



Testimony of the American Immigration Lawyers Association

Submitted to the Subcommittee on Immigration Policy and Enforcement of the  
Committee on the Judiciary of the U.S. House of Representatives

Hearing on March 7, 2012  
“H.R. 3808, the Scott Gardner Act”

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The American Immigration Lawyers Association (AILA) offers the following testimony to the Subcommittee on Immigration Policy and Enforcement regarding the Scott Gardner Act, H.R. 3808. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 11,000 attorney and law professor members.

Driving while under the influence (DUI) is an important public safety issue that deserves thoughtful and comprehensive response by Congress and law enforcement agencies nationwide. The Scott Gardner Act, however, is the wrong tool to address this problem. This bill would force state or local law enforcement agencies (LLEA) to engage in significant additional activities without federal reimbursement—this constitutes an unfunded mandate and a violation of the 10<sup>th</sup> Amendment. By compelling states and localities to engage in immigration enforcement, the bill would also foster abuse and racial profiling by police officers and undermine the community trust in local law enforcement. As a result, H.R. 3808 would compromise public safety rather than strengthen it.

Furthermore, H.R. 3808 would result in the detention of large numbers of people who have never been convicted of a crime and do not need to be held in custody to ensure public safety. This bill would take away the authority from federal immigration officers and judges who should be making the individualized determinations about whether to keep someone in custody or release them. In effect, H.R. 3808 would impose huge costs unnecessarily on federal taxpayers because it mandates custody across the board. In so doing, it would mandate into ICE custody individuals who have families that depend on them or other compelling equities in their favor and who may be eligible for relief under immigration law.

**What is H.R. 3808?** This bill would mandate U.S. Immigration Customs and Enforcement (ICE) to take into custody anyone who is merely “apprehended” for a DUI charge while unlawfully present in the U.S. ICE interprets the federal law mandating custody (8 U.S.C. § 1226(c)) as requiring jail-like detention. Under H.R. 3808, when a state or local law enforcement officer apprehends someone for DUI and has “reasonable ground to believe that the individual is an alien,” that officer would have to verify whether that person is unlawfully present through federal law

enforcement databases. The bill would authorize the LLEA to issue a federal detainer to keep the person in custody and to transport the person to federal custody. It reimburses LLEAs for transport costs only. Finally, H.R. 3808 would require the Department of Homeland Security (DHS) to prioritize the removal of these individuals. This last provision duplicates what is already a clear enforcement priority of ICE to remove DUI offenders.<sup>1</sup>

**H.R. 3808 misuses local public safety resources and imposes an unfunded mandate on states.** DUI arrests constitute more than one in ten of all law enforcement arrests nationwide and total over 1.4 million arrests annually. Under H.R. 3808, police officers and sheriffs would be drawn away from their primary duty to ensure public safety in order to verify the immigration status of the many people being arrested for DUI. A police officer who has stopped someone for drunk driving should be concerned primarily with evaluating whether the person is a danger on the road and needs to be taken off streets, not with making a legal determination of alienage.

While making a traffic stop, police and sheriffs do not have access to databases containing information about an individual's immigration status. Under H.R. 3808, the officer would have to contact ICE and have ICE run the person through the federal database. During the time ICE checks the database the officer will either have to detain that person or book them into jail. H.R. 3808 would result in thousands of people being held by the roadside or taken to jail while the checks are being run. All the time officers spend on these checks would be time diverted from other public safety priorities. For example, local law enforcement who are running sobriety checkpoints on large numbers of individuals would experience enormous delays if they had to confirm immigration status while stopping large numbers of vehicles. .

Moreover, the cost of training state and local personnel and verifying the immigration status of arrestees would place a substantial burden on state and local resources. None of these costs would be reimbursed by the federal government, despite the fact that H.R. 3808 mandates them. In this regard, H.R. 3808 is almost certainly in violation of the 10<sup>th</sup> Amendment to the Constitution and its prohibition against the federal government commandeering state or local participation to enforce federal law. In 1997, the Supreme Court struck down a federal handgun law as a 10<sup>th</sup> Amendment violation because it compelled state and local law enforcement officials to conduct background checks on persons attempting to purchase handguns. *Printz v. United States*, 521 U.S. 898 (1997). H.R. 3808 would similarly require LLEAs to conduct checks on the immigration status of DUI arrestees without reimbursing states for the costs.

**H.R. 3808 would cause the unnecessary detention of people who pose no public safety threat.** Mandatory custody laws take the authority away from federal law enforcement officials to make the important determination as to whether an individual should be released or kept in custody. Typically, ICE agents or a judge decide whether to detain someone based on a variety of factors that indicate the risk that the individual poses to public safety and the likelihood that he or she will appear for court.

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<sup>1</sup> See November 17, 2011 ICE memorandum, "Guidance to ICE Attorneys Reviewing Cases before EOIR," available at [www.aila.org/pd](http://www.aila.org/pd).

H.R. 3808 is a blunt instrument that would mandate custody even if someone posed little or no threat to public safety. H.R. 3808 does not require that a person has been convicted for DUI to be subject to mandatory custody. The bill would cover all those who are “apprehended” for DUI. Furthermore, the bill treats someone with just a single apprehension the same as a DUI offender with multiple convictions. The man convicted of killing Scott Gardner, for whom H.R. 3808 is named, had a criminal record of five DUIs including one incident that was a head-on collision. By making no distinction between those who have been apprehended or convicted or who are repeat recidivists, the bill casts too wide a net.

