

April 14, 2021

The Honorable Nancy Pelosi
Speaker

The Honorable Chuck Schumer
Majority Leader

The Honorable Kevin McCarthy
Minority Leader

The Honorable Mitch McConnell
Minority Leader

The Honorable Rosa DeLauro
Chairwoman, Committee on Appropriations

The Honorable Patrick Leahy
Chairman, Committee on Appropriations

The Honorable Kay Granger
Ranking Member, Committee on Appropriations

The Honorable Richard Shelby
Vice Chairman, Committee on Appropriations

The Honorable Lucille Roybal-Allard
*Chairwoman, Committee on Appropriations,
Subcommittee on Homeland Security*

The Honorable Chis Murphy
*Chairman, Committee on Appropriations,
Subcommittee on Homeland Security*

The Honorable Chuck Fleischmann
*Ranking Member, Committee on Appropriations,
Subcommittee on Homeland Security*

The Honorable Shelley Moore Capito
*Ranking Member, Committee on Appropriations,
Subcommittee on Homeland Security*

U.S. House of Representatives
Washington, DC 20515

U.S. Senate
Washington, DC 20510

Re: FY 2022 Department of Homeland Security (DHS) Appropriations Bill

Dear Members of Congress:

The Public Defenders Coalition for Immigrant Justice writes to ask for your support to include a provision in the FY2022 Homeland Security Appropriations Bill which is similar or identical to that found in Section 219 of the draft FY2021 House DHS Appropriations bill, requiring that ICE release all persons after 20 days in custody, notwithstanding 236(c), unless the agency can meet a burden of establishing public safety or flight risk. Relatedly, we ask for cuts to ICE's Custody Operations account in FY2022.

The Public Defenders Coalition for Immigrant Justice is a growing coalition with public defender member offices in Alabama, California, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Nebraska, New York, Texas, and Washington. As advocates who represent noncitizens in criminal and immigration proceedings, we are deeply aware of the devastating impact of criminal and immigration laws that disproportionately punish noncitizens and separate immigrant families by incarceration and deportation. This coalition seeks to disentangle the

criminal and immigration legal systems and support policies that promote family reunification, decarceration, and due process protections for immigrant communities.

Before detailing the merits of this proposal, it bears reminding this subcommittee what is truly at stake: not only does this provision implicate individual liberty, but specifically incarceration within a system that has revealed itself to be an enormous risk to public health and safety. ICE custody is “civil” in name only as most immigrants are held in criminal jails or in carceral facilities run by private prison companies. Many of these facilities have [failed to protect](#) the people in their custody from COVID-19. Detained immigrants with life-threatening conditions are often denied, or forced to [wait months for proper medical care](#). Women in detention have been [forcibly sterilized](#). We read in the news and hear from our own clients reports of [physical and sexual abuse by ICE officials](#), exposure to [freezing temperatures](#) and [extreme heat](#), and [inadequate mental healthcare](#). While suffering these abuses, immigrants behind bars also endure separation from their families and communities for an indeterminate period of time.

Under the current system, once the mandatory detention bar under section 236(c) of the Immigration Nationality Act (“INA”) is triggered, our clients are rendered permanently ineligible for release. People detained under INA § 236(c) remain detained for the entire duration of their immigration case and appeal. Complex cases, with appeals and remands, new hearings, and new appeals, and the severe backlog in the immigration court system, can take years. Even the most straightforward case, where an individual is clearly eligible to remain in the United States, can take at least a few months. In that amount of time, we have seen the lives of our clients and their families fall apart due to our client’s detention. Often, a person will serve more time in ICE custody than in criminal custody: indeed, for many clients their time in ICE custody is the first time they have ever spent more than a couple days in jail. Some of our clients with strong defenses to deportation will give up and accept deportation simply because they can no longer bear their extended time in ICE custody.

INA § 236(c) encompasses a wide range of criminal offenses, many of which do not require a conviction to trigger the bar. Offenses that subject an individual to mandatory detention include simple drug possession (including small amounts of marijuana), theft offenses (including low level misdemeanors, such as turnstile jumping and shoplifting in a convenience store), gambling offenses, writing bad checks, and other offenses unrelated to the usual government justifications for detention (flight risk and danger). Most of the mandatory detention provisions do not require any term of imprisonment to have been imposed by a criminal court — meaning that even where a criminal court judge did not believe incarceration to be warranted, our clients are subjected to ongoing detention by the immigration system for the same conduct. Similarly, there is no possibility of release where someone has served a criminal sentence and can demonstrate rehabilitation, nor is there the ability to consider the amount of time that has passed since such conduct or conviction. A forty-year old lawful permanent resident with a stable career and

family can be subject to mandatory detention for a crime committed when they were eighteen and in high school.

Moreover, because many of the INA § 236(c) designations are grounded in the criminal legal system, mandatory detention has a disproportionate impact on Black and brown communities that are overpoliced and inequitably treated within that system. These communities are more likely to have had police interaction, which results in low level criminal convictions, which in turn trigger mandatory detention. In fact, INA § 236(c) was enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which was part of the Clinton era “tough on crime” policies that contributed to the mass incarceration and separation by imprisonment of Black and brown communities. Just as President Biden has [criticized the 1994 Crime Bill](#), this administration must address the corresponding racist immigration policies enacted during that era, including dismantling INA § 236(c).

Because of the devastation created by INA § 236(c), our coalition supports the proposal that, notwithstanding INA § 236(c) or any other provision of law, no Federal funds may be used hereafter by the Department of Homeland Security to detain an individual for more than 20 days unless it is determined by the Director of U.S. Immigration and Customs Enforcement, following an individualized assessment, that the person is likely to pose a specific and substantial risk of causing bodily injury or using violent force against the person of another. This proposal is an important first step to ending civil detention and providing some measure of due process when a person’s liberty is at stake. Mandatory detention (INA § 236(c)) is a highly punitive provision of the INA that should be rescinded in its entirety. No other system of incarceration so completely removes individualized consideration as INA § 236(c) which, once triggered, ties the hands of an adjudicator so that they must continue detention regardless of any circumstances that might compel release. At minimum, meaningful due process requires individualized consideration of release for all individuals.

Furthermore, we specifically support a requirement that the government bear the burden of proving a “specific and substantial risk” that an individual will cause bodily injury or use violent force against the person of another, and such likelihood must be established by clear and convincing evidence, including credible and individualized information. Any individualized consideration must place the burden on the government. The advocates in our coalition who practice in detained immigration courts regularly encounter abuses in the adjudication of dangerousness where clients remained detained based on pending charges, unsubstantiated allegations, and years-old convictions. This proposal provides the important protection of requiring the government to more concretely support their theory of dangerousness in that it provides that a criminal conviction, arrest, pending criminal charge, or combination thereof may not be the sole factor relied upon to justify continued detention.

This proposal is a critical first step to disentangling the criminal and immigration legal systems, keeping families together, and respecting the liberty rights of all individuals. We look forward to working with you to ensure due process is provided for all individuals facing loss of liberty. If you have any questions or concerns, please feel free to contact Rosa Cohen-Cruz at rosac@bronxdefenders.org on behalf of the Public Defender Coalition for Immigrant Justice.

Sincerely,

The Public Defenders Coalition for Immigrant Justice