

## **Top Criminalization & Enforcement Threats in the White House's Border Security and Immigration Reform Act of 2018**

### **1. Subjects Individuals to Indefinite Detention and Expands Mandatory Detention**

This bill seeks to institute and operationalize no-bond or indefinite detention for all noncitizens in custody, in part by trying to overturn numerous court decisions, including the Supreme Court's, that limited indefinite and no-bond detention. These provisions will lead to a huge increase in immigration detention because immigrants cannot seek bond. This bill tries to re-establish DHS as judge and jailor on prolonged detention matters because DHS is given vast authority to extend detention in dozens of ways.

### **2. Expands criminalization and harsh 1 strike you're out mandatory deportation laws**

Our existing immigration laws are already extremely harsh for both those trying to get and those trying to keep their immigration status. There are dozens, if not hundreds, of ways to deport people under our current immigration laws. There are over 52 separate grounds of removal, many of which contain dozens of subcategories. This bill seeks to expand an already expansive list of offenses that trigger mandatory detention and deportation, prohibiting a judge from considering anything else about someone's life, including weighing U.S. military service, family ties, contributions to community, and seriousness or how long ago an offense took place. There is no statute of limitations and the bill applies this expansion retroactively; a person can face mandatory deportation decades after their conviction, undermining our commitment to second chances and upends the idea of rehabilitation.

For example, the bill would expand mandatory deportation to include:

- 3 misdemeanor offenses, including "quality of life" offenses that result in no jail time
- Any state felony offense relating to drugs, including marijuana possession and even offenses where federal law does not consider it a controlled substance
- A consensual sexual relationship between a 17-year-old and a 19-year-old
- Theft offenses where the person only intended to temporarily take something, like joyriding
- A first offense for "smuggling" where someone is only intending to aid their child
- Throwing someone's iPhone
- DUIs
- Any felonies where the aggregate prison term imposed was 3 years or more

The bill also criminalizes asylum seekers with up to 10 years in prison for knowingly making a materially false statement or using a false document at entry.

Given how existing harsh laws have allowed the Trump Administration to maintain high levels of deportation and increase the scope of surveillance and enforcement, further expansion of our immigration laws is an unnecessary and misguided approach to addressing the crisis in our immigration system.

### **3. Forces immigrants, often without lawyers, to essentially relitigate decades-old convictions already adjudicated in the criminal justice system**

This bill undermines a pillar of immigration law called the “categorical approach” that has been affirmed by the Supreme Court time and again. This approach prevents re-litigation of old convictions in immigration court, ensures some due process rights of immigrants facing deportation, and helps protect the integrity and finality of the criminal justice system.

It also codifies that immigrants can face immigration consequences, including detention and deportation, for offenses that were vacated or expunged and no longer count as convictions under state law.

Note: The language in the bill cuts off in a few places, so it is impossible to provide an accurate interpretation of the provision.

### **4. Attacks Sanctuary Policies**

The bill expands how detainers, which are requests from Immigration and Customs Enforcement (ICE) to hold an individual beyond a constitutionally permissible timeframe to effectuate their transfer to ICE custody, currently operate and shifts liability from constitutional defects inherent in detainer compliance to the federal government and provides a new private right of action for victims or surviving relatives of individuals where perpetrator was released “as a consequence” of locality not honoring a detainer.

Through the activism and organizing of local communities, often with the support of local law enforcement, district attorneys, and elected officials, over 760 counties in the United States have enacted sanctuary policies that limit compliance with detainers. This bill seeks to derail these efforts by local stakeholders to influence their county policies and, moreover, are a slap in the face to those counties that want to support healthier relationships with the communities of color they serve by promoting constitutional policing practices.

### **5. New gang deportability and inadmissibility ground: Please refer to previous talking points: The WH/Ryan bill also creates a new gang-labeling deportation and exclusion ground that will defer to ICE’s flawed and racist labeling and profiling of gang members.**

- The White House/Ryan bill includes and goes farther than Goodlatte’s bill HR 4760 because this bill allows exclusion and deportability for those individuals with misdemeanor or felony convictions whose sentencing enhancements were “predicated” on gang conduct/membership.
  - Example: A person convicted of possessing a joint who receives a sentencing enhancement referencing possible gang involvement would be mandatorily deportable.

