

# Immigration Enforcement: Major Provisions in H.R. 2278, the Strengthen and Fortify Enforcement Act (SAFE Act)

(name redacted)

Legislative Attorney

(name redacted)

Legislative Attorney

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## Summary

Reforming the nation's immigration laws has been the subject of significant legislative activity in the 113<sup>th</sup> Congress. In June, the Senate passed an omnibus immigration bill (S. 744) that addresses a broad array of issues, including immigration enforcement and border security, verification of aliens' employment eligibility, the temporary and permanent admission of foreign nationals into the country, and the creation of mechanisms for some unauthorized aliens to acquire legal status. The House, in contrast, has focused legislative activity on a number of stand-alone bills that would reform specific aspects of immigration law. The House Judiciary Committee has ordered several of these bills to be reported, including proposals that focus on strengthening immigration control and enforcement.

H.R. 2278, the Strengthen and Fortify Enforcement Act (SAFE Act), is aimed at increasing immigration control and enforcement, particularly within the interior of the United States. Many of the bill's provisions appear intended to address and override court decisions that have narrowly construed existing statutory authorities. The bill would encourage states and localities to play a greater role in immigration enforcement; heighten penalties for violations of federal immigration laws; impose additional requirements concerning background checks and screening of aliens seeking admission, status (including naturalization), or benefits under immigration law; and clarify or establish rules to facilitate the detention and removal of aliens who lack authorization to remain in the United States, particularly when such aliens have been involved in criminal activity. During Judiciary Committee hearings, several significant amendments were made to the bill, including provisions which would generally make unlawful presence by an alien a criminal offense, require the establishment of a biometric entry/exit system within two years of the bill's enactment, and generally constrain the exercise of prosecutorial discretion in the removal process. On June 18, 2013, the committee completed its markup of the SAFE Act, and ordered it to be reported, as amended, by a vote of 20-15.

While the SAFE Act contains a few provisions which resemble those found in S. 744, there are notable differences in both the breadth of the bills' enforcement provisions and their approach to the unauthorized alien population. The SAFE Act generally imposes more significant penalties for immigration-related violations and more stringent requirements relating to the detention and removal of aliens than the Senate-passed bill. Perhaps most significantly, the SAFE Act would make an alien's knowing unauthorized presence a criminal offense, whereas the Senate bill would not make unlawful presence a crime. In fact, the Senate bill would establish procedures whereby some of the current unauthorized population could potentially acquire legal status, while neither the SAFE Act nor the other bills ordered to be reported by the House Judiciary Committee, to date, make similar provisions for legalization. The SAFE Act more closely resembles the last comprehensive immigration enforcement legislation passed by the House, H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (109<sup>th</sup> Congress), though it differs from the earlier legislation on many specific matters.

This report discusses the SAFE Act, as reported out of the House Judiciary Committee. For discussion of other immigration reform proposals in the 113<sup>th</sup> Congress and prior Congresses, see CRS Report R43097, *Comprehensive Immigration Reform in the 113<sup>th</sup> Congress: Major Provisions in Senate-Passed S. 744*, by (name redacted) and (name redacted), and CRS Report R42980, *Brief History of Comprehensive Immigration Reform Efforts in the 109<sup>th</sup> and 110<sup>th</sup> Congresses to Inform Policy Discussions in the 113<sup>th</sup> Congress*, by (name redacted).

## Contents

|   |    |
|---|----|
| Introduction.....   | 1  |
| Immigration-Related Sanctions .....   | 2  |
| Immigration-Related Crimes .....  | 2  |
| Unlawful Entry, Presence, and Reentry.....  | 3  |
| Fraud-Related Crimes .....  | 5  |
| Alien Smuggling .....   | 5  |
| Other Modifications to Criminal Laws .....  | 6  |
| Immigration Consequences of Criminal and Terrorist Activity.....                      | 7  |
| Definition of Aggravated Felony.....  | 7  |
| Grounds of Inadmissibility and Deportability.....                                     | 8  |
| Ineligibility for Relief from Removal for Criminal Aliens .....                       | 10 |
| Limiting Relief for Removal on Security-Related Grounds.....                          | 11 |
| Consideration and Review of Immigration-Related Applications and Petitions .....      | 13 |
| Detention and Removal of Aliens.....  | 14 |
| Detention of Aliens Pending Removal .....   | 15 |
| Detention Following an Order of Removal.....  | 15 |
| Detention During Removal Proceedings.....   | 17 |
| Removal of Criminal Aliens.....   | 19 |
| Judicial Review of Voluntary Departure and Reinstated Removal Orders.....             | 20 |
| Visa Issuance and Security .....  | 21 |
| Visa Issuance .....   | 21 |
| Visa Revocation and Review.....   | 23 |
| Visa Security Program.....  | 23 |
| Student Visas .....   | 24 |
| Naturalization Reform .....   | 26 |
| Limiting Naturalization Eligibility on Account of Criminal or Terrorist Activity..... | 26 |
| Denaturalization Due to Terrorist Activity .....                                      | 27 |
| Other Naturalization Reforms .....  | 29 |
| Immigration Enforcement Operations .....  | 30 |
| Immigration Enforcement Resources and Arrest Authority .....                          | 30 |
| Prosecutorial or Enforcement Discretion .....   | 32 |
| Access to Federal Lands for Immigration Enforcement Activities.....                   | 33 |
| Biometric Entry-Exit System.....  | 33 |
| State and Local Involvement in Enforcement.....                                       | 34 |
| Express Authorization of State and Local Measures and Actions .....                   | 35 |
| Information Sharing Among Federal and State and Local Officials.....                  | 36 |
| Holding Aliens for Transfer to Federal Custody .....                                  | 37 |
| Federal-State Partnerships to Identify Removable Aliens .....                         | 38 |
| Training and Immunity for State and Local Officials.....                              | 39 |

## Contacts

|                                 |    |
|---------------------------------|----|
| Author Contact Information..... | 41 |
|---------------------------------|----|

|                     |    |
|---------------------|----|
| Key CRS Staff ..... | 41 |
|---------------------|----|

## Introduction

There has been significant activity in the 113<sup>th</sup> Congress concerning legislative proposals to reform the nation's immigration laws. In June, the Senate passed an omnibus immigration bill (S. 744) that addresses a broad array of issues, including immigration enforcement and border security, verification of aliens' employment eligibility, the temporary and permanent admission of foreign nationals into the country, and the creation of mechanisms for some unauthorized aliens to acquire legal status.<sup>1</sup> The House, in contrast, is considering a number of stand-alone bills that would reform specific aspects of immigration law.<sup>2</sup> The House Judiciary Committee has ordered several of these bills to be reported. Some of these legislative proposals contain provisions that broadly correspond with provisions found in the Senate bill, whereas other House proposals take a markedly different approach.

H.R. 2278, the Strengthen and Fortify Enforcement Act (SAFE Act), is aimed at increasing immigration control and enforcement, particularly within the interior of the United States. Many of the SAFE Act's provisions appear intended to address and override court decisions that have narrowly construed existing statutory authorities for immigration enforcement. The bill would heighten penalties associated with violations of federal immigration laws; clarify or establish rules intended to facilitate the detention and removal of aliens who lack authorization to remain in the United States, particularly when such aliens have been involved in criminal activity; impose additional requirements concerning security-related background checks and screening of aliens seeking admission, status, or benefits under immigration law; and encourage states and localities to play an increased role in immigration enforcement.

During Judiciary Committee hearings, several significant amendments were made to the bill,<sup>3</sup> including provisions which would generally make unlawful presence by an alien a criminal offense, require the establishment of a biometric entry/exit system within two years of the bill's enactment, and generally constrain the exercise of prosecutorial discretion in the removal process.<sup>4</sup>

While the SAFE Act contains a few provisions which resemble those found in S. 744, there are notable differences in both the breadth of the bills' enforcement provisions and their approach to the unauthorized alien population. The SAFE Act generally imposes more significant penalties for immigration-related violations and more stringent requirements relating to the detention and removal of aliens than the Senate-passed bill. Perhaps most significantly, the SAFE Act would make an alien's knowing unauthorized presence a criminal offense, whereas the Senate bill would

<sup>1</sup> For background, see CRS Report R43097, *Comprehensive Immigration Reform in the 113<sup>th</sup> Congress: Major Provisions in Senate-Passed S. 744*, by (name redacted) and (name redacted).

<sup>2</sup> See, e.g., H.R. 1772 (addressing unauthorized alien employment and employer verification); H.R. 1773 (concerning temporary admission of agricultural workers); H.R. 2131 (concerning high-skilled immigration).

<sup>3</sup> Manager's Amendment to H.R. 2278 (Goodlatte), adopted by a vote of 21-16; Amendment offered to H.R. 2278 by Rep. Steve King, adopted by vote of 19-17.

<sup>4</sup> The term prosecutorial discretion is commonly used to describe the wide latitude that prosecutors have in determining when, whom, how, and even whether to prosecute apparent violations of the law. The Immigration and Naturalization Service (INS) and, later, the Department of Homeland Security (DHS) and its components have historically described themselves as exercising prosecutorial discretion in immigration enforcement (e.g., deciding which aliens to arrest and place in removal proceedings). For more on prosecutorial discretion in the immigration context, see CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by (name redacted) and (name redacted).

not make unlawful presence a crime. In fact, the Senate bill would establish procedures whereby some of the current unauthorized population could potentially acquire legal status, while neither the SAFE Act nor the other bills ordered to be reported by the House Judiciary Committee, to date, make similar provisions for legalization. Indeed, the SAFE Act's provisions much more closely resemble the last comprehensive immigration enforcement legislation passed by the House, H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005,<sup>5</sup> though it differs from the earlier legislation on many specific matters.

This report describes and analyzes the SAFE Act, as ordered reported out of the House Judiciary Committee. The report's discussion of SAFE Act is arranged by issue area, and considers how the bill modifies current laws concerning immigration-related sanctions; the consideration and review of immigration-related applications and petitions; the detention and removal of aliens; visa issuance and security; naturalization reform; federal immigration enforcement operations; and state and local involvement in immigration enforcement. It will be updated as events require.

## Immigration-Related Sanctions

In addition to establishing a comprehensive set of rules governing the admission, continued presence, and departure of foreign nationals, the Immigration and Nationality Act (INA) currently provides for an enforcement regime to deter violations of these rules. Some violations may be subject to criminal fines and imprisonment; others are subject to civil monetary penalties; and still others, if committed by an alien, may be grounds for denying the alien admission into the country or removing the alien from the United States.<sup>6</sup>

The SAFE Act seeks to bolster this enforcement regime in various ways. It would expand the scope of many immigration-related criminal statutes, including by making unlawful presence a criminal offense. It would also expand the grounds for removability to cover additional types of criminal activity, and broaden the INA's definition of "aggravated felony" to include more criminal offenses. In addition, it would expand the immigration consequences of criminal activity and certain activities posing a danger to U.S. security (e.g., terrorist activity).

## Immigration-Related Crimes

Congress has established criminal penalties for a variety of activities that undermine immigration rules and requirements (and convictions for some of these offenses, in turn, may have implications upon aliens' ability to remain in the United States). Some criminal offenses concern conduct taken by aliens in contravention of immigration rules which govern their admission and

<sup>5</sup> For more information on H.R. 4437, see generally CRS Report R42980, *Brief History of Comprehensive Immigration Reform Efforts in the 109<sup>th</sup> and 110<sup>th</sup> Congresses to Inform Policy Discussions in the 113<sup>th</sup> Congress*, by (name redacted).

<sup>6</sup> Alien removal and related administrative proceedings have been viewed as a civil, rather than criminal matter, as the primary function is to end a violation of the nation's immigration laws rather than punish wrongdoing. *See, e.g., Padilla v. Kentucky*, — U.S. —, 130 S. Ct. 1473, 1481 (2010) ("We have long recognized that deportation is a particularly severe 'penalty,' but it is not, in a strict sense, a criminal sanction.") (internal citations omitted); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry.... The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.").

presence in the United States, whereas others may be applicable to both aliens and U.S. citizens who facilitate violations of federal immigration law. Several provisions of federal law, found either in the INA or in the U.S. Criminal Code, impose criminal penalties for various activities that undermine immigration rules and requirements, including entering the country unlawfully, forging or using falsely made documents to satisfy immigration requirements, and bringing in and harboring certain aliens. The SAFE Act would make changes to several existing immigration-related criminal offenses, typically by widening their scope and by heightening the available penalties.

## **Unlawful Entry, Presence, and Reentry**

Currently, under the INA, an alien who unlawfully enters the United States not only is subject to removal, but also potentially faces criminal sanctions. INA Section 275 makes unlawful entry a criminal offense punishable as a misdemeanor in the case of a first violation, and punishable as a felony in the case of a subsequent conviction.<sup>7</sup> INA Section 276 similarly makes it a felony for an alien to unlawfully reenter the United States in violation of an outstanding order of removal. However, unlawful presence by an alien is not a criminal offense, absent certain aggravating factors.

Section 315 of the SAFE Act would rewrite INA Section 275 and significantly expand its scope, making it a criminal offense for an alien to knowingly (1) violate the terms of admission or parole, or (2) be unlawfully present in the country.<sup>8</sup> First time offenders would generally be subject to a fine and/or imprisonment for up to six months, but heightened penalties would be available if the alien had prior criminal convictions. A second or subsequent conviction for illegally entering or crossing the border of the United States would be subject to felony penalties, as would a second or subsequent offense for violating the terms of admission or parole into the country. However, a second or subsequent offense under the provision more generally criminalizing unlawful presence would remain a misdemeanor (absent prior criminal convictions).

For purposes of the amended statute, “unlawful presence” would be defined with reference to INA Section 212(a)(9)(B),<sup>9</sup> and would also incorporate that provision’s exceptions. Accordingly, unlawful presence would not cover any unauthorized period while the alien was a minor. Criminal liability would also generally not attach to unauthorized aliens with bona fide pending asylum applications, battered women or children, or victims of severe forms of trafficking.<sup>10</sup>

Section 315 of the bill would also amend INA Section 275 to cover instances where an alien illegally “crosses the border.” This provision responds to jurisprudence interpreting the current

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<sup>7</sup> The statute also includes separate provisions imposing criminal penalties for immigration fraud through marriage or a commercial enterprise. INA §275(c)-(d), 8 U.S.C. §1325(c)-(d).

<sup>8</sup> As introduced, the SAFE Act would have made unlawful presence a criminal offense only in the case of aliens who violated the terms or conditions of their admission or parole for at least 90 days. However, the provision was amended during the House Judiciary Committee’s markup by the manager’s amendment, which eliminated the 90-day requirement for liability to attach to aliens who violate the terms or conditions of their admission. The amendment also added a provision which more generally criminalized unlawful presence. Manager’s Amendment to H.R. 2278.

<sup>9</sup> INA Section 212(a)(9)(B) generally bars aliens who have been unlawfully present for more than 180 days, but less than one year, from admission for three years. Those who have been unlawfully present for one year or longer are inadmissible for ten years.

<sup>10</sup> INA §212(a)(9)(B)(iii), 8 U.S.C. §212(a)(9)(B)(iii).



unlawful entry statute as not covering situations where an alien crosses the border while under the surveillance of law enforcement.<sup>11</sup> Unlawful entry or presence would also be deemed to constitute continuing offenses until an alien was discovered by an immigration, customs, or agriculture officer, meaning that the statute of limitations for prosecuting such offenses would not begin until the alien had been detected by the designated federal authorities. Under current law, the crime of unlawful entry ends (and the statute of limitations for prosecution is triggered) once the entry is completed.<sup>12</sup> The bill would also increase the criminal penalties associated with unlawful entry/border crossing offenses in certain situations.

In revising INA Section 275, the SAFE Act also eliminates certain provisions that currently impose criminal penalties upon persons who engage in marriage-based immigration fraud or establish a commercial enterprise for the purposes of evading immigration laws. It is unclear whether this omission was the result of a drafting error or due to a belief that such conduct could be punished under other provisions of current law.

Section 316 of the bill would amend INA Section 276, which generally makes it a felony for an alien who was previously removed from the United States to reenter the country while the order of removal remains in effect.<sup>13</sup> The bill would expand the statute's scope to cover instances where a removed alien thereafter crossed the border without authorization, even if such conduct might not constitute "entry" into the country. It would also modify the available penalty enhancements for aliens convicted of a second or subsequent offense under INA Section 276, or who had been convicted of certain crimes prior to their removal. It would eliminate an existing provision in INA Section 276 which allows an alien charged with unlawful reentry, in limited circumstances, to challenge the validity of the removal order he is alleged to have violated. However, this provision may be in tension with the Supreme Court's ruling in *United States v. Mendoza-Lopez*, where the Court held that due process considerations required that "a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted[,] where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review."<sup>14</sup>

<sup>11</sup> See *United States v. Gonzalez-Torres*, 309 F.3d 594, 598 (9<sup>th</sup> Cir. 2002) ("To 'enter,' an alien must cross the United States border free from official restraint ...When under surveillance, the alien 'has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population.' On the other hand, if an alien is not discovered until some time after exercising his free will within the United States, he has entered free from official restraint.") (internal citations omitted).

<sup>12</sup> Courts have recognized that, under current law, the act of unlawful entry ends once the alien's entry has been completed, triggering the federal statute of limitations for prosecuting the offense. See *United States v. Rincon-Jimenez*, 595 F.2d 1192 (9<sup>th</sup> Cir. 1979). Accordingly, a prosecution for unlawful entry cannot proceed unless instituted within five years of the offense having been committed. 18 U.S.C. §3282.

