

July 6, 2011

**Rep. Lamar Smith’s “Keep Our Community Safe Act of 2011”
Creates More Problems than Solutions**

One of the ugliest myths in the immigration debate involves the relationship between immigrants and crime. While studies repeatedly have shown that immigrants are less likely to commit crimes than native-born Americans, many politicians exploit the public’s fear of crime to advance a restrictive immigration agenda.¹ One of the latest attempts to do so is the “Keep Our Communities Safe Act of 2011,” or H.R. 1932, introduced by Rep. Lamar Smith (R-TX). This bill seeks to expand the authority of the Department of Homeland Security (DHS) to subject certain immigrants to indefinite—that is, potentially life-long—detention, even though the Supreme Court has held that such detention raises serious constitutional concerns.

This proposal relies on continued detention of immigrants—many of whom have never committed a crime—as a stand-in for fixing the underlying problems of our broken immigration system. The evidence suggests that this bill would increase costs, put further strain on the judicial system, and do little to keep America safe.

H.R. 1932, the “Keep our Communities Safe Act of 2011” would:

- Authorize the indefinite detention of certain immigrants who have been ordered removed but cannot be deported because no country will accept them.²
- Allow DHS to detain thousands of harmless individuals such as asylum seekers and lawful permanent residents returning from abroad during their removal proceedings, which could take months or years to conclude, without ever giving them a bond hearing before a judge.³
- Mandate the detention of individuals who were convicted of crimes years or even decades ago, and who have served their sentences and have been living responsible lives since that time.⁴
- Require that any petition for a writ of habeas corpus to challenge the detention of such individuals be filed with the federal district court in Washington, D.C., instead of the local federal court.⁵

H.R. 1932 is unnecessary because existing legal mechanisms already protect public safety.

The U.S. justice system already has two different legal mechanisms in place to deal with the general protection of public safety. The criminal system incarcerates roughly 1.6 million people on any given day, including thousands of non-citizens.⁶ In addition, a parallel civil system allows the detention of people who are mentally ill or dangerous to society, including sex offenders, even after their criminal sentences are over.⁷ Only after serving their sentences are immigrants subject to immigration detention and removal.

Because delay cooperation in accepting their nationals or lack diplomatic relations with the U.S., it may take several months or even years to accomplish removal of a noncitizen.⁸ In 2001, the Supreme Court

found in *Zadvydas v. Davis* that six months is a reasonable amount of time to detain an individual while trying to effectuate removal. After that period, if there is no significant likelihood of removal in the reasonably foreseeable future, the government must furnish evidence to show that removal is imminent or establish special circumstances that require continued detention.⁹ In addition, the USA PATRIOT Act of 2001 authorizes the detention of noncitizens who cannot be removed if they are a threat to national security.¹⁰

H.R. 1932 does not address the source of the problems with indefinite detention—that some nations either delay or refuse to issue travel documents.

- There are a few nations that delay or refuse to accept their nationals who are under final orders of removal. These delays may force Immigration and Customs Enforcement (ICE) to release non-citizens subject to *Zadvydas*.¹¹ For example, six nations (Cambodia, Iraq, Liberia, Sierra Leone, Somalia, and Vietnam) take more than 180 days to release travel documents *on average*.¹²
- The U.S. government is actively trying to reduce delays caused by other countries. Recently, the Department of State and ICE signed a Memorandum of Understanding establishing a target travel document issuance time of 30 days.¹³

H.R. 1932 is expensive and does not advance ICE’s stated priorities.

- ICE *already* spends \$2 billion per year to detain immigrants, and this bill would do nothing but increase that cost. Passage of H.R. 1932 would likely result in the prolonged or indefinite detention of thousands of additional noncitizens, costing U.S. taxpayers hundreds of millions of dollars per year.¹⁴
- While ICE has stated that it must prioritize the immigrants it detains because of limited resources, this bill would allow and often require the detention of immigrants who do not fit within those priorities.¹⁵ This would include the indefinite detention of asylees, refugees, and LPRs who have long since completed their criminal sentences and are not a threat to national security or public safety.
- When detention is prolonged, due process requires a bond hearing where the government must establish that no other conditions are sufficient to prevent flight risk or a danger to the community.¹⁶

H.R. 1932 compromises federal court review and adequate representation.

