AILA Advocacy
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Summary of H.R. 1932 "Keep Our Communities Safe Act of 2011"

Introduction:
Supporters of H.R. 1932 describe it as a narrow, constitutional bill meant to protect our communities from a few dangerous individuals. In fact, H.R. 1932 is a sweeping piece of legislation that would result in many immigrants, including asylum seekers fleeing persecution, being detained for months or years without any opportunity to show a judge that their detention is not warranted. In the past decade, the U.S. Supreme Court and numerous circuit courts around the country have issued decisions setting the constitutional limits on the government's authority to hold noncitizens in immigration detention. This bill seeks to undercut those decisions and create a regime in which many additional immigrants can or must be detained unnecessarily.

Specifically, H.R. 1932 would do the following five things:

- Authorize DHS to indefinitely detain many immigrants who have been ordered removed but cannot be deported because no country will accept them.
- Authorize DHS to detain immigrants who arrive at our borders without the proper documents or who are otherwise inadmissible throughout their removal proceedings, no matter how long those proceedings might take. This includes asylum seekers and lawful permanent residents returning from trips abroad.
- Mandate DHS to detain many noncitizens throughout their removal proceedings, no matter how long those proceedings might take, without giving any opportunity for a judge to conduct a bond hearing. This includes asylees, refugees, and lawful permanent residents (LPRs) who have criminal convictions and are fighting their deportation.
- Mandate DHS to detain people who were convicted of crimes years, even decades ago, and have been fully rehabilitated.
- Radically restructure the judicial review process to require all noncitizens challenging their detention under H.R. 1932—no matter where in the country they are being held—before the federal district court in Washington, DC.

Overview of Immigration Detention:
Even though many immigrants are held in county jails or other penal institutions, immigration detention is a form of civil, not criminal confinement. This means that detention is not meant to be punitive but rather to serve an administrative purpose. In the case of immigration detention, the purpose is to ensure that noncitizens who pose a flight risk or danger to the community: (1) attend their immigration hearings; and (2) do not endanger the community during the removal process. ICE will spend over $2 billion this year to detain approximately 400,000 noncitizens, many who have never been given the opportunity to demonstrate to a judge that they are neither a flight risk nor a danger. H.R. 1932 would significantly increase the number of immigrants held in detention, at great human cost and taxpayer expense.

A. Indefinite Detention—Section 2(a) of H.R. 1932

Indefinite detention arises when a person who has *already been ordered removed* cannot be physically deported from the U.S. When someone is ordered removed, she is generally deported to her home country. However, in some cases, the home country refuses to take the person back, the person is stateless—and so does not have a home country to return to—or the person has proven that she will be persecuted or tortured if returned and no other country will take her. This occurs with approximately 5,000 of the nearly 400,000 people the U.S. deports each year, or 1.25%. Roughly a third of those who cannot be deported are Cubans.

Regardless of the reason why a noncitizen cannot be deported, the question becomes what the U.S. should do with these individuals. For a number of years, the government argued that it had the discretion to keep these individuals in detention indefinitely. However, in 2001, the U.S. Supreme Court ruled that the government has no such authority.[1]

In almost direct contravention of this decision, Section 2(a) of H.R. 1932 would specifically allow DHS to hold certain categories of individuals in indefinite detention. These include noncitizens convicted of an aggravated felony[2] or other type of crime designated by DHS, if it believes that "the release of the [person] will threaten the safety of the community or any person." Under H.R. 1932, DHS would have complete discretion to decide who is a threat and should be detained.

In addition, H.R. 1932 lacks any meaningful procedural protections for a person at risk of indefinite detention, including the right to a hearing before a judge or to have legal counsel provided by the government. As a result, H.R. 1932 would likely result in thousands of individuals being subject to indefinite, potentially permanent, detention with DHS serving as both judge and jailer.

B. Prolonged Detention—Section 2(b) of H.R. 1932

Prolonged detention occurs when a noncitizen, *currently in removal proceedings*[3] is held in immigration detention for many months or even years without a bond hearing. In general, removal proceedings for individuals who are detained proceed quickly, in a matter of a few weeks to a few months. However, for the thousands who have particularly complex cases,

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[1] The Supreme Court decision, *Zadvydas v. Davis*, 533 U.S. 678 (2001), instead gave the government six months in which to effectuate the physical removal of the person. If after six months deportation was not significantly likely in the reasonably foreseeable future, continued detention was unconstitutional. In its decision, the Court noted that the Constitution only permits a very narrow category of persons—such as those who are specially dangerous due to mental illness or a mental defect—to be held in civil detention indefinitely, and only if there are sufficient procedural safeguards to protect individuals' rights.

[2] The term "aggravated felony" is an immigration term encompassing various types of crimes. Initially, the term referred to only very serious and violent crimes, such as murder or firearm trafficking. However, in 1996, Congress greatly expanded the category and today it includes many crimes that are non-violent and some that are misdemeanors.