<sup>13</sup> Aliens are generally barred from readmission for a particular period of time after having been removed from the country, unless they first obtain the consent of immigration authorities. The duration of this bar depends upon a number of factors. See INA §212(a)(9), 8 U.S.C. §1182(a)(9).

<sup>14</sup> 481 U.S. 828 (1987). Under the current version of the unlawful reentry statute, a criminal defendant is permitted to challenge the propriety of an earlier removal order if (1) the criminal defendant had exhausted any administrative remedies available to seek relief against the order; (2) the removal proceedings under which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair. INA §276(d), 8 U.S.C. §1326(d).



## Fraud-Related Crimes

Given that an estimated 11.1 million aliens are residing in the United States without legal authorization,<sup>15</sup> it is reasonable to presume that many of these unauthorized aliens are committing some type of immigration-related document fraud, particularly those who are employed.<sup>16</sup>

The SAFE Act would modify several existing criminal sanctions applicable to identify theft and immigration-related document fraud. Section 312 of the bill would amend the federal statutes concerning fraud involving identification documents and aggravated identity theft to cover instances where the offender uses a means of identification that is not his own, regardless of whether it belongs to another person.<sup>17</sup>

Section 317 of the bill would rewrite Chapter 75 of the U.S. Criminal Code, which addresses immigration document and passport fraud. Notable changes made by the bill include increasing the maximum penalties available for some offenses; lowering the degree of mental culpability required for criminal liability to attach for certain offenses; specifying that attempts or conspiracies to commit an offense under the Chapter are punishable to the same degree as a completed offense; and making it a crime to defraud any person on a matter that is authorized by or arises under immigration laws. Section 409 of the bill would also amend Chapter 75 to add specific penalties for fraud committed by the owner or personnel of an education institution with respect to the institution's participation in the Student and Exchange Visitor Program (SEVP, discussed later in "Student Visas"). Additionally, Section 318 of the bill would amend the federal civil forfeiture statute to permit the seizure and forfeiture of any property or proceeds traceable to a violation of Chapter 75 of the U.S. Criminal Code.

## Alien Smuggling

INA Section 274, commonly referred to as the alien smuggling and harboring statute, currently proscribes various activities that facilitate aliens entering and living in the United States without lawful status.<sup>18</sup> Section 314 of the SAFE Act would rewrite and reorganize INA Section 274. As amended, the statute would, among other things, cover additional extraterritorial conduct which assists aliens seeking to unlawfully enter the United States; grant federal courts extraterritorial jurisdiction over proscribed conduct; expand the scope of property that may be subject to forfeiture on account of its relationship to a violation of INA Section 274; and impose heightened penalties (including minimum sentencing requirements) for many smuggling offenses. In rewriting the smuggling statute, the bill eliminates the provision in current law imposing criminal penalties upon persons that hire 10 or more aliens known to have been smuggled into the country.

<sup>15</sup> Jeffrey Passel and D'Vera Cohn, Pew Hispanic Center, *Unauthorized Immigrants: 11.1 Million in 2011*, Dec. 6, 2012, available at <http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011/>.

<sup>16</sup> INA Section 274A requires employers to verify the employment eligibility of newly hired workers by reviewing certain identity and work eligibility documents; see CRS Report R40002, *Immigration-Related Worksite Enforcement: Performance Measures*, by (name redacted).

<sup>17</sup> H.R. 2278, §312. The current language of these statutes concerns the knowing use, possession, or transfer of a means of identification for "another person." 18 U.S.C. §§1028 (identification document fraud), 1028A (aggravated identification document fraud). Courts have construed this phraseology to require the government to demonstrate that the defendant was aware that the means of identification belonged to an actual person. *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *United States v. Aslan*, 644 F.3d 526 (7<sup>th</sup> Cir. 2011).

<sup>18</sup> INA §274(c), 8 U.S.C. §1324(c).

Section 314 would also modify language in INA Section 274 concerning authority to make arrests for violations of the alien smuggling and harboring statute. Under current law, arrests may be made by designated immigration officers or any other officer “whose duty it is to enforce criminal laws”—a clause that has been interpreted to permit arrests by state and local police. As revised by Section 314, however, no person is authorized to arrest persons for violations of INA Section 274 except officers and employees designated by the Secretary of the Department of Homeland Security (DHS), or other “officers responsible for the enforcement of Federal criminal laws.” It is possible that the amended language could be construed as barring state and local police from arresting persons suspected of violating INA Section 274, as the enforcement of federal criminal laws might not be considered the “responsibility” of sub-federal officers, notwithstanding their ability to make arrests for many federal criminal law violations as a matter of discretion.<sup>19</sup> On the other hand, as discussed later,<sup>20</sup> Section 102 of the SAFE Act generally authorizes state and local police to make arrests for violations of federal immigration law “to the same extent as Federal law enforcement personnel,” and the amended Section 274 could potentially be construed in light of this provision.

The bill would also make persons who use firearms during the commission of certain violations of INA Section 274 subject to additional criminal penalties under the U.S. Criminal Code.<sup>21</sup>

## Other Modifications to Criminal Laws

Section 304 of the bill would amend the criminal statute barring the possession of guns or sale of guns to certain categories of aliens, so as to more broadly cover any alien not admitted for lawful permanent residence (with limited exceptions).<sup>22</sup> Section 305 would establish a uniform, 10-year statute of limitations for the prosecution of federal crimes concerning peonage, human trafficking, document fraud, and several other immigration-related offenses currently found in the INA and the U.S. Criminal Code (many of these offenses are currently subject to a five-year statute of limitations).<sup>23</sup> Section 313 would amend the federal money laundering statute to cover laundering in connection with offenses under INA Section 274(a) (alien smuggling and harboring) and 18 U.S.C. Section 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), and it would also make a few non-immigration specific alterations to the money laundering statute. Section 323 of the bill would amend INA Section 243(a), which establishes criminal penalties for aliens who fail to comply with an order of removal, to cover aliens described in either the grounds for deportation or inadmissibility who fail to comply with a removal order. Current law only covers the grounds for deportability.

<sup>19</sup> See, e.g., *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9<sup>th</sup> Cir. 1983) (The “general rule is that local police are not precluded from enforcing federal statutes.”). For discussion of state and local enforcement of federal immigration laws, see CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by (name redacted d) and (name redacted).

<sup>20</sup> See *infra* at “State and Local Involvement in Enforcement.”

<sup>21</sup> H.R. 2278, §314(c) (amending 18 U.S.C. §924(c)).

<sup>22</sup> The current prohibition, found in 18 U.S.C. Section 922, generally covers unlawfully present aliens and those aliens who were admitted on a nonimmigrant visa, but it has been construed as not covering those aliens who were temporarily admitted into the country without a visa (e.g., foreign nationals admitted under the visa waiver program). For background on the Executive’s interpretation of the scope of the federal criminal prohibition on firearms sales to aliens, see Dep’t of Justice, Office of Legal Counsel, Nonimmigrant Aliens and Firearms Disabilities under the Gun Control Act, Oct. 28, 2011, available at <http://www.justice.gov/olc/2011/nonimmigrant-firearms-opinion.pdf>.

<sup>23</sup> 18 U.S.C. §3282 (providing that in non-capital cases and unless otherwise specified, the statute of limitations for indictment for a federal crime is five years after the offense was committed).

## Immigration Consequences of Criminal and Terrorist Activity

Both criminal activity and involvement in conduct posing a threat to U.S. security (including terrorist activity) currently may potentially bar an alien from entering or remaining in the United States, obtaining relief from removal (e.g., asylum), qualifying for immigration benefits or naturalization, or re-entering the country following departure. With respect to criminal activity, several specific criminal offenses or general categories of crimes constitute grounds for inadmissibility and deportability. The most significant immigration consequences typically attach to aliens convicted of any offense defined as an “aggravated felony” by the INA. The SAFE Act would include additional offenses within the definition of “aggravated felony,” and expand the criminal grounds for removability. It would also limit criminal or terrorist aliens’ eligibility for relief from removal.

### Definition of Aggravated Felony

INA Section 101(a)(43) currently provides a list of crimes deemed to be aggravated felonies for immigration purposes; a list which Congress has repeatedly expanded over the years to cover additional crimes. The list includes many specific offenses (e.g., violations of particular federal tax statutes), as well as several broad categories of crimes (e.g., crimes of violence). Moreover, the definition is not limited to offenses that are punishable as felonies (i.e., offenses punishable by at least a year and a day imprisonment); certain misdemeanors are also defined as aggravated felonies for INA purposes. This term can potentially cover designated crimes regardless of whether they are violations of federal, state, or foreign law.

The SAFE Act would make several changes to the aggravated felony definition. Section 301 would add more crimes to the list of aggravated felonies (e.g., manslaughter,<sup>24</sup> any offense of a sexual nature involving a person who is under 18 years of age),<sup>25</sup> expand the scope of alien smuggling offenses and immigration-related document fraud offenses covered under the aggravated felony definition,<sup>26</sup> and make a second conviction for driving while intoxicated an

<sup>24</sup> The current definition of “aggravated felony” lists murder and crimes of violence as falling under its scope, but these crimes may not cover instances where a person causes the death of another due to negligence or perhaps recklessness. *See* *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (alien’s conviction for causing serious bodily injury to another while driving under the influence did not constitute a “crime of violence,” as the statute that did not require proof of mental state). The inclusion of the crime of manslaughter would appear to cover these situations.

<sup>25</sup> Although “sexual abuse of a minor” presently constitutes an aggravated felony, this might not cover every sexual offense involving a person under 18. The Board of Immigration Appeals (BIA) has interpreted “sexual abuse of a minor” to cover a broad array of sexual offenses, including those, like indecent exposure, that do not involve direct physical contact with the victim. *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (BIA 1999) (interpreting “sexual abuse of a minor” with reference to the definition of “sexual abuse” of a child under 18 U.S.C. Section 3509). While this interpretation has been deemed permissible by the majority of reviewing appellate courts, the Ninth Circuit Court of Appeals has taken the view that the current provision applies in a much narrower set of circumstances. *See, e.g., Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9<sup>th</sup> Cir. 2008) (interpreting the term “sexual abuse of a minor” with reference to the federal crime of sexual abuse of a minor or ward, 18 U.S.C. §2243, and stating that offenses falling under the definition must satisfy “four elements: (1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor”).

<sup>26</sup> The bill would make any offense under INA Section 274, the alien smuggling and harboring statute, an aggravated felony. It would also make any offense under Chapter 75 of the U.S. Criminal Code (concerning passport and immigration-document fraud) an aggravated felony when the term of imprisonment is at least one year (subject to certain preexisting exceptions for certain first-time offenses involving immediate family members). H.R. 2278, §§301, 307.

aggravated felony, regardless of whether such offense constituted a misdemeanor or felony under state law.

Section 301 would also provide that offenses under INA Section 275 (which, as amended, addresses both unlawful entry and presence by an alien) or INA Section 276 (unlawful reentry by a removed alien) constitute aggravated felonies, so long as the length of imprisonment for the offense is *at least a year*. Although the SAFE Act would amend INA Section 275 to criminally sanction both unlawful entry and unlawful presence, neither offense would normally constitute an aggravated felony in the case of a first offense. However, unlawful entry or unlawful presence could constitute aggravated felonies in other circumstances, including when the offender had previously been convicted of certain crimes.<sup>27</sup>

In addition, although the existing definition of “aggravated felony” provides that attempts or conspiracies to commit listed offenses constitute aggravated felonies themselves, section 301 would expand this clause to cover the soliciting, aiding, abetting, counseling, commanding, inducing, or procuring of the commission of any offense listed as an aggravated felony. The bill would further specify that, in cases where length of imprisonment may determine whether or not an offense is an “aggravated felony,” the term includes those offenses where the length of imprisonment was based on recidivism or other enhancements.

The modifications made to the “aggravated felony” definition generally would be retroactive in effect, applying to conduct and convictions occurring before, on, or after the bill’s enactment. A second or subsequent conviction for drunk driving, however, would only constitute an aggravated felony if it occurred on or after the bill’s enactment.

## Grounds of Inadmissibility and Deportability

Currently, certain conduct by aliens may disqualify them from admission to the United States (grounds of inadmissibility) or, if they have been lawfully admitted, make them removable (grounds of deportability).<sup>28</sup> There is considerable overlap between the grounds of inadmissibility and deportability, but they are not identical. Some grounds of inadmissibility and deportability are subject to waiver, whereas others are not. Aliens removable on certain grounds may also be statutorily barred from many forms of relief from removal, such as asylum.<sup>29</sup>

The SAFE Act includes several provisions that would expand or otherwise modify the grounds for inadmissibility and deportability, particularly as they relate to criminal activity. Specifically, Section 302 of the bill would: (1) make an aggravated felony conviction (which is already a ground for deportability) an express ground for inadmissibility;<sup>30</sup> (2) modify the grounds of

<sup>27</sup> Notably, pursuant to amendments made by Section 315 of the bill, a first-time conviction for unlawful entry or unlawful presence could be subject to more than a year imprisonment if the offender had prior criminal convictions, including three or more misdemeanors or a felony.

<sup>28</sup> The grounds of inadmissibility generally apply to aliens who have not been lawfully admitted into the United States, including (1) aliens outside the United States who seek to obtain a visa or admission at a port of entry; (2) aliens within the United States who seek to adjust their status to that of LPR status; and (3) aliens who entered the United States unlawfully. The grounds for deportability, in contrast, apply to aliens who were lawfully admitted into the United States.

<sup>29</sup> For further background, see CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by (name redacted).

<sup>30</sup> Although aggravated felony convictions are a ground for removal of lawfully admitted aliens, if committed after their (continued...)

inadmissibility to cover crimes of domestic violence, child abuse, stalking, and violation of protection orders (all of which are already grounds for deportability); (3) provide that certain firearms offenses would make an alien inadmissible; and (4) amend both the grounds for inadmissibility *and* deportability to cover additional fraud-based offenses (e.g., Social Security fraud, identification document fraud). These changes would apply to any conduct which occurs either prior to or after the bill's enactment, and to removal proceedings filed, pending, or reopened on or after such date.

Section 303 of the bill would also amend the ground of inadmissibility for aliens who seek to enter the United States with the intent to engage in specific activities threatening national security (e.g., espionage). The bill would amend the provision to expressly cover aliens who had previously engaged in proscribed conduct and thereafter seek admission, regardless of whether they also intend to engage in such conduct within the United States.

Section 311 of the bill would establish new grounds of inadmissibility and deportability based on membership in a criminal street gang or participation in its activities.<sup>31</sup> Aliens removable on the basis of involvement with criminal street gangs would also be subject to mandatory detention throughout removal proceedings,<sup>32</sup> and would be made ineligible for various forms of relief from removal, including asylum. The bill would amend the INA to define “criminal gang” to cover, for immigration purposes, (1) entities of five or more persons which have a primary purpose of, and engage or have in the past five years engaged in, the commission of one or more enumerated offenses; and (2) entities that have been designated by the Secretary of DHS, in consultation with the Attorney General, as meeting these criteria.<sup>33</sup>

(...continued)

admission, such convictions are not necessarily a ground for inadmissibility for aliens who have not been admitted, unless such aliens had been previously removed from the country. INA §212(a)(9)(A), 8 U.S.C. §1182(a)(9)(A). Relatedly, Section 302(a)(3)(B) of the bill would also limit immigration authorities' ability to waive the grounds of inadmissibility for aliens convicted of aggravated felonies.

<sup>31</sup> The changes made by Section 311 would apply to acts occurring before, on, or after the date of the bill's enactment.

<sup>32</sup> For further discussion of mandatory detention, see CRS Report RL32369, *Immigration-Related Detention*, by (name redacted).

<sup>33</sup> Section 311 would also establish a separate statutory mechanism for the Secretary of DHS to designate entities as “criminal gangs,” which appears to authorize the Secretary to designate a group as a criminal gang when it either (1) constitutes a “criminal gang,” as defined by the INA; or (2) otherwise “poses a significant risk that threatens the security and the public safety of United States nationals or the national security, homeland security, foreign policy, or economy of the United States.” This would appear to enable the Secretary to designate a group as a criminal gang on the basis of the security or public interest threat it poses, even if it does not fulfill the definitional requirements that would ordinarily be necessary to constitute a “criminal gang.”

Although the definition of “criminal gang” added by the SAFE Act refers to entities that have been designated as such by the Secretary of DHS, it does not directly state that such designation must be pursuant to the statutory mechanism provided by the bill, and arguably, the statutory designation mechanism established by the bill could be construed as separate and distinct. While the “criminal gang” definition permits the Secretary to designate entities as falling under its purview, it goes on to state that such designations must be based upon those entities “meeting [the definition's] criteria” for inclusion. This language could be construed to mean that designated entities must include five or more persons and be engaged in specific criminal activity described in the definition; criteria that need not be satisfied in order for a group to be designated as a criminal gang under the statutory designation mechanism established under the bill. Moreover, the gang-related grounds for inadmissibility and deportability added by the bill refer to entities falling under the purview of the INA's definition of “criminal gang,” rather than persons associated with groups designated as “criminal gangs” under the separate statutory designation mechanism. On the other hand, if the statutory designation mechanism is not read in conjunction with the INA's definition of “criminal gang,” thereby allowing the Secretary to designate groups as covered by the definition even if they do not satisfy the typical requirements for inclusion, then the intended function of the statutory designation mechanism is unclear.