H.R. 1932 would significantly compromise judicial review of unlawful detention by restricting review of habeas petitions exclusively to the United States District Court for the District of Columbia. Currently, noncitizens who are detained may ask a federal district court to review the legality of their detention by filing a habeas petition in the district where they are detained.

- The bill would limit habeas review to a single court and impose a significant burden on the D.C. district court. According to some estimates, the bill would increase the court’s caseload by at least thirty percent.¹⁷ In addition, the expansive detention provisions in H.R. 1932 would likely result in a greater number of habeas petitions, imposing an even greater burden on the D.C. district court and undermining the court’s ability to provide prompt and effective review in immigration habeas cases, as well as all the other cases before it.
- By forcing noncitizens to file and litigate their cases in a district far from where they are detained, the bill would impose a costly burden on petitioners and could effectively deter noncitizens from challenging unlawful detention.

Endnotes

¹ Immigration Policy Center, [*Immigrants and Crime: Are They Connected? A Century of Research Finds that Crime Rates for Immigrants are Lower than for the Native-Born*](#) (Washington, DC: American Immigration Council, December 2007).

² H.R. 1932 Sec. 2(a)

³ H.R. 1932 Sec. 2(b)(2). 2(b)(4) DHS would be allowed to detain these individuals while they are in removal proceedings. In general, these proceedings last from a few weeks to a few months. However, for complex cases, these proceedings can last many months or even years.

⁴ 2(b)(5)

⁵ 2(a)(7)

⁶ [*Hearing on Providing for the Detention of Dangerous Aliens, before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement*](#), 112th Cong. (May 24, 2011) (statement of Ahilan T. Arulanantham, Deputy Legal Director, American Civil Liberties Union of Southern California) at 10, citing Bureau of Justice Statistics—[Total Correctional Population](#) (year end 2009).

⁷ 18 U.S.C. § 4246; § 4248

⁸ For example, Cuba lacks formal relations with the United States and accepts only aliens from a very short list related to the Mariel boatlift. Under the U.S.-Vietnam Repatriation Agreement, Vietnam refuses to accept anyone who entered the United States prior to July 12, 1995, the date that relations with the U.S. were reestablished. [*Hearing on H.R. 1932, The Keep Our Communities Safe Act, before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement*](#), 112th Cong. (May 24, 2011) (statement of Gary Mead, Executive Associate Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement) at 8.

⁹ 533 U.S. 678 (2001).

¹⁰ 8 U.S.C. 1226(a).

¹¹ [*Hearing on H.R. 1932, The Keep Our Communities Safe Act, before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement*](#), 112th Cong. (May 24, 2011) (statement of Gary Mead, Executive Associate Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement) at 8.

¹² *Ibid.*, at 9.

¹³ *Ibid.*, at 10.

¹⁴ Average cost of \$122 per day. See Detention Watch Network, [About the U.S. Detention and Deportation System](#).

¹⁵ Shoba Sivaprasad Wadhia, [Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion](#) (Washington, DC: Immigration Policy Center, American Immigration Council, December 2010).

¹⁶ *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455, 468-71 (D. Mass. 2010) (construing § 1226(c) to implicitly require that removal proceedings be completed within a reasonable period of time; if not, detention can only continue after an individualized determination of flight risk and dangerousness).

¹⁷ [*Hearing on Providing for the Detention of Dangerous Aliens, before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement*](#), 112th Cong. (May 24, 2011) (statement of Ahilan T. Arulanantham, Deputy Legal Director, American Civil Liberties Union of Southern California) at 23.