[3] In other words, their case is being heard by the immigration judge or it is on appeal.

removal proceedings can last for many months or even years. An increasing number of federal courts have held that the government cannot hold noncitizens in detention for prolonged periods of time without a bond hearing. The next three sections describe how H.R. 1932 seeks to ensure that this type of constitutionally questionable detention continues.

1. Arriving Aliens—Section 2(b)(2)

Arriving alien is the term used to describe an individual who arrives at a U.S. port of entry but is not legally eligible to be admitted into the country. This includes asylum seekers[4] fleeing persecution and LPRs who are "inadmissible," meaning that their status is in jeopardy, usually because of a past criminal conviction. The vast majority pose no threat to public safety—they are asylum seekers or LPRs with older or minor convictions. Yet H.R. 1932 would explicitly authorize their detention for months or years without the benefit of a bond hearing.

Under current regulations, arriving aliens may be released from detention but only at the discretion of DHS; they are not eligible for a bond hearing before an immigration judge. DHS maintains that they have the discretion to hold these individuals for as long as it takes for their cases to be resolved. This is true even if the immigration judge grants the person relief, and it is DHS who appeals that decision. For those whose cases prove difficult to resolve, this means they will languish in detention, sometimes for years, before ultimately winning their claims.

A number of courts have recognized the grave due process concerns with the current system and have held that individuals subject to this type of unreviewable, prolonged detention must be granted a bond hearing before an immigration judge. In an end-run around those federal court cases, Section 2(b)(2) of H.R. 1932 would authorize continued detention at DHS discretion by specifying that "an alien may be detained under this section, without limitation, until the alien is subject to an [sic] final order of removal." This provision has little to do with public safety and targets even the most vulnerable immigrants who arrive at our borders.

2. INA § 236 Detention—Section 2(b)(4)

Typically noncitizens, who are not arriving aliens, are eligible for a bond hearing before an immigration judge. Many in this category, however, are subject to "mandatory detention" pursuant to INA § 236(c) and are precluded from a bond hearing. Additionally, DHS currently interprets INA § 236(c) as *requiring* detention during removal proceedings, even if an individualized assessment would demonstrate that detention is not warranted.

Persons subject to mandatory detention include those convicted of one of a broad number of criminal offenses, including convictions for nonviolent crimes or misdemeanors. Some served

[4] People who arrive at the border without a valid visa are detained and generally ordered removed by a DHS officer, without any opportunity to see an immigration judge. This is known as expedited removal. However, if an individual expresses fear of returning to her home country she is granted an interview before a specially trained officer to determine if she has a "credible fear" of persecution. Only those who pass this interview are then permitted to apply for asylum before an immigration judge. LPRs and others who have status in the U.S. but are inadmissible are not subject to expedited removal, however, they too can be detained and placed into removal proceedings.

no time in jail while others completed their sentences years before and have demonstrated their rehabilitation. Each year tens of thousands of individuals—including LPRs, asylees, and refugees—are detained under this provision for months or years without the benefit of a bond hearing. This includes immigrants with extensive ties to the U.S. who are eligible to apply for relief to remain in the U.S. or who show that they never should have been placed in removal proceedings.

Although the Supreme Court held in 2003 that mandatory detention was constitutional for individuals who conceded removability for the *relatively brief period* needed to conduct removal proceedings, this holding was based specifically on the Court's understanding that the vast majority of detentions lasted 47 days or less. The growing consensus among federal courts is that mandatory detention without the benefit of a bond hearing is unconstitutional when an individual contests removability, or when the detention is not brief.

Contrary to these federal court decisions, Section 2(b)(4) of H.R. 1932 would explicitly authorize detention "for any period, without limitation, until the alien is subject to a final order of removal."

3. Expanding Mandatory Detention—Section 2(b)(5)

H.R. 1932 would not only explicitly authorize prolonged detention under Section 236(c), it would also make individuals with very old convictions subject to mandatory detention. Under the current interpretation of Section 236(c), only those who were arrested or still completing sentences after October 9, 1998 are subject to it. Section 2(b)(5) of H.R. 1932 would amend Section 236(c) to expand the mandatory detention provision to include individuals who have been at liberty for years, or even decades, and leading productive lives on the basis of an old criminal offense. Mandatory detention without a bond hearing already raises numerous constitutional and public policy concerns. Rather than protect public safety, H.R. 1932 would needlessly sweep tens of thousands of more hardworking members of our communities into immigration detention.

C. Limiting Habeas Actions to DC District Court

In addition to authorizing indefinite and prolonged detention, H.R. 1932 would greatly restrict noncitizens' ability to challenge their detention in federal court. Already, individuals deemed ineligible for a bond hearing have very limited options to obtain judicial review and are only able to challenge their detention by filing a petition for a writ of habeas corpus ("habeas petition") with a federal district court. Currently, as is the common practice in habeas cases, petitions are filed in the federal district in which the person is being detained. H.R. 1932 would limit habeas review to a single court nationwide, the DC district court, thereby reducing the number and diversity of judges considering this issue. As a result, H.R. 1932 would impose a significant burden on the DC district court, undermining the court's ability to provide prompt and effective review. Noncitizens wrongly detained will spend even more time locked up as they wait for their habeas petition to be resolved.