Other provisions in the SAFE Act would expand the grounds of inadmissibility and deportability to cover aliens who violate the federal requirements concerning the registration of sex offenders. These modifications would apply to acts or convictions occurring on, before, or after the bill's date of enactment. The bill would also bar U.S. citizens and lawful permanent residents (LPRs) convicted of sex-related offenses listed in the INA's definition of "aggravated felony" from sponsoring aliens for admission, unless the Secretary of DHS determines that the potential sponsor poses no risk to the alien being sponsored.<sup>34</sup>

Section 602 would re-state the grounds of inadmissibility for aliens previously removed, so that they refer to aliens who seek "admission not later than" (i.e., before) a certain number of years after removal, as opposed to "admission within" a certain number of years of removal. Judging from the caption of the section, this change is apparently intended to deter aliens ordered removed from remaining in the United States unlawfully, although it is unclear that the amended language would necessarily be construed in a significantly different way than the current language has been.

The bill would also provide that, in cases where a conviction record does not conclusively establish whether the underlying conduct was a "crime of violence" (a category of crimes designated as aggravated felonies), immigration authorities may, in certain instances, consider evidence that is extrinsic to the conviction record that clearly establishes that the offense was a crime of violence.<sup>35</sup> The bill would also permit the examination of evidence extrinsic to an alien's conviction record in certain instances to assess whether the conviction was based on conduct constituting a crime of moral turpitude or a domestic violence offense that would make the alien removable. These provisions appear to respond to certain federal courts' rejection of immigration authorities' consideration of evidence outside the record of conviction when assessing whether the alien's criminal conviction makes him or her removable.<sup>36</sup> These modifications would apply to acts or convictions occurring on, before, or after the bill's enactment.

## Ineligibility for Relief from Removal for Criminal Aliens

The INA currently provides that aliens who engage in certain types of criminal or other proscribed conduct are ineligible to receive various forms of relief from removal that are available to other aliens. Moreover, criminal aliens are often subject to more streamlined removal

<sup>34</sup> H.R. 2278, §321. As currently written, the relevant INA provision restricts sponsorship by U.S. citizens and LPR's who have been convicted of a "specified offense against a minor," which is defined in 42 U.S.C. Section 16911. INA §204(a)(1)(A)(viii), (B) (i) (I); 8 U.S.C. §1154(a)(1)(A)(viii), (B)(i)(I). The amendment made by the SAFE Act would apply to applications filed on or after the date of enactment.

<sup>35</sup> H.R. 2278, §301. The Supreme Court has interpreted the term "crime of violence" as involving the "intentional avilment of force." *Leocal*, 543 U.S. at 9 (emphasis in original). This provision would authorize immigration authorities to determine that criminal conduct satisfied the criteria needed to be considered a "crime of violence," based on evidence related to a criminal conviction, even if the underlying criminal statute did not require a showing of intentional wrongdoing for criminal liability to attach.

<sup>36</sup> See, e.g., *Jean-Louis v. Attorney General*, 582 F.3d 462 (3d Cir. 2009) (rejecting immigration judge's consideration of evidence extrinsic to the record of conviction to assess whether the alien's criminal conduct made him removable); *Gertsenshteyn v. Dep't of Justice*, 544 F.3d 137 (2d Cir. 2008) (adopting categorical approach in assessing whether alien's conviction constituted an aggravated felony making him removable, and stating that the INA "premises removability not on what an alien has done, or may have done ... but on what he or she has been formally convicted of in a court of law"); *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004) (ruling that the immigration judge erred in determining that the alien's burglary conviction was a "crime of domestic violence" making him removable, on account of victim's testimony during removal proceedings).

proceedings than other categories of aliens. Title III of the SAFE Act would modify the immigration consequences for some types of criminal activity, and broaden the category of criminal aliens potentially subject to streamlined proceedings.

Section 302 would amend INA Section 212(h), which authorizes the Secretary of DHS to waive many of the criminal grounds of inadmissibility if certain criteria are met. The bill would amend the provision to permit the exercise of waiver authority with respect to the newly added inadmissibility grounds concerning firearms, fraud, or domestic violence. It would also bar such waivers from being used with respect to any alien who had been convicted of an aggravated felony.<sup>37</sup>

Section 309 would bar refugees or asylees who had committed an aggravated felony from having their status adjusted under INA Section 209.<sup>38,39</sup> Although INA Section 209(c) allows immigration authorities to waive application of many grounds of inadmissibility that might otherwise prevent adjustment by asylees and refugees, the bill would make aggravated felons ineligible to receive such a waiver.<sup>40</sup>

Section 311 of the bill would make aliens who are described in the gang-related grounds for inadmissibility and deportability ineligible for asylum or withholding of removal. Alien members of criminal street gangs would also be ineligible to receive temporary protected status (TPS).<sup>41</sup>

## Limiting Relief for Removal on Security-Related Grounds

Aliens who engage in specified activities that pose a threat to U.S. security, including terrorist activity, are generally barred from admission and subject to removal.<sup>42</sup> Over the years, these

<sup>37</sup> Under current law, an aggravated felony conviction makes an alien statutorily ineligible for a waiver under INA Section 212(h) only if the alien had previously been admitted as an LPR and the conviction occurred after the date of such admission.

<sup>38</sup> The INA defines refugees and asylees as aliens who are unable or unwilling to return to their country of origin on account of their race, religion, nationality, membership in a particular social group, or political opinion; or, under certain conditions, who are in their home country and have a well-founded fear of persecution on one of these grounds. INA §101(a)(42), 8 U.S.C. §1101(a)(42). For further discussion, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by (name redacted), and CRS Report R41753, *Asylum and "Credible Fear" Issues in U.S. Immigration Policy*, by (name redacted).

<sup>39</sup> INA §101(a)(42), 8 U.S.C. §1101(a)(42).

<sup>40</sup> Current executive policy permits the exercise of a 209(c) waiver for aliens convicted of aggravated felonies in limited situations. In re K-A-, 23 I. & N. Dec. 661, 666 (BIA 2004) (“[A]n alien convicted of an aggravated felony will become the beneficiary of the Attorney General’s discretion under sections 209(b) and (c) only in those rare situations where he or she successfully demonstrates the existence of truly compelling countervailing equities.”).

<sup>41</sup> TPS is blanket relief from removal that the Secretary of DHS grants for a limited time for nationals from a specific country as a result of a crisis occurring in the particular nation. For further discussion, see CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by (name redacted) and (name redacted). Section 311 would also make several other changes to INA Section 244, including by eliminating a provision that discusses the effective date of the termination of a country’s TPS designation, and by specifying that while the DHS is not authorized to detain an alien granted TPS on account of his immigration status, it may detain the alien whenever appropriate under any other provision of law.

<sup>42</sup> INA §§212(a)(3), 237(a)(4); 8 U.S.C. §1182(a)(3), 8 U.S.C. §1227(a)(4). These grounds include, but are not limited to, engaging in terrorist activity, membership in a terrorist organization, or support to entities or persons involved in terrorism. Other security-related grounds making an alien inadmissible or deportable include involvement in espionage, significant human rights abuses, or activities that would result in the alien’s admission or presence having serious foreign policy consequences. For background on the terrorism-related grounds for inadmissibility and deportability, see (continued...)



grounds have been expanded to expressly include a broader range of activities in support of terrorism or entities involved in terrorism, and covered persons have been made ineligible for a range of immigration benefits and forms of relief from removal (e.g., asylum). The SAFE Act would further broaden the categories of aliens ineligible for specified forms of relief.

Under current law, if aliens are described under specified terrorism-related grounds for inadmissibility or deportability, they are ineligible to receive asylum. Section 201 of the bill would expand the scope of this prohibition to cover aliens described in any of the terrorism-related grounds for inadmissibility.<sup>43</sup> A limited waiver to this prohibition could be exercised with respect to persons described in the inadmissibility grounds covering members or representatives of terrorist organizations, or the spouses or children of persons who are inadmissible on terrorism-related grounds. The issuance of such a waiver would be contingent upon the Attorney General or Secretary of DHS determining “there are not reasonable grounds for regarding the alien as a danger to the security of the United States.” Similar modifications would be made to the category of aliens who would be ineligible to receive withholding of removal under INA Section 241(b).<sup>44</sup>

The bill would also provide that aliens who are “described” in certain security-related grounds for inadmissibility or deportability are ineligible both for cancellation of removal and adjustment of status under Section 240A, and for the granting of voluntary departure in lieu of removal under INA Section 240B. Currently, both provisions provide that an alien is ineligible for relief if he or she “is inadmissible ... [or] deportable” under specific security-related grounds. The phrasing in current law has been construed by the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying immigration laws, to mean that the alien actually had to have been charged and found removable on the listed ground in order to be ineligible for relief.<sup>45</sup> The bill would clearly establish that aliens who engage in conduct described in the security-related grounds for deportability and inadmissibility would be ineligible for relief, even if those aliens were not ordered removed pursuant to those grounds.

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(...continued)

generally CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by (name redacted) and (name redacted).

<sup>43</sup> In making this modification, the bill would eliminate current references in the asylum bar to the terrorism-related grounds for deportability. It might be argued that, by eliminating references to the terrorism-related grounds for deportability, the bill would also eliminate the asylum bar for lawfully admitted aliens who are described by those grounds. On the other hand, the terrorism-related grounds for deportability are identical to (and, in fact, cross-reference) the terrorism-related grounds for inadmissibility. Accordingly, it may be appropriate to construe the statutory bar to asylum established by the bill as applying equally to aliens who are deportable or inadmissible on terrorism-related grounds. INA §237(a)(4)(B), 8 U.S.C. §1227(a)(4)(B) (“Any alien who is described in subparagraph (B) or (F) of section 212(a)(3) is deportable.”).

<sup>44</sup> Asylum and withholding of removal are similar but distinct forms of relief from removal for aliens who, if returned to their home country, would face persecution. Among other things, asylum is a discretionary form of relief from removal while withholding of removal under INA Section 241(b) is non-discretionary. A higher burden of proof is required for an alien to demonstrate withholding of removal, and an alien granted withholding of removal is not able to adjust to LPR status, unlike in the case of an alien granted asylum.

<sup>45</sup> See *In re Jurado-Delgado*, 24 I. & N. Dec. 29, 31 (BIA 2006) (“We have long held that an alien must be charged and found deportable where Congress has used the phrase ‘is deportable.’”); *Matter of Fortiz*, 21 I. & N. Dec. 1199 (BIA 1998) (bar for eligibility for relief from removal under the former Section 212(c) of the INA, which covers an alien who “is deportable” under listed grounds, covers only those aliens charged and found deportable on such grounds).

Section 201 would also amend and reorganize INA Section 249 (which authorizes the granting of LPR status to certain long-term continuous alien residents),<sup>46</sup> including by providing that aliens “described” in various criminal- and security-related grounds for inadmissibility are ineligible to have their status adjusted under INA Section 249.

## Consideration and Review of Immigration-Related Applications and Petitions

The SAFE Act contains a number of provisions concerning the consideration or review of petitions and applications for various rights, benefits, and statuses under the INA. All applicants for immigration benefits are subject to criminal and national security background checks, and U.S. Citizenship and Immigration Services (USCIS) requires applicants (other than children under 12) for most immigration benefits to submit fingerprints. In 2007, the USCIS Ombudsman observed that Federal Bureau of Investigation (FBI) name checks did not clear on a timely basis and that this represented a “pervasive and serious” problem for USCIS.<sup>47</sup> In response to such criticisms, USCIS negotiated with the FBI to more expeditiously process the background checks and issued policy guidance in 2008 instructing USCIS adjudicators to approve certain benefits if the FBI name checks had been pending for more than 180 days.<sup>48</sup>

Section 206 would seek to overturn this guidance by generally barring the granting or adjudication of applications for specified immigration benefits and privileges (including naturalization applications and immigrant and non-immigrant petitions) until any background or security checks required by the Secretary of DHS have been completed or updated to the Secretary’s satisfaction. Section 206 would also provide that immigration authorities are not required to grant or adjudicate applications for specified immigration benefits and privileges when fraudulent activity in relation to the application is suspected, until such time as the activity has been investigated and resolved to the Secretary’s satisfaction (also see “Naturalization Reform”).

Section 206 would also add a new provision to the INA which would state that nothing in federal law requires the granting of any application, petition, status, benefit, or relief under immigration laws to either (1) persons deemed by DHS to be described under the terrorism- and security-related grounds of inadmissibility or deportability; or (2) aliens for whom a criminal or other proceeding or investigation is open or pending, when the result of such proceeding or

<sup>46</sup> For background, see CRS Report RL30578, *Immigration: Registry as Means of Obtaining Lawful Permanent Residence*, by (name redacted).

<sup>47</sup> The USCIS Ombudsman wrote: “FBI name checks, one of the security screening tools used by USCIS, continue to significantly delay adjudication of immigration benefits for many customers, hinder backlog reduction efforts, and may not achieve their intended national security objectives.” He further stated that USCIS should reexamine the value of the FBI name check. Prakash Khatri, *Annual Report 2007*, U. S. Citizenship and Immigration Services Ombudsman, June 30, 2008, <http://www.dhs.gov/sites/default/files/publications/2007%20Annual%20Report.pdf>.

<sup>48</sup> The policy guidance specifies these four immigration benefits: I-485, Application to Register Permanent Residence or Adjust Status; I-601, Application for Waiver of Ground of Inadmissibility; I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act; and I-698, Application to Adjust from Temporary to Permanent Resident (Under Section 245A of P.L. 99-603). Michael Aytes, *Revised National Security Adjudication and Reporting Requirements*, U.S. Citizenship and Immigration Services, Interoffice Memorandum to Field Leadership, February 4, 2008, <http://www.uscis.gov/files/pressrelease/DOC017.PDF>.

investigation is material to the alien's eligibility for the status or benefit sought. During such time as immigration authorities are investigating whether a person falls under either of these two categories, they would be permitted to deny or withhold adjudication of the person's request for a benefit, status, or other privilege under immigration law, and no court would have jurisdiction to review such denials or withholding of adjudication.<sup>49</sup>

Section 205 addresses the disclosure of information that was submitted by applicants for adjustment of status under the Immigration Reform and Control Act of 1986 (IRCA, P.L. 99-603). It would permit the Secretary of DHS to disclose, as a matter of discretion, information submitted by special agricultural workers for census or national security purposes, and information submitted by other applicants for legalization for national security purposes (disclosures for census purposes already being permitted).<sup>50</sup>

In addition, Section 604 would clarify that an alien's adjustment to LPR status constitutes "admission," even if it occurs while the alien is present in the United States.<sup>51</sup> This amendment would effectively codify BIA decisions which have found that adjustment of status within the United States constitutes "admission" under the INA, and overturn certain federal court decisions which found that aliens who adjust to LPR status within the United States are not subject to certain requirements for waivers of inadmissibility under Section 212(h) of the INA.<sup>52</sup>

## Detention and Removal of Aliens

The SAFE Act includes provisions that seek to facilitate the removal of criminal aliens, and clarify or augment immigration officials' authority to detain aliens during removal proceedings or following a final order of removal. Currently, immigration officials are generally required to detain "arriving aliens," as well as certain other aliens who have not been admitted or paroled into the United States and are subject to expedited removal; those who are inadmissible or deportable on certain criminal or security grounds; and aliens engaged in terrorist activity or "any other activity" endangering U.S. security.<sup>53</sup> They also have authority to detain other aliens, although the general policy is to use detention resources to support enforcement policies, which prioritize the

<sup>49</sup> A limited exception to these bars would exist for eligible aliens seeking withholding of removal under INA Section 241 or relief from removal under the Convention Against Torture.

<sup>50</sup> Disclosure of information collected from both groups to law enforcement authorities in connection with a criminal law enforcement investigation or prosecution upon written request is already permitted under current law. INA §§210, 245A; 8 U.S.C. §§1160, 1255a.

<sup>51</sup> The INA currently defines the terms "admitted" and "admission" as the lawful entry of a noncitizen following inspection. *See* INA §101(a)(13), 8 U.S.C. §1101(a)(13).

<sup>52</sup> *Compare* Matter of Koljenovic, 25 I. & N. Dec. 219 (BIA 2010) (alien who entered the United States without inspection and later obtained LPR status through adjustment of status has "previously been admitted to the United States as an alien lawfully admitted for permanent residence" and must therefore satisfy the seven-year continuous residence requirement of Section 212(h) of the INA to be eligible for a waiver of inadmissibility) *with* Hanif v. Attorney General, 694 F.3d 479 (3d Cir. 2012) (alien who acquired LRP status within the United States was never "admitted" to the United States as an LPR, and thus is not subject to the seven-year residency requirement).

<sup>53</sup> *See generally* INA §235(b), 8 U.S.C. §1225(b) (arriving aliens); INA §236(c), 8 U.S.C. §1226(c) (aliens inadmissible or deportable on criminal and security grounds); INA §236A, 8 U.S.C. §1226a (aliens engaged in terrorist activity or "any other activity" endangering U.S. security).

removal of aliens who pose a danger to national security or a risk to public safety; are recent illegal entrants; or are fugitives or otherwise obstruct immigration controls.<sup>54</sup>

## Detention of Aliens Pending Removal

Section 310 of the SAFE Act would make a number of significant changes to INA provisions governing the detention of aliens in removal proceedings and aliens ordered removed who are awaiting transfer to another country. The changes made by Section 310 primarily seek to clarify or augment immigration authorities' ability to detain aliens identified for removal until their removal may be effectuated. Some provisions seek to ensure that certain categories of aliens—particularly those involved in criminal activity or deemed to pose a threat to the community—remain detained throughout the removal process and until removed. Other provisions are more generally applicable to any alien placed in removal proceedings or ordered removed.

