Immigrants' Rights Organizations Encourage Members of Congress to Vote No on H.R. 6691, a Retrogressive Mass Incarceration Bill

September 5, 2018

H.R. 6691 is a retrogressive measure that seeks to expand the federal criminal code and exacerbate mass incarceration at a time when the vast majority of Americans believe the country is ready for progressive criminal justice reform. The bill vastly broadens the scope of the federal term "crime of violence," a definition with sentencing repercussions throughout the federal criminal code. Because the term is also referenced in one of the harshest provisions of immigration law, the bill would also expand the already vast category of crimes that render even lawfully present immigrants subject to immigration detention and deportation. The bill will cause numerous harms, outlined here and described in detail below:

1. **H.R. 6691's expansion of Section 16 of Title 18 of the United States Code, the definition of a "crime of violence," will expand the criminal justice and incarceration systems.** Because this definition is cross-referenced widely throughout the criminal code and incorporated into federal immigration law, this bill will trigger a significant expansion of the penalties attached to even minor criminal conduct in federal criminal court, exacerbate the mass incarceration crisis, *and* render even more immigrants subject to the disproportionate penalty of deportation.
2. **H.R. 6691 broadens the "crime of violence" definition far beyond what the statute included prior to the Supreme Court's decision in *Dimaya***, including offenses as minor as simple assault and as vague as "communication of threats."
3. **H.R. 6691 will expand the already overly punitive immigration consequences of involvement in the criminal justice system** by further broadening the already sweeping list of offenses that constitute an "aggravated felony," in a manner almost entirely duplicative and sometimes at odds with other provisions in federal immigration law.
4. If H.R. 6691 became law, there would be **serious questions about its constitutionality**.

This bill represents a cynical effort to deepen the penalties attached to even minor criminal offenses, further criminalizing immigrants and communities of color. **The Immigrant Justice Network, Immigrant Defense Project, Immigrant Legal Resource Center, National Immigrant Justice Center, and the National Immigration Project of the National Lawyers Guild urge Members of Congress to vote NO on H.R. 6691.**

1. H.R. 6691 expands the federal definition of "crime of violence," with vast ripple effects.

H.R. 6691 purports to amend only one provision of U.S. law—the definition of what constitutes a "crime of violence" as defined at Section 16 of Title 18 of the United States Code. Section 16, however, serves as the "universal definition" of a "crime of violence" for the entirety of the federal criminal code.[1] The language is cross-referenced in the definitions and sentencing provisions for numerous federal offenses, including racketeering, money laundering, firearms, and domestic violence offenses.[2] Additionally, the definition is incorporated into the Immigration and Nationality Act as one of a list of 21 different types of offenses that constitute an "aggravated felony," which in turn constitutes a ground of deportability and a bar to nearly every type of defense to deportation.[3]

Expanding the "crime of violence" definition is anathema to progressive criminal justice reform, criminalizing *more* conduct and attaching greater penalties across numerous provisions of the federal code, all while rendering more immigrants subject to the double penalty of deportation.

2. H.R. 6691 broadens the "crime of violence" definition far beyond what the statute included prior to the Supreme Court's decision in *Dimaya*.

H.R. 6691 is a solution in search of a problem. Section 16 is written in two sub-parts, (a) and (b). The text of the statute already broadly defines "crime of violence" in sub-section (a), including any offense "that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[4] We can assume that H.R. 6691 was written in response to the Supreme Court's April 2018 decision in *Sessions v. Dimaya*, in which the Court struck down sub-section (b) as unconstitutional in the immigration context. Section 16(b) includes any felony offense that "by its nature" involves a substantial risk of the use of such force; in *Dimaya*, the Court found its application so vague as to create "more