**H.R. 3808 would waste federal resources.** In many cases ICE will not detain someone in immigration removal proceedings because he or she poses neither a threat to public safety nor a flight risk. In such cases, ICE may release the individual or require a bond, intensive supervision, or ankle monitors that use GPS-technology. These alternative methods cost less than a dime for each dollar spent on jails.

Under H.R. 3808, federal taxpayers would bear substantial costs for the jailing of individuals until their cases are decided. Currently about \$2 billion is spent annually on immigration detention. This covers the cost of maintaining about 33,000 detention beds and detaining about 400,000 people annually. If H.R. 3808 became law, it would result in the detention of thousands of people and increase costs by tens of millions of dollars.

**H.R. 3808 would force ICE to take custody of victims of crime, trafficking, or persecution and others who have compelling cases or personal circumstances.** Under H.R. 3808, ICE would be compelled to take custody of someone no matter the specific circumstances involved or factors showing the person poses no risk to public safety. ICE would not be able to take into account favorable factors such as whether someone is a caregiver of young children or other dependents. ICE could not consider if the person has a clean record and no previous arrests for DUI or any other crime. As a result, H.R. 3808 would cause hardship for many people who are eligible for relief under immigration law, including asylum seekers and applicants for visas to protect victims of human trafficking or serious crimes. Moreover, those who are detained are much less likely to obtain relief.

When Emilia G was a child living in Mexico, she was sexually abused by her mother’s boyfriend. She married at the age of 17, and during their marriage her husband beat and raped her repeatedly. In 1997, Emilia came to the U.S. illegally to join her husband who had come earlier. The beatings and sexual abuse continued until they separated in 2004. Emilia began a relationship with another man. That relationship ended when he returned to Mexico a year later. After his departure, Emilia discovered she was pregnant with his child. She gave birth to their daughter in 2007 and now bears the sole responsibility of raising their daughter.

In 2008, Emilia G was violently raped while returning home late at night from her job at a restaurant. The man forced her out of her car and raped her while her one-year-old girl was in the car. As a victim of a serious crime, Emilia is eligible to apply for a U visa. She testified at his trial. The prosecutor supported her

application and wrote a letter on her behalf. Emilia's case for U visa is exceptionally strong. Emilia also has a conviction for driving while intoxicated. She has no other criminal background.

If Emilia G were apprehended for DUI after H.R. 3808 became law, ICE would have no choice but to take her into custody until her U visa is granted. While Emilia is in detention, it would be a severe hardship—and perhaps an impossible task—for her to provide and care for her daughter who is now four years-old. Mandatory custody would likely result in her child being placed in the child welfare system. Emilia's case for a U visa would also be in jeopardy while she is in detention for the sole reason that people who have strong cases for relief frequently give up because they simply cannot endure being jailed.

The mandatory custody required under H.R. 3808 would result in severe punishment that is grossly out of proportion for many people, especially those with a single DUI arrest like Emilia who have compelling factors that speak in favor of their release. The ability to make judgments about custody and release should remain with ICE officers and immigration judges.

**H.R. 3808 will foster abuses by local law enforcement officers and undermine public safety.** Under H.R. 3808's terms, if an officer has "reasonable ground to believe that the individual is an alien," the officer must verify that person's immigration status. In this regard the bill suffers from the same fundamental problem as Arizona's immigration enforcement law, S.B. 1070, which is now being challenged before the Supreme Court. Both operate on the premise that state and local law enforcement officials will identify and confirm an individual's immigration status. Arizona's S.B. 1070 requires officers to determine the immigration status of any individual who is stopped or detained if there is "reasonable suspicion that the person is an alien" and "unlawfully present in the United States."

H.R. 3808 will encourage abuse and racial profiling by law enforcement officers. Alienage is a legal status. Whether a person is an alien is not a determination that can be readily made based on observable factors or traits, such as physical appearance or behaviors. As a result, H.R. 3808 will create incentives for officers to use proxies such as race, ethnicity, language, or accent to identify people who are unlawfully present. Such practices are precisely what local officials complain are undermining the community's trust of law enforcement and, as a result, the ability of LLEAs to ensure public safety and to investigate crimes.

In August 2011, AILA released a report entitled, "Immigration Enforcement Off Target: Minor Offenses with Major Consequences,"<sup>2</sup> that showcased dozens of examples of racial profiling and disturbing police practices. In these cases, local law enforcement had detained individuals at the roadside or booked them even though the individual had committed only minor offenses or no offense at all, presented no public safety or security risk, and had no criminal background. The targeting of people who look foreign by the police is a recognized problem that needs to be stopped not encouraged. H.R. 3808 would only compound a problem that already exists and give additional motivation for police to detain people using biased assumptions of who is unlawfully present.

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<sup>2</sup> Available at [www.aila.org](http://www.aila.org).

In conclusion, AILA recommends that the subcommittee reject H.R.3808 as a poor solution to an important problem. H.R. 3808 would misuse finite law enforcement resources and place tremendous burdens on states, localities, and federal taxpayers. Moreover, it would sweep so many people unnecessarily into detention causing tremendous harm and hardship.

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