Many of these amendments appear intended to address and override court decisions that have construed existing detention authorities narrowly. Several courts have interpreted provisions of the INA requiring the mandatory detention of certain categories of aliens as having implicit temporal limitations.<sup>55</sup> These interpretations have often been influenced by reviewing courts' desire to avoid definitively resolving constitutional questions that would be raised if the statutes were construed to permit the prolonged or indefinite detention of aliens,<sup>56</sup> particularly as they involve weighing aliens' due process interests against Congress's sweeping authority over immigration matters. Section 310 includes a severability provision, specifying that if any of the section's provision or any amendment made by the section is held invalid for any reason, the application of the provisions and the amendments made by this section to any other person or circumstance shall not be affected.

## Detention Following an Order of Removal

INA Section 241 generally provides that an alien subject to an administratively final order of removal shall be removed from the country within 90 days, with the alien usually required to remain in detention until removal is effectuated. However, in some cases, DHS is unable to effectuate the removal before this 90-day period elapses, and INA Section 241 authorizes the

<sup>54</sup> See U.S. ICE, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, Mar. 2, 2011, *available at* [http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities\\_app-detrn-reml-aliens.pdf](http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detrn-reml-aliens.pdf). For further discussion of alien detention policy, see CRS Report RL32369, *Immigration-Related Detention*, by (name redacted).

<sup>55</sup> See generally, CRS Legal Sidebar, "How 'Mandatory' Is the Mandatory Detention of Certain Aliens in Removal Proceedings?," by (name redacted) and (name redacted), May 22, 2013, *available at* <http://www.crs.gov/LegalSidebar/details.aspx?ID=524&Source=search>.

<sup>56</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001) (stating that "when an Act of Congress raises 'a serious doubt' as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided," and construing INA Section 241, "read in light of the Constitution's demands, [to limit] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States"); *Rodriguez v. Robbins*, 517 F.3d 1127, 1133 (9th Cir. 2013) ("[T]he canon of constitutional avoidance requires us to construe the government's statutory mandatory detention authority [during removal proceedings] as limited to a six-month period, subject to a finding of flight risk or dangerousness."); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) ("Since permanent detention of Permanent Resident Aliens under [INA Section 236] would be unconstitutional, we construe the statute to avoid that result....").

continued detention of certain categories of aliens beyond this 90-day period.<sup>57</sup> In 2001, the Supreme Court concluded in *Zadvydas v. Davis* that, if the statute were construed to permit the indefinite detention of an LPR beyond the removal period, it would raise a “serious constitutional problem.”<sup>58</sup> Thus, the Court interpreted the statute as permitting the detention of aliens only so long as it is “reasonably necessary to bring about that alien’s removal from the United States,” and found that that the presumptively reasonable limit for detention following a final order of removal is six months.<sup>59</sup> However, the Court also suggested that continued detention beyond the six-month period may be warranted when the policy is limited to especially dangerous individuals or the basis for the continued detention is based on terrorism or other special circumstances, and strong procedural protections are in place.

Section 310 of the SAFE Act would make several modifications to INA Section 241, including by amending the statute to provide that, if an alien is not in DHS custody when an order of removal becomes administratively final, the 90-day period begins once the alien is taken into DHS custody. The bill would also expand the circumstances in which the 90-day removal period would potentially be suspended,<sup>60</sup> during which time the Secretary could, as a matter of discretion, continue to detain the alien. During any such extended period, aliens who are subject to mandatory detention during removal proceedings under INA Section 236 would be required to remain in detention (see “Detention During Removal Proceedings”). Aliens contesting their extended detention would be permitted to seek habeas review in federal court,<sup>61</sup> but would not have a right to seek release on bond.

Section 310 would also authorize the continued detention of aliens ordered removed beyond the 90-day removal period when immigration authorities are unable to effectuate their removal. In general, the Secretary of DHS would be provided with discretionary authority to detain an alien ordered removed for an additional 90 days beyond the removal period. In some circumstances, the Secretary would be authorized to detain aliens beyond this period, including when such aliens are “expected to be removed in the reasonably foreseeable future.” Aliens detained beyond the 90-day removal period would have no right to seek release on bond. However, the Secretary would be required to establish an administrative review process to determine whether aliens who are not subject to mandatory detention should continue to be detained pending removal or be released on conditions, provided that they have made reasonable efforts to comply with their removal orders and cooperate with DHS’s efforts to facilitate their removal.

<sup>57</sup> INA §212(a)(6) (“An alien ordered removed who is inadmissible under section 212, removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period ...”).

<sup>58</sup> *Zadvydas*, 533 U.S. at 690.

<sup>59</sup> *Id.* at 671. The Court subsequently ruled that aliens who have been paroled into the United States also may not be indefinitely detained. Its holding was based on statutory construction of the applicable immigration law, and it did not consider whether such aliens were owed the same due process protections as aliens who had been legally admitted into the United States. *Clark v. Martinez*, 543 U.S. 371 (2005).

<sup>60</sup> Under current law, the 90-day removal period is suspended, and the alien ordered removed may be detained, in situations where the alien fails to make a timely application for travel and other documents necessary for his departure, or otherwise acts to prevent his removal. The bill would expand these grounds to cover situations where either an immigration judge, the BIA, or an Article III court judge orders a stay of the alien’s removal order; an Article III court or the BIA remands the case; or the Secretary transfers the alien to a federal, state, or local agency in connection with its official duties (e.g., for law enforcement purposes).

<sup>61</sup> Habeas review is a procedure by which a federal court may review the legality of a person’s incarceration.



In specific circumstances, the Secretary would also be authorized to continue to detain certain categories of aliens, including those believed to pose a security threat, beyond this additional 90-day period, if the Secretary certifies that the alien falls under a listed category.<sup>62</sup> Such certifications could be renewed every six months, with the detained alien provided the opportunity to request reconsideration of the certification. This provision in many ways resembles existing DHS regulations promulgated in the aftermath of the Supreme Court's decision in *Zadvydas*, which were premised on the Court's recognition that it might be constitutionally permissible to detain aliens ordered removed for an extended period when special circumstances exist.<sup>63</sup> However, reviewing courts have taken conflicting views as to whether these regulations are based on a permissible construction of INA Section 241.<sup>64</sup>

The bill would additionally provide the Secretary with discretionary authority to re-detain an alien subject to a final order of removal who had been released from custody if the alien's removal has become reasonably foreseeable, the alien has failed to comply with the conditions of his release, or the Secretary upon reconsideration determines that the alien can be detained pursuant to the certification process and related requirements described above. Other provisions would make clerical amendments to INA Section 241 to reflect the Secretary of DHS's responsibility for detaining aliens ordered removed, limit review of the Secretary's decisions by other agencies, and amend provisions concerning the supervised release of aliens ordered removed who cannot be removed during the 90-day removal period.

## Detention During Removal Proceedings

Section 310 of the SAFE Act also addresses the detention of aliens during removal proceedings pursuant to INA Section 236. Under INA Section 236(a), individual aliens placed in removal proceedings are potentially subject to detention, but could also be released on conditional parole or bond. However, INA Section 236(c) generally requires the detention of aliens who are inadmissible or deportable on certain criminal or security-related grounds. Two years after the Supreme Court ruled in *Zadvydas* that "serious constitutional concerns" would be raised if lawfully admitted aliens were indefinitely detained after removal proceedings against them had been completed, the Court ruled in *Demore v. Kim* that the mandatory detention under INA Section 236(c) of certain aliens—including LPRs—was constitutionally permissible.<sup>65</sup> The relationship between the *Zadvydas* and *Demore* rulings has been open to debate. Some have construed the rulings to mean that the standards for mandatory detention prior to a final order of removal differ from those after a final order is issued. However, several lower courts have

<sup>62</sup> Pursuant to such certification, the Secretary could potentially detain an alien who (1) has a highly contagious disease threatening public safety; (2) would, if released, pose serious foreign policy consequences to the United States or threaten national security; or (3) poses a threat to public safety and has either (a) previously engaged in specified criminal conduct or (b) has previously committed a crime of violence and, because of a mental disorder, is likely to engage in future acts of violence.

<sup>63</sup> 8 C.F.R. §241.14; Dep't of Justice, Immigration & Naturalization Service, Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001).

<sup>64</sup> *Compare* *Thai v. Ashcroft*, 366 F.3d 790 (9<sup>th</sup> Cir. 2004) (provision in INA Section 241 authorizing continued detention of certain aliens following 90-day removal period did not authorize indefinite detention of aliens whose removal was not foreseeable, including those deemed specially dangerous under immigration regulations); *Tran v. Mukasey*, 515 F.3d 478 (5<sup>th</sup> Cir. 2008) (similar) *with* *Marquez-Coromina v. Hollingsworth*, 692 F. Supp. 2d 565 (D. Md. 2010) (immigration regulations authorizing continued detention of specially dangerous aliens ordered removed, but whose removal was not foreseeable, were based on a reasonable interpretation of immigration detention statute).

<sup>65</sup> 538 U.S. 510 (2003).

suggested that mandatory detention pending a final order of removal may, if “prolonged,” raise similar constitutional issues as those raised after a final order, and have construed the mandatory detention requirements of INA Section 236(c) as having implicit temporal limitations.<sup>66</sup>

Section 310 would make a number of changes to INA Section 236. It would add language that seems intended to ensure that the statute will be construed by reviewing courts to authorize the detention of an alien until removal proceedings are completed. It also would provide that the period of time that an alien is detained under INA Section 236 has no affect upon his ability to be detained under INA Section 241 following the completion of removal proceedings.

In addition, Section 310 would add language to INA Section 236(c) concerning the Secretary of DHS’s obligation to take certain criminal aliens into custody and detain them for the duration of removal proceedings. The new language would provide that this obligation applies at any time after the criminal alien has been released from law enforcement custody,<sup>67</sup> and without regard to the reason why the alien was released from such custody.<sup>68</sup>

Section 310 of the bill also includes a provision addressing the scope of an immigration judge’s review of DHS’s custody determinations under INA Section 236. Such review would be limited to assessing whether the alien should be detained, released on bond, or release with no bond. The bill identifies three categories of aliens as being subject to this review: aliens who are subject to mandatory detention under INA Section 236(c), aliens in exclusion proceedings, and aliens inadmissible or deportable on security-related grounds. The purpose of this provision is unclear,<sup>69</sup> and similarly worded provisions in prior legislative proposals expressly *exempted* these categories of aliens from such review.<sup>70</sup>

<sup>66</sup> See, e.g., *Rodriguez v. Robbins*, 715 F.3d 1127 (9<sup>th</sup> Cir. 2013) (construing INA Section 236(c) as requiring mandatory detention for up to six months, after which any further detention must be under another, discretionary authority); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3<sup>rd</sup> Cir. 2011) (similar, but declining to establish “a universal point at which detention will always be considered unreasonable” under INA Section 236(c)).

<sup>67</sup> The current provision requires the mandatory detention of a covered alien “when the alien is released” from criminal custody. The BIA has interpreted this provision as enabling immigration authorities to take covered aliens into custody at any time following their release. *In re Rojas*, 23 I. & N. Dec. 117 (BIA 2001). Reviewing courts have taken conflicting positions on the permissibility of this interpretation, with some holding that aliens who are not promptly taken into custody are not subject to mandatory detention under INA Section 236(c). Compare *Hosh v. Lucero*, 680 F.3d 375 (4<sup>th</sup> Cir. 2012) (affirming BIA’s interpretation); *Sylvain v. Attorney General*, 714 F.3d 150 (3<sup>rd</sup> Cir. 2013) (construing statute as unambiguously permitting mandatory detention of criminal aliens arrested at any time following release from criminal law enforcement custody) with *Valdez v. Terry*, 874 F. Supp. 2d 1262 (D.N.M. 2012) (ruling that criminal alien not immediately taken into custody was not subject to mandatory detention under INA Section 236(c)).

<sup>68</sup> In 2010, the BIA issued an opinion that construed INA Section 236(c) as requiring the mandatory detention of criminal aliens released from non-DHS custody when the basis of their detention is directly tied to conduct serving as a basis for detention under Section 236(c). *In re Garcia Arreola*, 25 I. & N. Dec. 267 (BIA 2010). See also *Saysana v. Gillen*, 590 F.3d 7 (1<sup>st</sup> Cir. 2009) (rejecting earlier BIA interpretation of INA Section 236(c) as permitting mandatory detention of criminal aliens that were in non-DHS custody, regardless of whether their non-DHS custody was for the criminal activity making the alien inadmissible or deportable).

<sup>69</sup> As aliens who are subject to mandatory detention are generally ineligible for bond, it is unclear why this provision expressly provides that immigration judges with authority to review such aliens’ bond eligibility, or assess whether an alien subject to mandatory detention could be released on his or her own recognizance. It should be noted, however, that the BIA has found it inappropriate to treat a lawful permanent resident alien as subject to the mandatory detention requirements of INA Section 236(c) if the presiding immigration judge finds that the government is “substantially unlikely to establish ... the charge or charges that would otherwise subject the alien to mandatory detention.” See *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999).

<sup>70</sup> Legislation in the 112<sup>th</sup> Congress, H.R. 1932, contained provisions similar to Section 310 of the SAFE Act. While H.R. 1932 would have provided that the same custody review standard as is found in the SAFE Act would be generally (continued...)



Section 310 would also specify that aliens who are not subject to mandatory detention may seek release on bond, and establish that no bond could be granted unless the alien established “by clear and convincing evidence that the alien is not a flight risk or a risk to another person or the community.”<sup>71</sup>

In addition to the changes made by Section 310 to INA Section 236, other provisions of the bill would make unlawfully present aliens convicted one or more times for driving while under the influence subject to mandatory detention during removal, along with aliens inadmissible or deportable on account of participation in a criminal street gang. Section 610 would also require the Government Accountability Office (GAO) to issue a report on detainee deaths.

## Removal of Criminal Aliens

The INA contains several provisions intended to facilitate the removal of aliens involved in criminal activity, including through the availability of streamlined removal procedures for aliens convicted of certain crimes. Notably, INA Section 238(b) authorizes DHS to “administratively”<sup>72</sup> order the removal of certain non-LPRs who have committed aggravated felonies in lieu of placing such aliens in removal proceedings before an immigration judge.<sup>73</sup>

Section 319 of the SAFE Act would make several changes to INA Section 238(b) that would facilitate the expedited removal of a broader category of criminal aliens. Section 319 would provide the Secretary of DHS with discretionary authority to determine that an alien who has not been paroled or lawfully admitted into the United States is removable under the criminal grounds for inadmissibility, and order his removal pursuant to the procedures of INA Section 238(b). Such procedures could not be employed if the aliens have a credible fear of persecution if returned to their home country, or are eligible for a waiver of inadmissibility or relief from removal.<sup>74</sup> Section 319 would also shorten the requisite period before an order of removal under INA Section 238(b) could be executed from 14 to 7 days. The changes made by Section 319 would take effect on the date of the bill’s enactment, but would not apply to aliens who were in standard removal proceedings at the time of enactment.

(...continued)

applicable to aliens detained during removal proceedings, the earlier bill expressly stated that this standard *did not apply* to aliens who were subject to mandatory detention under INA Section 236(c), in exclusion proceedings, or inadmissible or deportable on security-related grounds. H.R. 1932 provided that for these classes of aliens, administrative review of DHS’s custody determinations would have been limited to whether “the alien is properly included in such category.” See H.R. 1932, §2(b) (reported version) (112<sup>th</sup> Cong.).

<sup>71</sup> As a general matter under current law, the burden of proof is on the alien in bond hearings to demonstrate that he or she is not a flight risk or a danger to others. 8 C.F.R. §1236.1(c)(8); *In re Guerra*, 24 I. & N. Dec. 37 (BIA 2006).

<sup>72</sup> Although almost all removal proceedings are administrative in the sense that they are conducted before administrative judges, certain streamlined removal proceedings are commonly described as “administrative removals.” See, e.g., 8 C.F.R. Part 238 (discussing expedited removal of aggravated felons).

<sup>73</sup> Those aliens who have conditional permanent residence on account of being the spouse or child of an LPR may potentially be subject to removal under INA Section 238(b) if they have committed an aggravated felony. INA §238(b)(2), 8 U.S.C. §1228(b)(2). The provision has been interpreted to allow the expedited removal of any non-LPR who has been convicted of an aggravated felony, including aliens who have not been legally admitted into the country and who are unlawfully present in the country. *United States v. Hernandez-Vermudez*, 356 F.3d 1011 (9<sup>th</sup> Cir. 2004); *Bazan-Reyes v. I.N.S.*, 256 F.3d 600 (7<sup>th</sup> Cir. 2001). See also *Bamba v. Riley*, 366 F.3d 195 (3d Cir. 2006) (construing INA Section 238(b) to apply to aliens paroled into the country who had committed an aggravated felony, even though parole did not constitute admission into the country for immigration purposes).

<sup>74</sup> The criminal grounds for inadmissibility are found in INA Section 212(a)(2).