[1] *Dimaya v. Sessions*, 138 S.Ct. 1204, 1241 (2018) (J. Roberts, dissenting).
[2] *See* 18 U.S.C. § 25 (use of minors in commission of a crime of violence); 18 U.S.C. § 842 (distributing information about the making or use of explosives); 18 U.S.C. § 924 (relating to firearms offenses); 18 U.S.C. §§ 1952 and 1959 (relating to racketeering offenses); 18 U.S.C. § 1956 (relating to money laundering); 18 U.S.C. § 2261 (relating to domestic violence offenses).
[3] The aggravated felony definition is found at 8 U.S.C. § 1101(a)(43)(A) - (U), incorporated as its own ground of removability at 8 U.S.C. § 1227(a)(2)(A)(iii), and serves as a categorical bar to nearly all forms of statutory relief from removal, even for those who are otherwise eligible and demonstrate positive equities, including, *e.g.*: asylum, 8 U.S.C. § 1158(b)(2)(B)(i); cancellation of removal for long-time residents, 8 U.S.C. § 1229b(a)(3) and (b)(1)(C); voluntary departure, 8 U.S.C. § 1229c(a)(1).
[4] 18 U.S.C. § 16(a).

unpredictability and arbitrariness than the Due Process Clause tolerates."[5] In short, the Court found the second half of the statute void for vagueness, but left the first half intact.

The *Dimaya* decision remedied significant injustices that had resulted from the inconsistent and often random application of section 16(b). Immigration legal service providers, serving as *amici* to the *Dimaya* Court, noted that the statute's "only predictable outcomes are continued disagreements among the courts and continued harms to immigrants."[6] To demonstrate this harmful disparity, *amici* described how the offense of residential trespass was considered a crime of violence under section 16(b) in the Tenth Circuit Court of Appeals, but not in the Seventh Circuit, which noted the offense could be committing simply by walking into a neighbor's open door under "the mistaken belief that she is hosting an open house…"

Now comes H.R. 6691, which proposes to keep section 16(a) intact while expanding the "crime of violence" definition to encompass dozens of *other* offenses that are in some cases given their own new definitions and in others defined via reference to the existing criminal code. Many of these offenses move section 16 far beyond its pre-*Dimaya* scope, including offenses as minor as spitting on another person.[7] The bill stretches the imagination by calling generally non-violent offenses, such as simple assault, "communication of threats," and extortion, crimes of violence.

3. H.R. 6691 will expand the already overly punitive immigration consequences of involvement in the criminal justice system, in a manner almost entirely duplicative and sometimes at odd with other provisions of federal immigration law.

The immigration penalties of involvement in the criminal justice system are already breathtakingly harsh and overbroad; undocumented immigrants and decades-long lawful permanent residents alike can face deportation for offenses as minor as shoplifting,[8] using a false bus pass,[9] or simple drug possession.[10] Immigration detention and deportation are frequently

[5] *Dimaya*, 138 S.Ct. at 1216. For more details on the immigration impact of the decision, *see* Immigrant Justice Network *et al.*, *Issue Brief: The Implications of* Sessions v. Dimaya (Apr. 2018).

[6] Brief of National Immigration Project of the National Lawyers Guild, Immigrant Defense Project, American Immigration Lawyers Association, and National Immigrant Justice Center as Amici Curiae in Support of Respondent, *Dimaya*,138 S.Ct. 1204 (2016).

[7] The bill includes "assault" as a delineated crime of violence and defines it as including "conduct described in" section 113(a). Section 113(a) by its plain text and relevant jurisprudence includes simple assault, which includes offensive touching. *See U.S. v. Lewellyn*, 481 F.3d 694 (9th Cir. 2011).

[8] *See, e.g.*, *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (2016) (Arizona shoplifting conviction is a "crime involving moral turpitude").

[9] *See, e.g.*, *Michel v. INS*, 206 F.3d 253 (2d Cir. 2000) (finding the offense of using false bus passes a "crime involving moral turpitude").

imposed as a penalty even in cases where a criminal court judge found community service or an entirely suspended sentence sufficient punishment for the offense committed.[11]

The "crime of violence" definition at 18 U.S.C. § 16 is incorporated as one of twenty-one types of offense that constitute an "aggravated felony" as defined at section 101 of the Immigration and Nationality Act.[12] An "aggravated felony" is one of dozens of categories of offenses that trigger deportation from or preclude entry to the United States, layered on top of the provisions of federal immigration law that authorize deportation for those unlawfully present. The "aggravated felony" category is different, however, because it triggers mandatory no-bond detention in almost every case[13] and categorically precludes nearly all immigrants from presenting a defense to their deportation.[14]

By adding dozens of offenses to the existing "crime of violence" definition, H.R. 6691 therefore grows the already vast expanse of offenses that render lawfully present immigrants in the United States subject to immigration detention and enforcement.

