed, in June of 2013, Rep. Smith reintroduced this legislation with H.R. 1901, the Keep our Communities Safe Act of 2013 with the support of Rep. Gowdy, the lead sponsor of the SAFE Act. Like the 2011 attempt, H.R. 1901 did not find success in the House.

Instead of a renewed effort to overturn the Zadvydas decision, the SAFE Act may only be an extension of the realities of current policies regarding border enforcement and immigrant detention. A Republican-backed mandate from 2006 dictates that a minimum of 34,000 immigrants must occupy beds in federal detention facilities daily. Takei elaborates, “The Bush Administration did not trust ICE to detain as many as thought should be detained. Congress mandated this as they did not believe as many people were being detained as there should be.”

The House of Representatives has even approved a fiscal year 2014 budget that allocates more funds than ICE leadership requested. In their official request, the Department of Homeland Security sought the provision of $2 billion to fund ICE operations. However, the fiscal year 2014 Homeland Security Appropriations bill approved by the House Appropriations Committee offers a budget of $5.4 billion for overall ICE operations, with $2.04 billion allocated specifically for Custody Operations.

Critics of the SAFE Act point to the detention quota as the actual pressing flaw in US immigration policy that requires legislative reform and fear that the bill will only increase the pressures on ICE detention. Brané says, “The bed mandate is a very big problem we need to address. As long as there is a bed mandate, there is no room for due process.” The communications director of Detention Watch Network, Silky Shah, adds, “Reduction of detention is necessary for reform. ICE is interpreting what Congress is mandating and they don’t have a handle on it.”

According to the Department of Homeland Security’s 2012 Annual Report, “ICE detained an all time high of 477,523 aliens during 2012, an increase of 11 percent from 2011.” In order to maintain custody operations across more than 250 ICE facilities, ICE has contracted out to private prison companies such as the Corrections Corporation of America and GEO Group. Subsequently, 49 percent of ICE detainees were held in 30 privately operated detention centers, according to a 2012 report by the Detention Watch Network. Shah says, “While ICE is increasing their internal oversight of operations, there is no third party oversight. There is no codification of detention standards for these private contractors.” She believes that the SAFE Act’s call for increased federal detention space and greater enforcement operations will only apply further pressure to contract out to private companies.

To increase oversight, ICE instituted a series of national standards for detention centers starting in 2000 with revisions and updates in 2008 and 2011. Takei notes that the 2011 PBNDS represents the civic detention ideal, but stresses a slow rate of adoption of these standards has kept the majority of immigrant detention facilities on the 2000 and 2008 standards. Still, Maria Navarro, an attorney at New York City’s Legal Aid Society, sees gains from the institution of the 2011 PBNDS. Navarro says, “ICE seems to be following their new standards. Everyone in detention is getting access to some form of legal representation.” Critics feel passage of the SAFE Act threatens to undermine these examples of success from the 2011 PBNDS by shifting the focus away from ensuring nation-wide adoption of the 2011 standards and back towards maintaining the detention quota.

At the moment, movement of the SAFE Act has remained on standby since the House Judiciary
Committee approved it shortly after its introduction back in June of 2013. The bill received the endorsement of the chair of the House Judiciary Committee, Rep. Bob Goodlatte, R-Va., and passed the Committee with 20-15 vote divided by party lines.

However, floor debate in September over the SAFE Act sparked an outbreak of nation-wide protests by immigrants and immigrant rights advocates. More recently, this past January, the United States Conference of Catholic Bishops’ Justice for Immigrants campaign launched a “national call-in day to Congress” to oppose the passage of the SAFE Act.

Despite this growing choir of critics, in an email to The State on February 3, 2014, bill sponsor Rep. Gowdy reiterated his call for immigration reform and the passage of the SAFE Act. The email stated, “The House Judiciary Committee has already tackled some aspects of our system that are important to our economy and national security, including national mandatory e-verify, an agricultural guest worker program, STEM visas and legislation I introduced called the SAFE Act, to ensure internal enforcement. Looking forward, immigration reform must include border security that is real and verifiable; internal security that includes state and local law enforcement; and a plan that works for Americans.”

Nearly a year after the last failed attempt, immigration reform has reemerged as the central focus for the Obama Administration in its 2014 legislative agenda. This renewal of the debate and Rep. Gowdy’s position as chairman of the House Judiciary Subcommittee on Immigration and Border Security breathes some life back into the SAFE Act. However, in the eyes of the bill’s critics, the passage of the SAFE Act could mortally wound the successful operations and constitutional integrity of the ICE detention system.