## Judicial Review of Voluntary Departure and Reinstated Removal Orders

Section 601 of the SAFE Act would provide additional statutory limitations upon judicial review of agency actions regarding the granting of voluntary departure. Under INA Section 240B and implementing regulations,<sup>75</sup> immigration authorities are permitted to allow certain aliens to voluntarily depart the United States at their own expense (as opposed to pursuant to an order of removal) either prior to being placed in removal proceedings, prior to the completion of removal proceedings, or at the completion of removal proceedings. Currently, the voluntary departure statute generally bars courts from hearing appeals from denials of an alien's request for voluntary departure at the conclusion of removal proceedings, or from staying an alien's removal pending consideration of any claim with respect to voluntary departure.<sup>76</sup> However, Section 601 of the bill would expressly provide that no court shall have jurisdiction to toll or otherwise affect the period allowed for voluntary departure. It would also make other amendments to the voluntary departure statute, including shortening the periods within which aliens must depart in the case of voluntary departure granted prior to the completion of proceedings and at the completion of proceedings; generally requiring that aliens post bond in all cases of voluntary departure prior to the completion of proceedings; and imposing the same terrorism-related bars upon grants of voluntary departure prior to the commencement or completion of removal proceedings as are currently imposed upon grants of voluntary departure at the completion of removal proceedings.

Like Section 601, Section 603 would also impose additional restrictions upon judicial review of reinstated removal orders against aliens who illegally reenter the United States after being removed (or departing under an order of removal). Currently, the INA provides that, when a removal order is reinstated against an alien who illegally re-entered, this order “is not subject to being reopened or reviewed.”<sup>77</sup> However, despite this language, courts have reviewed prior orders in certain cases. In particular, some courts have exercised jurisdiction pursuant to Section 242(a)(2)(D) of the INA, which provides that “[n]othing in [Sections 242(a)(2)(B) & (C) of the INA], or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.”<sup>78</sup> Section 603 would, among other things, effectively reverse these decisions by providing that the order is not subject to reopening “notwithstanding section 242(a)(2)(D).”<sup>79</sup> Section 603 would also clarify that reinstatement applies regardless of the date of the original

<sup>75</sup> 8 C.F.R. §1240.26.

<sup>76</sup> INA §240B(f), 8 U.S.C. §1229c(f). Prior to 2008, some courts found that filing a motion to reopen automatically “tolled” the departure period. The Supreme Court rejected this view in *Dada v. Mukasey*, 554 U.S. 1 (2008). However, the Court also held that, given the language of the INA, aliens must be permitted to unilaterally withdraw a voluntary departure request before the expiration of the voluntary departure period in order “to safeguard the right to pursue a motion to reopen,” and, after *Dada*, the Executive Office for Immigration Review (EOIR) amended its regulations to expressly provide that filing a petition for review terminates voluntary departure. See EOIR, Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76927 (Dec. 18, 2008) (codified at 8 C.F.R. §1240.26).

<sup>77</sup> INA §241(a)(5), 8 U.S.C. §1231(a)(5).

<sup>78</sup> See, e.g., *Debeato v. Attorney General*, 505 F.3d 231 (3d Cir. 2007); *Ramirez-Molina v. Ziglar*, 436 F.3d 508 (5<sup>th</sup> Cir. 2006).

<sup>79</sup> It would also amend the INA to expressly bar judicial review of any claim arising from or relating to a challenge to the original order “notwithstanding ... any ... habeas corpus provision.”

removal, effectively reversing court decisions holding that it does not apply to removals prior to April 1, 1997.<sup>80</sup>

## Visa Issuance and Security

Foreign nationals not already legally residing in the United States who wish to come to the country generally must obtain a visa to be admitted.<sup>81</sup> Under current law, the Department of State (DOS) and the DHS each have roles in visa issuances. DOS's Bureau of Consular Affairs processes visa applications and issues visas. The Secretary of DHS promulgates regulations regarding visa policy. Although there was discussion of assigning all visa issuance responsibilities to DHS when the department was being created, the Homeland Security Act of 2002 (HSA, P.L. 107-296) opted not to do so. Rather, the HSA drew on compromise language stating that DHS issues regulations regarding visa issuances, and that DOS continues to issue visas.

The SAFE Act reflects some Members' continuing interest in visa issuances and security, including whether governing laws need to be strengthened, whether funding should be increased, and which agency should take the lead. Specific provisions in Title IV of the bill concerning the tracking of foreign students after they arrive in the United States address a specific and perennial visa security concern.

### Visa Issuance

The visa issuance procedures delineated in the INA require applicants to submit their photographs, as well as their full name (and any other name used or by which they have been known), age, gender, and the date and place of birth.<sup>82</sup> Depending on the visa category, certain documents must be certified by the proper government authorities (e.g., birth certificates, marriage licenses). All prospective LPRs must submit to physical and mental examinations, and prospective nonimmigrants may also be required to have physical and mental examinations. Consular officers use the Consular Consolidated Database (CCD) to store data on all visa applicants and screen them for admissibility. Records of all visa applications are now automated in the CCD, with some records dating back to the mid-1990s. Since February 2001, the CCD has stored photographs of all visa applicants in electronic form; since 2007, the CCD has stored 10-finger scans. Pursuant to INA Section 222(f), such data is deemed confidential and its dissemination or release (including to the visa applicant) is restricted. The provision specifies that collected data may be used for specific purposes regarding immigration law and other law enforcement purposes.

<sup>80</sup> The Supreme Court in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), interpreted INA Section 241(a)(5) as applying retroactively to persons who were ordered removed prior to the provision's 1997 date of enactment, at least in situations where the alien had not thereafter affirmatively taken steps to obtain legal status. However, since this decision, certain appellate courts have interpreted the provision as not covering situations where the alien was ordered removed prior to 1997, but has made efforts to obtain legal status. See, e.g., *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1090 (10<sup>th</sup> Cir. 2007)(collecting cases).

<sup>81</sup> Authorities to except or to waive visa requirements are specified in law, such as the broad parole authority of the Secretary of DHS under INA Section 212(d)(5) and the specific authority of the Visa Waiver Program in INA Section 217.

<sup>82</sup> INA §§221-222, 8 U.S.C. §§1201-1202.

The INA requires an in-person consular interview of most applicants for nonimmigrant visas who are between the ages of 14 and 79.<sup>83</sup> In addition to indicating the outcome of any prior visa application of the alien in the CCD and comments by consular officers, the system links with other databases to flag issues that may have an impact on the issuance of the visa. These reviews are intended to ensure that aliens are not ineligible for visas or admission under the grounds for inadmissibility spelled out in the INA.<sup>84</sup>

Section 402 of the SAFE Act would amend current law restricting the sharing or release of certain data concerning visa applicants, so as to expressly cover information pertaining to the revocation of visas or entry permits.<sup>85</sup> The bill would also broaden the exception to this confidentiality requirement relating to the sharing of information with foreign governments, including by allowing such sharing for purposes of “determining a person’s deportability or eligibility for a visa, admission, or other immigration benefit,” or any other instance when “the Secretary of State determines that it is in the national interest.”<sup>86</sup>

Section 403 would narrow DOS’s authority to waive personal interviews for purposes related to the “facilitation of travel of foreign nationals to the United States, reduction of visa application processing times, or the allocation of consular resources.” Section 403 would also add national security and “high risk of degradation of visa program integrity” as reasons for requiring a personal interview.

Section 404 of the legislation would also give consular officers the authority *not* to interview visa applicants if they are deemed to be ineligible for the visa they are seeking. Consular officers are currently required to conduct in-person interviews unless the interview is waived by the consular officer for certain classes of aliens (e.g., certain aliens seeking temporary admission as accredited diplomats, consular officers, or foreign government representatives to international organizations).

Section 405 would generally grant the Secretary of DHS *exclusive* authority to issue regulations, establish policy, and administer and enforce the provisions of the INA and all other immigration or nationality laws relating to the functions of consular officers of the United States in connection with the granting or refusal of a visa.<sup>87</sup>

<sup>83</sup> INA §222(h), 8 U.S.C. §1202.

<sup>84</sup> INA §212(a), 8 U.S.C. §1182(a).

<sup>85</sup> Currently, INA Section 222(f) restricts the sharing or release of records pertaining to the issuance or refusal of visas or permits to enter the United States,” and some courts have construed this language as not covering visa revocations. *See, e.g.,* El Badrawi v. Dep’t of Homeland Sec., 583 F. Supp. 2d 285 (D. Conn. 2008) (visa revocation records were not covered by INA Section 222(f), and the agency therefore could not deny alien’s request for such records under the Freedom of Information Act (FOIA) on the basis of the FOIA exemption for records “specifically exempted from disclosure by statute”); Guerra v. United States, 2010 U.S. Dist. LEXIS 132999, Case No. C09-1027RSM (W.D. Wa. Dec. 5, 2010).

<sup>86</sup> The SAFE Act would also eliminate language in INA Section 222(f) providing that the sharing of visa or permit-related information with foreign governments shall be “on the basis of reciprocity.”

<sup>87</sup> Section 207 of the SAFE Act would also make minor, technical changes to the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458), including designating the Secretary of DHS, rather than the Secretary of State, with primary authority for implementation of the transit visa program. The C nonimmigrant visa (or transit visa) is used for a foreign national traveling in immediate and continuous transit through the United States en route to another country. It typically is used by a foreign national who has a brief layover in the United States, such as to change planes or embark on a cruise ship.

## Visa Revocation and Review<sup>88</sup>

After a visa has been issued, the consular officer, as well as the Secretary of State, has discretion to revoke the visa at any time.<sup>89</sup> Visa revocation is currently a ground for removal.<sup>90</sup> The INA generally limits judicial review of visa revocations, except in the course of a removal proceeding where visa revocation constitutes the sole ground for removal.<sup>91</sup> A recurring issue has been whether the Secretary of DHS should also have the authority to revoke visas and to immediately remove a foreign national whose visa has been revoked.

Section 405 of the SAFE Act would also give DHS the authority to refuse or revoke any visa to any alien or class of aliens if the Secretary, or designee, determines that such refusal or revocation is necessary or advisable in the security interests of the United States.<sup>92</sup> Revocation would purportedly “take effect immediately.” The legislation would also provide that “notwithstanding any other provision of law,” no court shall have jurisdiction to review a decision by the Secretary of DHS to refuse or revoke a visa, and “no court shall have jurisdiction to hear any claim arising from, or any challenge to, such a refusal or revocation.”<sup>93</sup> This language appears intended to afford DHS decisions concerning visa refusals and revocations a similar degree of judicial non-reviewability as is accorded to consular officials’ visa denials, though it is unclear whether reviewing courts would interpret Section 405 to limit judicial review of visa refusals or revocations in all cases, including when such action implicates the constitutional rights of U.S. citizens.<sup>94</sup> Amendments made by Section 405 would apply to all visa refusals and revocations occurring before, or, or after the bill’s date of enactment.

## Visa Security Program

The Homeland Security Act (HSA) gave the Secretary of DHS the authority to assign DHS employees to diplomatic and consular posts. The duties of these DHS employees were described in HSA Section 428 as (1) providing expert advice and training to consular officers on specific security threats attending to the adjudication of individual visa applications or classes of applications; (2) reviewing such applications, either on the initiative of DHS or upon request by a consular officer or other person charged with adjudicating such applications; and (3) conducting

<sup>88</sup> (name redacted) and (name redacted), CRS Specialists in Immigration Policy, contributed to this section.

<sup>89</sup> INA §221(i), 8 U.S.C. §1201(i).

<sup>90</sup> INA §237(a)(1)(B), 8 U.S.C. §1227(a)(1)(B).

<sup>91</sup> INA §221(i), 8 U.S.C. §1201(i).

<sup>92</sup> Section 401 of the bill also makes technical amendments to INA Section 222(g), concerning the cancellation of a nonimmigrant visa of an alien who has remained in the country beyond the authorized period.

<sup>93</sup> Under the doctrine of consular non-reviewability, visa denials by consular officials are generally not subject to judicial review. *Bruno v. Albright*, 197 F.3d 1153, 1159-160 (D.C. Cir. 1999) (“In view of the political nature of visa determinations and of the lack of any statute expressly authorizing judicial review of consular officers’ actions, courts have applied what has become known as the doctrine of consular nonreviewability. The doctrine holds that a consular official’s decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise.... Under succeeding incarnations of federal immigration law through to the present, this court and other federal courts have adhered to the view that consular visa determinations are not subject to judicial review.”). *But see Din v. Kerry*, 718 F.3d 856 (9<sup>th</sup> Cir. 2013) (recognizing limited exception to doctrine of consular review for instances where the denial of a visa implicates the constitutional rights of a U.S. citizen).

<sup>94</sup> *See Din*, 718 F.3d at 860 (when visa denial by consular officer implicates constitutional rights of a U.S. citizen, court may engage in “a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason” (quoting *Bustamante v. Mukasey*, 531 F.3d 1059, 1060) (9<sup>th</sup> Cir. 2008)).



investigations with respect to consular matters under the jurisdiction of the Secretary of DHS. This statutory language established what is currently known as the Visa Security Program (VSP). The absence of VSP at posts considered “high-risk” has been a matter of particular congressional concern.<sup>95</sup>

The SAFE Act seeks to expand the VSP by several means. Section 407 would require DHS to conduct an on-site review of all visa applications and supporting documentation before adjudication at the top thirty visa-issuing posts designated jointly by the Secretaries of State and Homeland Security as high-risk posts. It would require DHS to assign personnel to the high-risk posts within one year of enactment. It would also authorize \$60 million in appropriations in each of FY2014 and FY2015 to expedite the implementation of these provisions. Section 408 would call for expedited clearance and placement of DHS personnel at overseas embassies and consular posts.

Section 406 would modify existing authorizations of appropriations for consular services in support of enhanced border security, so as to expressly authorize crediting to the appropriated funding of the VSP a portion of the fees collected by DOS to process immigration visa applications, and make other changes.<sup>96</sup>

## Student Visas

Congress first mandated a foreign student and exchange visitor tracking system in 1996,<sup>97</sup> and it expanded the system’s requirements for an electronic tracking system after the September 11, 2001, terrorist attacks.<sup>98</sup> This monitoring system is known as the Student and Exchange Visitor Information System (SEVIS). SEVIS became operational in 2003, and is administered by Immigration and Customs Enforcement’s (ICE’s) Student and Exchange Visitor Program (SEVP).<sup>99</sup> In addition, SEVP certifies schools so that they are eligible to accept foreign students.

<sup>95</sup> See, e.g., U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *President’s Fiscal Year (FY) 2009 Budget Request for U.S. Immigration and Customs Enforcement (ICE)*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., February 2008; U.S. Congress, Senate Committee on the Judiciary, *Securing America’s Safety: Improving The Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication*, 111<sup>th</sup> Cong., 2<sup>nd</sup> sess., January 20, 2010.

<sup>96</sup> Section 406 amends provisions in the Department of State and Related Agency Appropriations Act, 2005 (P.L. 108-447, Div. B). Other modifications made by the bill include (1) eliminating reference to the use of passport fees and surcharges as a source of funding for such programs; (2) establishing that the imposed surcharge for immigration visa applications shall be 10% of the fee assessed (as opposed to a flat \$45 fee under current law); and (3) requiring that 20% of the funds collected each year under this authority be deposited in the general fund of the Treasury as repayment of funds appropriated pursuant to Section 407(c) of the SAFE Act (concerning implementation of the VSP) until the entire appropriated sum has been repaid.

<sup>97</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, §641, 110 Stat. 3009-704 to 3009-707 (Sept. 30, 1996).

<sup>98</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, P.L. 107-56, §416, 115 Stat. 354-355 (Oct. 26, 2001); Enhanced Border Security and Visa Reform Act of 2002, P.L. 107-173, §501, 116 Stat. 560-62 (May 14, 2002). For more on the history of SEVIS, see archived CRS Report RL32188, *Monitoring Foreign Students in the United States: The Student and Exchange Visitor Information System (SEVIS)*, by (name redacted).

<sup>99</sup> Reportedly, ICE is developing a new system, known as SEVIS II, which is an effort to address limitations in the current SEVIS system. For example, SEVIS II will be a person-centric recordkeeping system, rather than having information about the same foreign national in several different records as occurs currently in SEVIS. For more information on SEVIS and SEVIS II, see U.S. Immigration and Customs Enforcement, SEVIS II Overview, available at <http://www.ice.gov/sevis/sevisii/overview.htm>.