- Creates a sweeping new definition of “criminal gang” that will demonize entire communities without any meaningful opportunity to present rebutting evidence;
- Creates overly broad grounds of deportability and inadmissibility tethered to this new definition that will lead to racial profiling and wrongful deportations;
- Subjects broad new categories of people to no-bond mandatory detention;
- Creates new bars to and proscribes detention for asylum, Temporary Protected Status and other protections that undermine domestic and international obligations, resulting in the return of those fleeing gang violence back to certain harm; and
- There is no waiver and it is retroactive.

**Notes by Section (for those who want to get into the weeds):**

Section 1102. Eligibility for Contingent Non-Immigrant Status

- Section 1102(b)(4)(A) disqualifies individuals with misdemeanor domestic violence and child abuse convictions as defined under VAWA (34 USC 12291(a)), assault resulting in bodily injury or violation of a protection order, (B) any juvenile court adjudications relating to a crime of violence.
- The VAWA definitions of domestic violence and child abuse were intended to be definitions allowing for services to be provided to victims, and defined to be expansive so that grant funding isn’t unnecessarily limited to prohibit services. ***It was never intended to be a definition to penalize people*** seeking to access a benefit.

Sec. 3103. Detention of dangerous aliens.

***THE WH/Ryan bill does not include the Sarah and Grant section which made vast expansions to 236c and people detained during removal proceedings.***

- This bill tampers with timing and finality of “removal orders” to limit the ways that federal courts can review prolonged detention when detention is over 90 days. (The “removal order” timing is a critical part of the time used to count when the detention becomes prolonged.) It stops and starts the timing of the “removal order” by creating dozens of new exceptions, new processes, and new categories that swallow the general rule that prolonged detention is disfavored in our courts. This means it will be difficult showing detention is prolonged because the removal period is tolled or restarted.
- Some examples below:
  - DHS grants itself automatic and unreviewable authority to extend the 90 day removal period to a 180 day removal period and takes away the right to ask for bond.
  - Allows extension if person refused to “comply with removal order.” This is unclear and could implicate a decision to appeal a BIA order.
  - A challenge to no-bond detention under 236c can ONLY be challenged in federal court, not immigration court

- Creates a category to automatically extend no-bond detention for immigrants who are granted a stay by the Immigration Court or if a case is “remanded” (usually means the immigrant won the case)
- Sets up vast categories to expand no bond indefinite detention 180 days for people who fall within certain categories
- Not only do these provisions raise constitutional flags, but they are so unwieldy and poorly drafted that they will set our courts up for lengthy and prolonged court battles.
  - For example, anyone who fits under these new processes is not eligible for bond - period.
  - This bill effectively tries to overturn SCOTUS long-term precedent like *Zadvydas* and numerous other appeals court decisions.

Sec. 3104. Definition of aggravated felony.

Expands aggravated felony definition to include, among other things:

- Statutory rape
- Any state felony offense relating to a controlled substance (even if federal law does not deem it a controlled substance)
- Expands crimes of violence to include any other offense in which the record of conviction establishes that physical force against property or person was used.
- Theft offenses where the person only intended to temporarily take something
- Takes out exception to alien smuggling for first offense where the person can show they were aiding only their child, spouse, or parent
- Takes out one year sentence requirement to obstruction of justice or perjury offense
- 2 DUIs or 1 DUI where serious injury resulted
- 3 misdemeanor offenses (not arising out of traffic laws except DUIs)
- Felonies where the aggregate prison term imposed was 3 years or more
- Applies retroactively

Sec. 3108. Clarification of authority regarding determinations of convictions.

- Crime shall be determined by record of conviction and any facts established within it.
- No vacatur for immigration or rehabilitative purpose. Unclear what saying about procedural or legal defect because sentence completely cuts off.
- Grounds based on maximum possible sentence at time of offense, not retroactive law change -> getting at retroactive 364 bills.

Sec. 3110. Clarifying the authority of ice detainers.

- Provides that DHS must have probable cause to issuer detainer, but defines probable cause by using the categories on the current detainer form, which have been found to be insufficient
- Provides DHS authority to take custody within 48 hours “but in no instances more than 96 hours” following date individual would otherwise be released from criminal custody
- Provides immunity for localities and state and local officials and contracting nongovernmental entities by providing they are considered to be acting under color of

federal authority when holding individuals pursuant to a detainer and requiring such actors to be held harmless for compliance

- New private right of action for victims or surviving relatives of individuals where perpetrator was released “as a consequence” of locality not honoring a detainer