There have been reports of some lesser-known colleges and universities accepting foreign students, as a mechanism to circumvent U.S. immigration law, so that the foreign nationals can enter and work illegally in the United States rather than attend school.<sup>100</sup> Such schools collect tuition from students but generally do not require them to attend classes, and continue to report to ICE that such students are enrolled in school.<sup>101</sup> Several recent events have raised concerns about whether the oversight of SEVP approved schools is adequate to prevent student visa fraud.<sup>102</sup>

The SAFE Act has several provisions dealing with the SEVP. The bill would change accreditation requirements for schools accepting foreign students on F visas,<sup>103</sup> and for flight schools accepting foreign students.<sup>104</sup> The bill would require accrediting agencies or associations to notify DHS about the denial, withdrawal, suspension, or termination of accreditation so that the school could be immediately withdrawn from SEVP and prohibited from accessing SEVIS, and by extension, enrolling foreign students. Additionally, within 180 days of enactment, DHS would be required to implement GAO's recommendations regarding SEVP and SEVIS, and report to Congress on the risk assessment strategy to prevent malfeasance in the student visa issuance system. Within two years after enactment DHS would be required to deploy both phases of the second generation SEVIS II.<sup>105</sup>

Section 409 of the bill would also increase the criminal penalties for fraud and misuse of visa documents (18 U.S.C. §1546(a)) if the offense was committed by an owner, official, or employee of a SEVP certified school, and would allow the Secretary of DHS to impose fines on institutions that failed to comply with reporting requirements. The SAFE Act would also allow the Secretary of DHS to immediately withdraw an institution's SEVP certification if there is a reasonable suspicion that the owner or school official has committed fraud relating to any aspect of the SEVP. Any person convicted of such fraud would be ineligible to hold a position of authority or ownership interest at any institution that accepts F or M foreign students. The bill would also prohibit individuals from serving as a designated school official<sup>106</sup> or being granted access to

<sup>100</sup> To be eligible for a student visa, a foreign national must be accepted by a SEVP certified school. Once the foreign national is accepted, the foreign national can apply for a student visa. After the foreign student has entered the United States, the school is required to provide updates about the foreign student's status including whether the student is attending class. For more on eligibility and monitoring of foreign students, see archived CRS Report RL32188, *Monitoring Foreign Students in the United States: The Student and Exchange Visitor Information System (SEVIS)*, by (name redacted), and CRS Report RL31146, *Foreign Students in the United States: Policies and Legislation*.

<sup>101</sup> For example, see Tom Bartlett, Karin Fischer, and Josh Keller, "Little-Known Colleges Exploit Visa Loopholes to Make Millions Off Foreign Students," *The Chronicle of Higher Education*, March 20, 2011; and David North, *Visa Mills, Diploma Mills, and Other For-Profit Colleges*, Center for Immigration Studies, Washington D.C., Sept. 2012, available at <http://www.cis.org/visa-mills-diploma-mills-for-profit-colleges>.

<sup>102</sup> For example, see Lisa M. Krieger, "Universities or Visa Mills?" *San Jose Mercury News*, July 17, 2011, available at [http://www.mercurynews.com/ci\\_18492754](http://www.mercurynews.com/ci_18492754); and David North, *Visa Mills, Diploma Mills, and Other For-Profit Colleges*, Center for Immigration Studies, Washington D.C., Sept. 2012, available at <http://www.cis.org/visa-mills-diploma-mills-for-profit-colleges>.

<sup>103</sup> Foreign students attending academic programs generally receive F visa status. Foreign students attending vocational schools are given M visa status, while students who are on exchange programs receive J visa status. For more on the different foreign student visa categories, see CRS Report RL31146, *Foreign Students in the United States: Policies and Legislation*.

<sup>104</sup> H.R. 2278, §§410, 413.

<sup>105</sup> H.R. 2278, §§414-417.

<sup>106</sup> Under the SEVP, schools must have at least one "designated school official" who is responsible for maintaining the SEVIS records and reporting on the nonimmigrant foreign students at the school.



SEVIS unless the individual is a U.S. national or an LPR, and has undergone a background check during the past three years.<sup>107</sup>

## Naturalization Reform

The INA presently contains substantive requirements that an alien must typically satisfy in order to become a U.S. citizen, including being, for a requisite period prior to naturalization, “a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.”<sup>108</sup> Other generally applicable requirements for naturalization (some of which may be subject to limited waiver) include continuous residence for at least five years as an LPR; literacy in English; and knowledge of the history, principles, and government of the United States.<sup>109</sup>

Although the INA does not affirmatively define “good moral character,” it lists certain activities as barring an alien from being found to possess good moral character if committed during the period for which good moral character is required to be established.<sup>110</sup> The commission of other specified conduct, including subversive activity, may also make an alien ineligible for naturalization.<sup>111</sup> Moreover, the INA authorizes the government to revoke U.S. citizenship for a limited category of naturalized persons, typically on the grounds that the person acquired citizenship through fraud, concealment, or willful misrepresentation of material facts.<sup>112</sup>

## Limiting Naturalization Eligibility on Account of Criminal or Terrorist Activity

The SAFE Act includes provisions that would bar aliens involved in many terrorism or crime-related activities from acquiring U.S. citizenship (provisions in the SAFE Act concerning the immigration consequences of criminal or terrorist activity are discussed earlier in “Immigration Consequences of Criminal and Terrorist Activity”). Specifically, Section 202 would add further activities or crimes to the list of conduct that disqualifies an alien from being found to possess “good moral character.” If an alien is determined by the Secretary of DHS or Attorney General to have been at any time described in the security-related grounds of inadmissibility or deportability, such alien could not be found to possess “good moral character” for immigration and naturalization purposes.<sup>113</sup> The bill would also provide that an alien convicted of an aggravated felony at any time is disqualified from being found to possess good moral character, regardless of whether the crime was considered an aggravated felony under the INA at the time of

<sup>107</sup> H.R. 2278, §§411-412, 414.

<sup>108</sup> INA §316(a), 8 U.S.C. §1427(a).

<sup>109</sup> INA §§312, 316; 8 U.S.C. §§1423, 1427.

<sup>110</sup> INA §101(f), 8 U.S.C. §1101(f).

<sup>111</sup> INA §313, 8 U.S.C. §1424 (concerning, *inter alia*, aliens who are members of the Communist Party, are opposed to the U.S. government, or favor totalitarian forms of government).

<sup>112</sup> INA §340, 8 U.S.C. §1451. The revocation of citizenship through denaturalization is distinct from the voluntary relinquishment of citizenship by a U.S.-born or naturalized citizen. See INA §349, 8 U.S.C. §1481.

<sup>113</sup> This determination “may be based upon any relevant information or evidence, including classified, sensitive, or national security information.” H.R. 2278, §202(a).

conviction.<sup>114</sup> The Attorney General or Secretary of DHS could waive this bar with respect to the commission of a single aggravated felony offense (other than murder, rape, manslaughter, homicide, rape, or any sex offense against a minor), if the alien's sentence was completed at least 10 years before the date when the alien applied for naturalization or some other status or benefit for which a good moral character finding is required. Section 202 would also clarify that the list of conduct identified in the INA as barring a finding of good moral character is not exhaustive, and that when considering whether an applicant possesses good moral character, immigration authorities may consider that applicant's conduct at any time.<sup>115</sup>

Section 203 would bar the naturalization of any alien determined by the Secretary of DHS to have been at any time described in the security-related grounds of deportability or inadmissibility (including those grounds concerning terrorist activities).

## Denaturalization Due to Terrorist Activity

Section 340 of the INA permits the denaturalization of persons whose acquisition of citizenship was either illegally procured or procured through the concealment of a material fact or misrepresentation.<sup>116</sup> Section 204 of the SAFE Act would authorize the Attorney General to denaturalize persons who have engaged in specified conduct involving terrorism or support for terrorism;<sup>117</sup> the receipt of military training from a terrorist organization; or activities committed with the purpose of overthrowing or opposing the U.S. government through violence or other unlawful means. The bill authorizes the Attorney General to find that the commission of any of these activities demonstrates that the naturalized person was "not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization ... [and that the acquisition of citizenship had therefore] been obtained by concealment of a material fact or by willful misrepresentation."

It seems likely that the denaturalization provision added by Section 204 of the bill, if exercised, could be subject to legal challenge. Whereas denaturalization has historically involved a judicial proceeding, Section 204 appears to authorize the Attorney General to revoke naturalization by way of an administrative determination. The Supreme Court has repeatedly emphasized that citizenship is "a most precious right,"<sup>118</sup> and to ensure that a person is not erroneously stripped of citizenship, it has required that the government's allegations that citizenship was improperly conferred be supported by "clear, unequivocal and convincing evidence which does not leave the issue in doubt."<sup>119</sup> The Court has also suggested that it would be especially "sensitive to the

<sup>114</sup> Under current law, aggravated felonies other than murder that were committed prior to November 29, 1990, do not necessarily bar a finding of good moral character. 8 C.F.R. §316.10(b). *See generally* In re Reyes, 20 I. & N. Dec. 789 (BIA 1994) (discussing the prospective effect of amendments made by the Immigration Act of 1990 to the list of activities precluding a finding of good moral character).

<sup>115</sup> These statutory changes largely track and codify current regulations. *See* 8 C.F.R. §316.10(a)(2).

<sup>116</sup> INA §340(a), 8 U.S.C. §1451(a).

<sup>117</sup> The conduct includes any activity listed in INA Section 212(a)(3)(B)(iii)-(iv). This definition includes a broad array of activities in furtherance or support of terrorist activities, ranging from direct participation in a terrorist bombing to providing material support to a person or entity that has engaged or plans to engage in terrorism.

<sup>118</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963). *See also* *Fedorenko v. United States*, 449 U.S. 490, 506 (1981) ("[T]he right to acquire American citizenship is a precious one and ... once citizenship has been acquired, its loss can have severe and unsettling consequences."); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (the revocation of citizenship may result in the "loss of both property and life, or of all that makes life worth living").

<sup>119</sup> *Schneiderman v. United States*, 320 U.S. 118, 135 (1943) (internal quotations omitted).

citizen's rights where the proceeding is nonjudicial because of the difference in security of judicial over administrative action....<sup>120</sup> Accordingly, it seems likely that any attempts to revoke citizenship via a non-judicial, administrative determination could be subject to legal challenge, including on grounds that administrative denaturalization would not provide constitutionally sufficient protections against the mistaken or otherwise erroneous deprivation of citizenship.

Secondly, Section 204 appears to permit denaturalization based on conduct committed at any time, including after a person has obtained U.S. citizenship. While it is clear that the government has the power to revoke the citizenship of a person when it was wrongly procured (e.g., through fraud or willful concealment or misrepresentation of material facts), current jurisprudence “reject[s] the idea ... [that] Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent.”<sup>121</sup> That is, a citizen's conduct can lead to loss of citizenship only if the citizen acts voluntarily with an intent to relinquish it.<sup>122</sup> However, a limited exception to this general rule may exist when a naturalized person's subsequent conduct indicates that he had acquired citizenship through fraud or deceit. A century ago in *Luria v. United States*, the Supreme Court upheld a (since-rescinded) federal statute which provided that a naturalized person's establishment of a foreign residence within five years of naturalization provided rebuttable evidence that the person had not intended to continuously reside in the United States when he or she applied for citizenship, despite such intent being required for naturalization.<sup>123</sup>

The construction of Section 204 seems to be informed by the exception recognized in *Luria*. The denaturalization provision expressly characterizes the commission of proscribed conduct by a naturalized person as indicating that the person “was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization.”<sup>124</sup> However, the statute at issue in *Luria* may be distinguishable. The statute in question established that post-naturalization conduct could provide *rebuttable evidence* that citizenship was fraudulently obtained, and the Court indicated that the evidentiary presumption conferred by the denaturalization was permissible because the relevant conduct occurred shortly after naturalization.<sup>125</sup> The denaturalization ground established by

<sup>120</sup> *United States v. Minker*, 350 U.S. 179, 188 (1956) (internal quotations omitted) (statute conferring subpoena power on immigration officers not construed to permit the subpoena of a naturalized citizen as a witness in an investigation as to whether to pursue denaturalization proceedings against him). Although the Supreme Court has never squarely addressed the issue, there is some question as to when or whether administrative denaturalization could satisfy due process requirements. *See, e.g., Ng Fung Ho v. White*, 259 U.S. 276 (1922) (due process considerations entitled a petitioner, who claimed to be a U.S. citizen erroneously placed in deportation proceedings, to seek a judicial determination of his claims of U.S. citizenship); *Minker*, 350 U.S. at 193 (Black, J., concurring) (“[C]itizenship, whether acquired by birth or by naturalization, cannot be taken away without a judicial trial in which the Government carries a heavy burden.”).

<sup>121</sup> *Afroyim v. Rusk*, 387 U.S. 251, 257 (1967) (overruling earlier decision in *Perez v. Brownell*, 356 U.S. 44 (1958), which held that Congress could expatriate a U.S. citizen because he engaged in proscribed conduct, regardless of whether the citizen intended to renounce his citizenship through that conduct).

<sup>122</sup> *See* INA §349, 8 U.S.C. §1481 (specifying acts that may cause a U.S. national to lose his or her U.S. citizenship, if such acts are performed voluntarily “with the intention of relinquishing United States nationality”).

<sup>123</sup> 231 U.S. 9 (1913).

<sup>124</sup> H.R. 2278, §204(a).

<sup>125</sup> *Luria*, 231 U.S. at 27. Indeed, the Court suggested the intervening five-year period authorized by the statute “seems long, and yet we are not prepared to pronounce it certainly excessive or unreasonable. But we are of opinion that as the intervening time approaches five years the presumption necessarily must weaken to such a degree as to require but slight countervailing evidence to overcome it.”

Section 204, however, does not directly afford a person with the ability to rebut the alleged connection between the person's post-naturalization conduct and his or her mental state at the time of the application for citizenship, regardless of the period of time between naturalization and the commission of proscribed acts.

## Other Naturalization Reforms

In addition to making certain aliens ineligible for citizenship, the SAFE Act would also effectuate more broadly applicable modifications to the naturalization process. Section 203 would provide that no petition for immigrant status or application for naturalization may be approved if there is any criminal or civil administrative or judicial proceeding pending that could result in the petitioner's denaturalization or loss of LPR status.<sup>126</sup> It would also specify that an alien admitted as a conditional LPR (i.e., on account of being the spouse or child of an LPR) is only considered to be lawfully admitted to permanent residence, and to have the conditional period count for naturalization purposes, if the conditionality has been removed.

Section 203 would also amend the INA provision concerning judicial review of failures to grant or deny naturalization applications, allowing an applicant to seek a federal district court hearing on the matter if, within 180 days of the completion of all examinations and interviews, a final administrative decision on the naturalization application has not been rendered,<sup>127</sup> and would specify that the court only has jurisdiction to review the basis for the delay and remand the matter to DHS.<sup>128</sup>

Section 203 would also amend the INA provision concerning judicial review of the denial of a naturalization application after a hearing before an immigration officer, and establish a more deferential standard of review.<sup>129</sup> It would delete the provision currently establishing a *de novo* standard of review, and require the petitioner to show that the Secretary of DHS's denial of the application was not supported by facially legitimate and bona fide reasons. It would also limit judicial review, except in a proceeding to revoke naturalization, of an administrative determination regarding aliens' good moral character; the alien's understanding of and attachment to the Constitution; or an alien's disposition to the good order and happiness of the United States for naturalization purposes.

<sup>126</sup> The modifications made by Section 203 relating to naturalization would apply to any act that occurred before, on, or after such date, and any pending or future application for naturalization or any other case or matter under the immigration laws.

<sup>127</sup> The statute currently provides that an applicant may seek district court review if a decision is not rendered within 120 days of the "examination" of the naturalization application having been conducted. INA §336(b), 8 U.S.C. §1447(b). This provision has been interpreted by several reviewing courts to mean that district court review may be obtained 120 days after the initial interview with the applicant has been conducted, regardless of whether DHS has completed the entire process of considering the application, including conducting an Federal Bureau of Investigation (FBI) background check. *Walji v. Gonzales*, 500 F. 3d 432, 435(5<sup>th</sup> Cir. 2007) (noting differing judicial rulings on when the 120-day period begins, but stating that "[t]he majority of courts addressing this issue have concluded that the term 'examination' in [INA Section 336(b)] refers to a discrete event—the agency's initial interview of the applicant—and that the 120-day period begins to run as of the date that interview is concluded").

<sup>128</sup> The statute currently permits a reviewing court, if it deems it appropriate, to "determine the matter"—i.e., grant the naturalization petition—or remand the case to DHS for determination. INA §336(b), 8 U.S.C. §1447(b).

<sup>129</sup> INA §310, 8 U.S.C. §1421.

## Immigration Enforcement Operations<sup>130</sup>

There are an estimated 11.1 million unauthorized aliens in the United States.<sup>131</sup> In 2012, ICE estimated that there were 1.9 million removable criminal aliens in the United States.<sup>132</sup> According to ICE, they have the capacity to remove 400,000 aliens a year, and accordingly, DHS has developed a system to prioritize certain aliens for removal. As a result, there has been ongoing debate about the amount of resources that should be allotted to removal activities, and how ICE should prioritize the removal of removable aliens.

Title V of the SAFE Act would attempt to increase the government's capacity to remove aliens by increasing resources for removal, and authorizing a pilot program to reduce and expedite clerical tasks required by ICE during the removal process. In addition, the bill would modify immigration officers' authority to arrest aliens suspected of being removable, and mandate the creation of an Advisory Council whose purpose would be to advise Congress on needed resources and the effectiveness of enforcement priorities.

## Immigration Enforcement Resources and Arrest Authority

Section 501 of the SAFE Act would potentially expand the categories of immigration officers permitted to engage in immigration enforcement activities, and also permit warrantless arrests of aliens suspected of being removable in a wider range of circumstances than under current law. Presently, the Secretary of DHS has discretion as to which officers and employees exercise certain enforcement powers conferred by Section 287(a) of the INA. The provision generally permits the interrogation of persons believed to be aliens about their right to be or remain in the United States and to carry firearms and execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States.<sup>133</sup> Notable among the powers conferred by Section 287(a) is the power to make warrantless arrests under certain conditions.

Section 501 would require the Secretary of DHS to authorize all immigration enforcement agents and deportation officers who have successfully completed "basic immigration law enforcement training"<sup>134</sup> to (1) make warrantless arrests for offenses against the United States committed in their presence and certain felonies cognizable under the laws of the United States; (2) make

<sup>130</sup> CRS Specialist in Immigration Policy, contributed to this section.

<sup>131</sup> Passel and Cohn, *supra* footnote 15.

<sup>132</sup> U.S. Department of Homeland Security, *U.S. Immigration and Customs Enforcement Salaries and Expenses Congressional Budget Justifications FY2013*, p. 61. DHS defines aliens subject to "criminal removal" to cover "an alien who has 1) been charged under a section of the Immigration and Nationality Act that requires a criminal conviction and that charge is the basis for the removal or 2) a criminal conviction noted in the Deportable Alien Control System (DACS) for a crime that renders the alien removable. An alien with an appropriate criminal conviction is considered a criminal alien regardless of the section of law under which the alien was removed." Dept. of Homeland Security, *Definition of Terms*, at <http://www.dhs.gov/definition-terms>. For additional discussion of DHS policies and programs targeting criminal aliens, see CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by (name redacted) and (name redacted).

<sup>133</sup> INA §287(a), 8 U.S.C. §1357(a).

<sup>134</sup> The bill does not define "basic immigration law enforcement training."



arrests for bringing in, transporting or harboring certain aliens, or inducing them to enter; (3) execute warrants of arrest for administrative immigration violations (i.e., removable offenses), or warrants of criminal arrest issued under the authority of the United States; and (4) carry firearms, under certain conditions.<sup>135</sup>

Section 501 would also provide statutory authorization for immigration officers to make warrantless arrests of aliens found in the United States in a broader range of circumstances. Currently, warrantless arrests of aliens found in the United States and suspected of being removable are permitted when the alien “is likely to escape before a warrant can be obtained for his arrest.” Section 501 would eliminate this language, and would apparently authorize warrantless arrests in situations where the arresting officer does not have reason to believe that the alien is likely to escape prior to the issuance of a warrant. Warrantless arrests in such circumstances might be subject to legal challenge, as constitutional jurisprudence generally recognizes the permissibility of warrantless arrests of persons in limited circumstances, such as when exigent circumstances exists.<sup>136</sup>

Section 501 of the SAFE Act would also provide that all immigration enforcement agents (IEAs) shall be paid on the same scale and receive the same benefits as deportation officers within DHS’s Immigration and Customs Enforcement Agency (ICE).<sup>137</sup> Section 502 would authorize the Secretary of DHS to hire 2,500 additional detention enforcement officers, and would specify their duties.<sup>138</sup> Section 506 would similarly require the Secretary of DHS, subject to appropriations, to increase the number of deportation officers by 5,000 and the full-time support staff by 700 above FY2013 appropriated levels, while Section 507 would require the Secretary to increase by 60 the number of ICE trial attorneys (a requirement not subject to appropriations). Section 503 would also require DHS to issue all deportation officers and IEAs body armor and reliable and effective weapons.<sup>139</sup>

Section 504 would require the establishment of an ICE Advisory Council within three months of the bill’s enactment. The council would be comprised of seven members,<sup>140</sup> and would be tasked with advising the Congress and the Secretary of DHS on: the status of current immigration enforcement efforts; the effectiveness of cooperation between DHS and other law enforcement agencies; resources needed in the field; possible improvements to the organizational structure; and the effectiveness of specific enforcement policies and regulations and whether other

<sup>135</sup> Currently, the Secretary of DHS has discretion to determine categories of officers that may perform such functions. *See, e.g.*, INA §287(a), 8 U.S.C. §1357(a) (authorizing officers and employees of DHS to make warrantless arrests where “authorized under regulations prescribed” by the Secretary of DHS); 8 C.F.R. §287.5(c)(5)(ii) (designating which officials have authority to make arrests for bringing in, transporting, or harboring aliens).

<sup>136</sup> *See, e.g.*, *Missouri v. McNeely*, — U.S. —, 133 S. Ct. 1552, 156 (2013) (noting that “the general importance of the government’s interest in [an] area [here, driving while intoxicated] does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case”).

<sup>137</sup> Non-supervisory IEAs are paid at the GS-5 through GS-9 levels, while deportation officers are paid at the GS-11 through GS-12 level. There is currently no difference in benefits between the two jobs. Email Communication between ICE Congressional Relations and CRS, July, 2, 2013.

<sup>138</sup> Their duties would include taking and maintaining custody of person arrested by immigration officers; transporting and guarding immigration detainees; securing DHS detention facilities; and assisting in the processing of detainees.

<sup>139</sup> Such weapons shall include, at a minimum, standard-issue handguns, M-4 or equivalent rifles, and Tasers.

<sup>140</sup> One member would be appointed by the President; one by the Chairman of House Judiciary Committee; one by the Chairman of Senate Judiciary Committee; one by the ICE prosecutor’s union; and 3 by the National Immigration and Customs Council (another union). Members would be given certain protections against retaliation.

enforcement priorities should be considered. The council would be required to provide quarterly reports to the Chairmen and Ranking Members of the House and Senate Judiciary Committees and the Secretary of DHS.

Section 505 would require the Secretary of DHS to establish a pilot program in at least five of the ten field offices with the largest removal caseloads to allow deportation officers and IEAs, while in the field, to electronically process and serve charging documents (e.g., notices to appear) and process and place detainers. The pilot program would be designed to replace, to the extent possible, the current paperwork and data-entry process for issuing such documents. The pilot program would have to be initiated within six months of the enactment of the bill, and 18 months after enactment GAO would be required to submit a report to the House and Senate Judiciary Committees on the effectiveness of the program and offer recommendation for improvements. The ICE Advisory Council (created by Section 504) would also be required to include recommendations on how the pilot program should work in its first quarterly report, and include assessments of the program and recommendations for its improvement in each subsequent report.

## Prosecutorial or Enforcement Discretion

The Obama Administration has issued several documents which provide guidance regarding the exercise of prosecutorial discretion in immigration enforcement activities.<sup>141</sup> In so doing, the Administration has emphasized that the exercise of discretion in individual cases helps “ensure that agency resources are focused on our enforcement priorities, including individuals who pose a threat to public safety, are recent border crossers, or repeatedly violate our immigration laws.”<sup>142</sup> The Administration has also claimed that the exercise of such discretion can promote humanitarian interests, as in the case of certain “young people who were brought to this country as children and know only this country as home.”<sup>143</sup> Others, however, have suggested that the Administration’s prosecutorial discretion policies are tantamount to “amnesty,”<sup>144</sup> and that the Deferred Action for Childhood Arrivals (DACA) initiative, in particular, contravenes certain provisions of the INA.<sup>145</sup>

<sup>141</sup> See generally CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by (name redacted) and (name redacted), and CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by (name redacted) and (name redacted).

<sup>142</sup> Gary Mead, Executive Associate Director, ICE, et al., *Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships*, Oct. 5, 2012, reproduced in 89 *Interpreter Releases* 1966-67 (Oct. 15, 2012).

<sup>143</sup> Janet Napolitano, Secretary of DHS, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, at 1, available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>144</sup> See, e.g., “Does Administrative Amnesty Harm Our Efforts to Gain and Maintain Operational Control of the Border?” Hearing Before the House Committee on Homeland Security, Subcommittee on Border and Maritime Security, Oct. 4, 2011; “U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law,” Hearing Before the House Committee on the Judiciary, Oct. 12, 2011.

<sup>145</sup> See *Crane v. Napolitano*, No. 3:12-cv-03247-O, Amended Complaint (filed N.D. Tex., Oct. 10, 2012). A federal district court initially found that the plaintiffs were likely to succeed on the merits of their claim that DACA is prohibited by the INA, but declined to enjoin implementation of DACA at that time, pending further briefing on related issues. See CRS Legal Sidebar, “Federal District Court Finds That DACA Is Prohibited by the INA,” by (name redacted), May 1, 2013, available at <http://www.crs.gov/LegalSidebar/details.aspx?ID=498&Source=search>. Following supplemental briefing by the parties, however, the district court dismissed the case on the jurisdictional grounds. *Crane*, No. 3:12-cv-03247-O, Order to Dismiss Plaintiff’s Claims (issued July 31, 2013) (finding that the plaintiffs’ claims were employment disputes, and thus not within the court’s jurisdiction under the Administrative Procedure Act).



Certain provisions of Title VI would respond to the Obama Administration initiatives, apparently with the intent of foreclosing certain exercises of prosecutorial discretion and promoting more vigorous enforcement of federal immigration law. Specifically, Section 605 would require DHS and the Department of Justice (DOJ) to report annually on exercises of prosecutorial discretion (e.g., number of notices to appear cancelled), as well as to identify the individual aliens who received favorable exercises of discretion. Section 608 would similarly prohibit DHS from finalizing, implementing, administering, or enforcing recent guidance regarding prosecutorial discretion, including DACA.<sup>146</sup>

## Access to Federal Lands for Immigration Enforcement Activities

The SAFE Act contains provisions concerning immigration enforcement activities along the U.S. border. Section 606 of the bill addresses immigration enforcement activities on federal lands within 100 miles of the U.S. land border. It would bar the Secretary of the Interior or the Secretary of Agriculture from restricting U.S. Custom and Border Protection (CBP) access to such lands either for the purpose of search and rescue operations, or for the prevention of unlawful entries into the United States, including through the construction of barriers, roads, and infrastructure.<sup>147</sup> To effectuate the expeditious installation of fencing and other barriers on these lands, the bill would waive application of several laws, including a number of environmental and land management statutes, which might otherwise delay construction.<sup>148</sup>

## Biometric Entry-Exit System

Section 607 of the bill would establish new requirements for the implementation of a biometric entry-exit system. In 1996, Congress required the development of an automated entry-exit system, which would collect information from arriving and departing aliens to identify whether aliens temporarily authorized to enter the United States had overstayed their authorized term of admittance.<sup>149</sup> Over the years, Congress has revised and expanded this entry-exit requirement, including by requiring it to include a biometric component, but the system has not been fully implemented.<sup>150</sup> Section 607 would require the establishment of a biometric entry-exit system within two years of the bill's enactment, separate and apart from any existing requirements

<sup>146</sup> A similar restriction is contained in the version of the Department of Homeland Security Appropriations Act, 2014, which passed the House on June 6, 2013. H.R. 2217, §588 (House-passed version). For further discussion, see CRS Report R43147, *Department of Homeland Security: FY2014 Appropriations*, coordinated by (name redacted).

<sup>147</sup> The reference to “unlawful entries” into the United States covers persons as well as “instruments of terrorism, narcotics, and other contraband....” H.R. 2278, §606(a).

<sup>148</sup> Specifically, the SAFE Act would exempt application of those laws which were waived by the Secretary of DHS on April 1, 2008, with respect to border fencing construction along particular segments of the southwest border. 73 Fed. Reg. 19078 (Apr. 8, 2008) (exercising waiver authority concerning border fencing projects that was granted by Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, Div. C., as amended). The SAFE Act's exemption would extend to all federal lands within 100 miles of both the northern and southern borders, and would continue to apply regardless of whether the Secretary of DHS terminated the April 1, 2008, waiver. For discussion of DHS's waiver authority concerning the construction of border fencing, see archived CRS Report RL33659, *Border Security: Barriers Along the U.S. International Border*, by (name redacted) and (name redacted).

<sup>149</sup> P.L. 104-208, Div. C, §110.

<sup>150</sup> For further discussion, see CRS Report R42985, *Issues in Homeland Security Policy for the 113<sup>th</sup> Congress*, coordinated by (name redacted).

contained in current law. It further specifies that the biometric entry-exit system to be implemented at all U.S. ports of entry must contain the biometric features required by the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>151</sup>

## State and Local Involvement in Enforcement

The role that states and localities play in enforcing federal immigration law has been a topic of significant interest in recent years.<sup>152</sup> Some states and localities, concerned about what they perceive as inadequate federal enforcement of immigration law, have sought to independently enforce federal law, as well as to penalize conduct that may facilitate the presence of unauthorized aliens within their jurisdiction.<sup>153</sup> Other states and localities, in contrast, have proscribed activities (e.g., sharing information, honoring federal requests to hold aliens) that could assist in federal immigration enforcement because they believe the federal government has been too aggressive in removing aliens who are not criminals and have ties to the community.<sup>154</sup>

At least until 2012, there had been considerable legal debate concerning the power of state and local police to enforce federal immigration law without express federal statutory authorization, or to criminally sanction persons for activities that may facilitate unauthorized immigration. In *Arizona v. United States*,<sup>155</sup> the Supreme Court found that existing federal law contemplates states and localities having a limited role in immigration enforcement.<sup>156</sup> The Court held that states are generally preempted from arresting or detaining aliens on the basis of suspected removability under federal immigration law. Such action may be taken only when there is specific federal statutory authorization, or pursuant to “request, approval, or instruction from the Federal Government.”<sup>157</sup> The *Arizona* ruling also suggested that measures which impose criminal penalties under state law for violations of federal immigration law may be vulnerable to facial

<sup>151</sup> P.L. 108-458, §7208; 8 U.S.C. §1365b.

<sup>152</sup> See generally CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by (name redacted) and (name redacted); CRS Report R41991, *State and Local Restrictions on Employing Unauthorized Aliens*, by (name redacted); and CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by (name redacted) and (name redacted).

<sup>153</sup> See, e.g., Arizona S.B. 1070, as amended by H.B. 2162, available at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>; Beason-Hammon Alabama Taxpayer and Citizen Protection Act, No. 2011-535, available at <http://www.ago.state.al.us/Page-Immigration>.

<sup>154</sup> See, e.g., Cook County, Illinois, Policy for Responding to ICE Detainers, Sept. 7, 2011, available at [http://cookcountygov.com/ll\\_lib\\_pub\\_cook/cook\\_ordinance.aspx?WindowArgs=1501](http://cookcountygov.com/ll_lib_pub_cook/cook_ordinance.aspx?WindowArgs=1501); Santa Clara County to Stop Honoring Immigration Detainers for Low-Level Offenders, *Los Angeles Times*, Oct. 18, 2011, available at <http://latimesblogs.latimes.com/lanow/2011/10/santa-clara-county-to-stop-honoring-immigration-detainers-for-low-level-offenders.html>. For further discussion and examples, see CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by (name redacted) and (name redacted).

<sup>155</sup> *Arizona v. United States*, 132 S. Ct. 2492, \_\_\_ U.S. \_\_\_ (2012).

<sup>156</sup> For further discussion, see CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by (name redacted) and (name redacted). Not every law or policy enacted by a state or locality that is related to unauthorized immigration is necessarily preempted. For example, in *Chamber of Commerce of the United States of America v. Whiting*, 131 S. Ct. 1968, \_\_\_ U.S. \_\_\_ (2011), the Court rejected a facial preemption challenge to a state statute that revoked the licenses of businesses that hired unauthorized aliens, and required employers to use the E-Verify database to check the employment authorization of new hires. The Court interpreted federal law as contemplating or encouraging such activity by the states. See CRS Report R41991, *State and Local Restrictions on Employing Unauthorized Aliens*, by (name redacted).

<sup>157</sup> *Arizona*, 132 S. Ct. at 2508.

challenges on preemption grounds, even when these sanctions mirror those found in federal law.<sup>158</sup> The Court did, however, find that state and local officers are not facially preempted from checking the immigration status of persons stopped for state and local offenses, at least so long as the inquiry does not unreasonably prolong the detention of the person in state or local custody.<sup>159</sup>

Title I of the SAFE Act includes several provisions which seem intended to override aspects of the Supreme Court's ruling in *Arizona*, and to provide states and localities with express statutory authorization to engage in immigration enforcement activities. The SAFE Act also includes other provisions which would more broadly encourage states and localities to play a greater role in immigration enforcement, deter state and local governments from adopting policies that limit cooperation with federal immigration enforcement efforts, and require DHS to exercise existing authorities to facilitate greater cooperation with states and localities in immigration enforcement matters.

## Express Authorization of State and Local Measures and Actions

Section 102 of the SAFE Act would effectively supersede the Supreme Court's ruling in *Arizona*, and provide express federal authorization for a significantly greater degree of immigration enforcement activities by states and localities than is permitted under current law. The bill would amend the INA to expressly permit states and localities to enact and enforce measures that make it a separate state or local crime to violate the criminal provisions of the INA, so long as the penalties are not greater than those that may be imposed under the corresponding federal statute. Similar measures imposing civil penalties for civil violations of the INA would also generally be permissible. States and localities, would, however, continue to be barred from imposing separate criminal or civil sanctions (other than through licensing or similar requirements) upon entities that hire or employ unauthorized aliens.<sup>160</sup> Section 102 also does not purport to permit state and local measures that would impose criminal or civil sanctions on conduct that is not already penalized by the INA.

Section 102 would also generally permit state and local officers to enforce the INA (or state and local "immigration laws") by investigating, identifying, and apprehending aliens suspected of immigration violations, and thereafter transferring them to federal custody.<sup>161</sup> Such enforcement would not necessarily be limited to inquiries into immigration status made in the course of enforcing state and local laws, as was the case with the immigration status checks upheld by the Supreme Court in *Arizona v. United States*. Rather, state and local officials would apparently be permitted to investigate, identify, apprehend, and transfer aliens separate and apart from their other duties.

<sup>158</sup> See *id.* at 2502-03 (Arizona law making it an Arizona crime to fail to comply with federal alien registration requirements held to be preempted); *id.* at 2504 (Arizona statute imposing criminal penalties upon unauthorized aliens working in the state was facially preempted).

<sup>159</sup> However, the Court expressly left open the possibility of "other preemption and constitutional challenges" to immigration status checks. *Id.* at 2510.

<sup>160</sup> INA §274A(h)(2), 8 U.S.C. §1324a(h)(2). Section 6 of the Legal Workforce Act (H.R. 1772), as ordered reported by the House Judiciary Committee, would permit states and localities to enforce the provisions of INA §274A, consistent with federal laws and regulations.

<sup>161</sup> State and local officers would, however, be expressly barred from removing aliens.

## Information Sharing Among Federal and State and Local Officials

Other provisions of Title I would promote immigration enforcement by requiring greater information-sharing by federal, state, and local authorities for immigration-related purposes. Such sharing is generally not required under existing federal law, although federal, state, and local governments and officials are generally barred from restricting the sending or receipt of information regarding citizenship or immigration status.<sup>162</sup> In addition, several forms of information sharing currently operate under cooperative arrangements entered pursuant to INA §287(g) of the INA, as well as through the ICE's Secure Communities and Criminal Alien Programs (see "Federal-State Partnerships to Identify Removable Aliens").

Section 103 would require that the "Immigration Violators File" of the National Crime Information Center (NCIC) contain "all available" information regarding aliens who are subject to final orders of removal, have entered into voluntary departure agreements, overstayed their visas, or had their visas revoked. Section 104 would similarly require that states be given access to federal programs and technology "directed broadly" at identifying removable aliens. Currently, states and localities must generally rely upon federal authorities to supply them with information regarding individuals' citizenship or immigration status.<sup>163</sup>

Section 105, on the other hand, requires states and localities to provide DHS with certain information about aliens<sup>164</sup> apprehended within their jurisdiction who may be removable.<sup>165</sup> Questions could be raised about whether a requirement to supply information impermissibly "commandeers" state and local resources, notwithstanding the fact that Section 105 would require DHS to reimburse "all reasonable costs" that states and localities incur.<sup>166</sup>

Related provisions of Title I, which would condition certain funding for states and localities upon their cooperation in enforcing federal immigration law, would arguably not raise similar concerns, because imposing conditions upon the use of federal funds has been widely recognized as within Congress's spending power.<sup>167</sup> Specifically, Section 106 would permit funds for the procurement of certain items that facilitate and are "directly related" to immigration enforcement to be given only to jurisdictions whose law enforcement officers are permitted to engage in immigration enforcement activities in the course of their routine duties. Relatedly, Section 106 would prohibit

<sup>162</sup> See 8 U.S.C. §1373(a) (sending or receipt of information regarding "citizenship or immigration status"), 8 U.S.C. §1644 (sending or receipt of information regarding "immigration status").

<sup>163</sup> See 8 U.S.C. §1373(c) (generally requiring DHS to provide "requested verification or status information").

<sup>164</sup> Victims and witnesses of crimes would be expressly excluded from this requirement.

<sup>165</sup> This requirement is said to be "[i]n compliance with section 642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act [(IIRIRA)] of 1996 ... and section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act [(PRWORA)]." However, the cited sections of IIRIRA and PRWORA only prohibit states and localities from adopting measures that restrict the sharing of information about individuals' immigration status. See 8 U.S.C. §1373(a) (sending or receipt of information regarding "citizenship or immigration status"), 8 U.S.C. §1644 (sending or receipt of information regarding "immigration status"). Neither Section 642(a) nor Section 434 requires states and localities to provide information to the federal government.

<sup>166</sup> Reimbursement could potentially address concerns about the federal government appropriating the "attention and resources" of state and local governments expressed in prior commandeering cases. See *New York v. United States*, 505 U.S. 144, 168 (1992). However, other concerns could potentially remain, such as the ability of state and local governments to "represent and remain accountable to [their] own citizens" if required to carry out federal policies. *Printz v. United States*, 521 U.S. 898, 920 (1996).

<sup>167</sup> See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding a federal law which directed the Secretary of Transportation to withhold federal highway funds from states in which the drinking age is less than twenty-one).

such funding to jurisdictions whose policies or practices prevent inquiries into suspects' immigration status.

Similarly, Section 114 would provide that jurisdictions whose statutes, policies, or practices prohibit state and local officers from assisting or cooperating with federal immigration law enforcement in the course of carrying out their routine duties would be ineligible for certain funds. It would also amend Section 642(b) of IIRIRA to prohibit states and localities from taking specified actions (in addition to restricting information-sharing with federal immigration authorities, which is currently prohibited) that may limit assistance with immigration enforcement efforts by the federal government. Among other things, states and localities would generally be barred from establishing restrictions on notifying the federal government of the presence of removable aliens and complying with immigration detainer requests from the federal government.<sup>168</sup>

## Holding Aliens for Transfer to Federal Custody

In addition to authorizing or encouraging greater involvement by states and localities in immigration enforcement, the Title I of the SAFE Act also contains provisions that seem intended to ensure that the federal government has adequate resources and authorities to take into custody those aliens who are apprehended by state and local law enforcement. For more on DHS's authorities to detain aliens, see "Detention and Removal of Aliens."

Section 107 would require DHS to construct or acquire additional detention facilities for aliens in removal proceedings, with each facility required to have "a number of beds necessary to effectuate the purposes of ... Title [I]."<sup>169</sup>

Section 108, in turn, would require that DHS consider assuming custody of removable aliens in state or local custody if requested to do so. Specifically, when such a request was made, DHS would be required to (1) take the alien into custody no later than 48 hours after a detainer<sup>170</sup> has been issued, following the conclusion of the state or local charging or dismissal process (or within 48 hours after the alien is apprehended, if no such charging or dismissal process is required); and (2) request that the state or locality temporarily hold the alien for transfer to federal custody.<sup>171</sup> This provision appears intended to make it more likely that federal immigration authorities will respond to a state or local request to take into custody an alien suspected of being removable.<sup>172</sup>

<sup>168</sup> Commandeering concerns could potentially be raised about some of these restrictions in their own right. However, the restrictions could potentially be construed as permissible in light of other provisions in Section 114 that apparently contemplate that Section 642 of IIRIRA, as amended, would be "enforced" through conditions on grant funding.

<sup>169</sup> The number of beds available for detained aliens has, as a practical matter, generally limited the number of aliens taken into custody by federal immigration authorities. See generally CRS Report RL32369, *Immigration-Related Detention*, by (name redacted).

<sup>170</sup> Immigration detainers are documents whereby ICE advises other law enforcement agencies that it seeks custody of particular aliens. See generally CRS Report R42690, *Immigration Detainers: Legal Issues*, by (name redacted).

<sup>171</sup> Section 108 would apparently permit DHS to determine to release the alien after assuming custody.

<sup>172</sup> The only arguably comparable provision in current law is one that could be construed to require immigration officials to determine whether to issue a detainer for aliens arrested for controlled substance offenses when requested to do so by state and local officials. See INA §287(d)(1)-(3), 8 U.S.C. §1357(d)(1)-(3).



Section 108 would also require that DOJ and DHS ensure that aliens arrested under Title I of the SAFE Act are held in custody, pending examination as to their removability, and would provide that a facility is adequate for such detention so long as it meets certain criteria, including satisfying the U.S. Marshals Service's standards for the housing, care, and security of detainees.<sup>173</sup>

## Federal-State Partnerships to Identify Removable Aliens

Congress has created several avenues for states and localities to assist in the enforcement of federal immigration law. One of the broadest grants of authority for state and local immigration enforcement activity stems from INA Section 287(g), which authorizes the Secretary of DHS to enter written agreements (commonly referred to as "287(g) agreements") which enable specially trained state or local officers to perform specific functions relative to the investigation, apprehension, or detention of aliens, during a predetermined time frame and under federal supervision.<sup>174</sup> In recent years, DHS has decreased its reliance on the 287(g) program to identify and apprehend aliens in state or local custody,<sup>175</sup> while increasing its use of programs like Secure Communities, which do not involve the delegation of immigration enforcement authority to states or localities.<sup>176</sup> Title I of the SAFE Act contains several provisions which seek to ensure the continuation and expansion of cooperative arrangements with states or localities on immigration enforcement matters.

Section 112 seeks to expand the use of 287(g) agreements to assist in the identification and apprehension of removable aliens. Pursuant to the bill, DHS would generally be required to enter a 287(g) agreement whenever requested to do so by a state or local government agency. DHS would only be permitted to deny a request to enter a 287(g) agreement on the basis of "a compelling reason." DHS would also be required to accommodate requesting jurisdictions regarding the types of immigration enforcement functions that will be carried out pursuant to a 287(g) agreement. DHS would be prohibited from substituting a program or technology "directed broadly" at identifying removable aliens—apparently a references to the Secure Communities program—in lieu of entering or maintaining a 287(g) agreement. DHS would also be barred from terminating 287(g) agreements without compelling reason and without complying with certain procedures (e.g., providing written notice at least 180 days in advance). States and localities that believe their agreements have been improperly terminated would be entitled to administrative and

<sup>173</sup> DHS has been pursuing initiatives to improve conditions at facilities used to house detainees within its custody. See ICE, Fact Sheet: ICE Detention Standards, Feb. 24, 2012, *available at* <http://www.ice.gov/news/library/factsheets/facilities-pbnds.htm>. Section 108 of the SAFE Act appears intended to ensure that DHS efforts to improve detention standards do not result in it refusing to take aliens into custody, provided that the relevant detention facility satisfies the requirements established by the bill.

<sup>174</sup> For a fuller discussion, see CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by (name redacted) and (name redacted).

<sup>175</sup> See *id.*

<sup>176</sup> Secure Communities is also used to identify criminal aliens in local law enforcement custody. Specifically, the fingerprints of persons arrested by state and local officers are sent to the FBI's Integrated Automatic Fingerprint Identification System (IAFIS), which then sends them to ICE's Automated Biometric Identification System (IDENT). This system automatically notifies ICE personnel whenever the fingerprints of persons arrested by state and local officers match those of a person previously encountered and fingerprinted by immigration officials ICE personnel then review other databases to determine whether the person is here illegally or otherwise removable, and may issue detainers for any aliens who appear removable. For further discussion, see CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by (name redacted) and (name redacted).



judicial review. Currently, such agreements may be terminated “at any time;” the termination is effective “immediately upon receipt;” and states and localities appear to have no legal recourse.<sup>177</sup>

Section 111 would require that DHS continue to operate a program (akin to the Criminal Alien Program)<sup>178</sup> that identifies removable aliens in correctional facilities and arranges for their removal at the completion of their sentences; and extend the program to all states. Also, in an exercise of Congress’s spending power, Section 111 would require any state which receives funding for the incarceration of “criminal aliens” pursuant to the State Criminal Alien Assistance Program (SCAAP) to provide assistance in the identification of criminal aliens within its prisons or jails.

Section 111 would further authorize states and localities to hold “criminal aliens” for up to 14 days after they have completed their sentences (or issue a detainer to hold such aliens) so that DHS can take custody of them. However, because such holds would arguably constitute warrantless seizures of the aliens’ person, they could potentially be challenged on Fourth Amendment grounds.<sup>179</sup>

In addition, Section 113 would amend Section 241(i) of the INA—which underlies the SCAAP program. Under current law, states may request reimbursement from DHS for costs associated with incarcerating an “undocumented criminal alien”—a term defined to cover unlawfully present aliens who have been *convicted* of a felony or two or more misdemeanors. Section 113 would modify this definition to also cover unlawfully present aliens who are *charged with* such offenses. The bill would further authorize appropriations necessary to carry out the program for FY2014 and each subsequent fiscal year.

Further, Section 115, captioned “Clarifying the Authority of ICE detainers,” would generally require DHS to execute all lawful writs, processes, and orders issued under the authority of the United States, and command “all necessary assistance to execute the Secretary’s duties.” The purpose of this general statement is not immediately apparent. Arguably, it could be construed to mean that DHS is required to employ detainers, when necessary, in order to acquire custody of an alien believed to be removable who is in state or local custody.

## Training and Immunity for State and Local Officials

In keeping with Title I’s encouragement of state and local involvement in immigration enforcement, Section 109 would require that DHS create materials to assist state and local officers in enforcing immigration law, although immigration-related training would not be a

<sup>177</sup> See generally ICE, Memorandum of Agreement, *available at* [http://www.ice.gov/doclib/detention-reform/pdf/287g\\_moa.pdf](http://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf) (last accessed: July 3, 2013).

<sup>178</sup> Under the Criminal Alien Program (CAP), ICE officers assigned to federal, state, and local prisons are tasked with identifying criminal aliens in order to facilitate their removal, including through the placement of detainers upon such aliens so that federal immigration authorities may take them into custody upon completion of their criminal sentences. Section 111 of the SAFE Act does not specifically refer to CAP; instead, it generally provides that DHS “continue to operate and implement a program” to identify and remove criminal aliens held at correctional facilities.

<sup>179</sup> Other provisions of the INA authorizing warrantless seizures of aliens have been found to be subject to standard Fourth Amendment restrictions regarding probable cause and exigent circumstances, and it is unclear whether the seizures contemplated here would be found to be based on probable cause that the alien is removable, or reasonably limited in their duration. See, e.g., *Babula v. INS*, 665 F.2d 293, 298 (3d Cir. 1981); *Tejeda-Mata v. INS*, 626 F.2d 721, 724-25 (9<sup>th</sup> Cir. 1980).

“requirement or prerequisite” for doing so, as it currently is for state and local officers acting pursuant to “287(g) agreements,”<sup>180</sup> discussed previously.<sup>181</sup> Section 110 would further provide that state and local officers, acting within the scope of their official duties, are immune “to the same extent as ... Federal law enforcement officer[s],” from personal liability arising from the performance of any “duty” described in Title I, including investigating, arresting, and detaining aliens. This provision would apparently clarify that immigration enforcement is within the scope of state and local officers’ duties for immunity purposes,<sup>182</sup> and could potentially be construed to grant state and local officers protection under the Federal Tort Claims Act for intentional torts.<sup>183</sup> Currently, the INA expressly provides for immunity only for state and local officers acting pursuant to a “287(g) agreement.”<sup>184</sup>

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<sup>180</sup> See INA §287(g)(2), 8 U.S.C. §1357(g)(2) (“adequate training” required for participating state and local officers).

<sup>181</sup> See *supra* at “Federal-State Partnerships to Identify Removable Aliens.”

<sup>182</sup> Plaintiffs suing state and local officials sometimes allege that the officers acted beyond their duties by enforcing certain federal matters. See, e.g., *Florance v. Buchmeyer*, 500 F. Supp. 2d 618, 626 (N.D. Tex. 2007) (alleging that the officer acted beyond the scope of his duties by “charg[ing the plaintiff] criminally, in state court, regarding an exclusively federal in rem commercial matter”).

<sup>183</sup> See 28 U.S.C. §2680(h).

<sup>184</sup> See INA §287(g)(8), 8 U.S.C. §1357(g)(8).

## Author Contact Information

(name redacted)  
Legislative Attorney  
[redacted]@crs.loc.gov, 7-....

(name redacted)  
Legislative Attorney  
[redacted]@crs.loc.gov, 7-....

## Key CRS Staff

| Area of Expertise  | Name  | Phone  | E-mail                 |
|--|---|--------|------------------------|
| Employment eligibility verification, worksite enforcement, legalization, DREAM Act, guest workers  | (name redacted), Specialist in Immigration Policy | 7-.... | -redacted-@crs.loc.gov |
| Border security, CIR triggers, inadmissibility, interior enforcement, detention and removal  | Michael Garcia, Legislative Attorney              | 7-.... | -redacted-@crs.loc.gov |
| Legal immigration (family), naturalization, immigrant integration, international adoptions, immigration fiscal impacts, immigration demography | William Kandel, Analyst in Immigration Policy     | 7-.... | -redacted-@crs.loc.gov |
| Legal immigration (immigrants and nonimmigrants), legalization, naturalization and citizenship, EOIR   | Margaret Lee, Legislative Attorney                | 7-.... | -redacted-@crs.loc.gov |
| Legalization, worksite enforcement, noncitizen eligibility for public benefits, interior enforcement, detention and removal                    | Kate Manuel, Legislative Attorney                 | 7-.... | -redacted-@crs.loc.gov |
| Guest-worker wage requirements; effects of immigration on the U.S. labor market  | (name redacted), Analyst in Labor Policy          | 7-.... | -redacted-@crs.loc.gov |
| Border security, entry-exit system, interior enforcement, CIR triggers and funding, employment eligibility verification                        | Marc Rosenblum, Specialist in Immigration Policy  | 7-.... | -redacted-@crs.loc.gov |
| Foreign labor contractors  | Jon Shimabukuro, Legislative Attorney             | 7-.... | -redacted-@crs.loc.gov |
| Interior enforcement, detention and removal, Visa Waiver Program, investors, nonimmigrant visas, noncitizen eligibility for federal benefits   | (name redacted), Specialist in Immigration Policy | 7-.... | -redacted-@crs.loc.gov |
| Legal immigration (immigrants and nonimmigrant), inadmissibility, document integrity, visa policy, noncitizen eligibility for federal benefits | (name redacted), Specialist in Immigration Policy | 7-.... | -redacted-@crs.loc.gov |

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