- The bill is largely duplicative of other grounds of removability, in several cases putting forth new definitions of offenses that are defined in other provisions of the Immigration and Nationality Act,[15] setting up a nearly impossible-to-effectuate removal scheme. Many of the offenses delineated in the bill constitute their own independent aggravated felony grounds (including, for example, murder and burglary),[16] their own independent ground of removability (including, for example, child abuse, stalking, and domestic violence),[17] or—in nearly every other case—already fall within the wide-reaching "crime involving moral turpitude" grounds of deportability and inadmissibility, and those excluded from those grounds are by nature largely minor offenses.[18]

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[10] *See* 8 U.S.C. § 1227(a)(2)(B). Deportations of non-citizens whose most serious conviction was for a drug offense increased 22 percent from 2007 to 2012, totaling more than 260,000 deportations over the same period. Human Rights Watch, *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses* (June 16, 2015).

[11] *See, e.g.*, 8 U.S.C. § 1101(a)(48)(B) (defining the term "sentence" as used in the Immigration and Nationality Act to include sentences suspended in part or whole).

[12] 8 U.S.C. § 1101(a)(43).

[13] *See* 8 U.S.C. § 1226(c).

[14] *See* n. 3 *supra*.

[15] The new categories of offenses set forth in the bill as under the "crime of violence" umbrella include, for example: the offense of "burglary" with its own definition, duplicative of the separately delineated theft or burglary aggravated felony ground at 8 U.S.C. § 1101(a)(43)(G); the offense of "domestic violence," defined differently and separately from the domestic violence ground of deportability at 8 U.S.C. § 1227(a)(2)(E); and various firearms offenses, defined differently and separately from the firearms ground of deportability at 8 U.S.C. § 1227(a)(2)(C).

[16] 8 U.S.C. § 1101(a)(43)(A) and (G).

[17] 8 U.S.C. § 1227(a)(2)(E).

[18] 8 U.S.C. § 1227(a)(2)(A)(i); 8 U.S.C. § 1182(a)(2)(A)(i). Crimes involving moral turpitude, while not defined in the federal immigration statute, have been interpreted by the Board of Immigration Appeals to include any act "which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and

- This bill will further criminalize immigrant communities, communities already living in fear of increasingly militarized immigration enforcement operations.[19] The bill's expanded list of "crime of violence" offenses includes relatively minor offenses including simple assault,[20] vaguely worded offenses such as "communication of threats," and a sweeping list of inchoate offenses including solicitation or "aiding and abetting" any of the enumerated categories.

- This bill will further marginalize historically marginalized communities, triggering heightened immigration penalties in already over-policed neighborhoods.[21]

4. If this bill were to pass, it would raise serious constitutional concerns.

If this bill were to become law, there would be serious questions about its constitutionality because it jeopardizes the long established "categorical approach" in our legal system.

What is the 'categorical approach'? Over the years, the Supreme Court has carefully crafted an efficient and predictable legal framework to determine whether a non-citizen's crime makes him or her deportable or inadmissible.[22] This framework is called the "categorical approach," which applies to determine deportability and inadmissibility for criminal grounds. It sets a clear and uniform standard to evaluate the immigration consequences of the crime of conviction. The categorical approach helps to eliminate subjectivity in adjudication by ensuring that convictions are characterized based on their inherent nature and official record, rather than on potentially disputed facts, and thus ensures that two people convicted of the same crime will be treated similarly under the law.

This bill makes a strong push to systematically switch from the established framework of the "categorical approach" to a "conduct based" definition. The conduct based definition would effectively allow an immigration judge to go back and "re-try" a conviction that was already decided in a court of law. This bill, if passed, would raise the same Sixth Amendment concerns that the Supreme Court identified in *Mathis v. United States*: "...allowing a sentencing judge to

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not the statutory prohibition of it which render a crime one of moral turpitude." *See, e.g.*, *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996).

[19] Franklin Foer, *The Atlantic*, "How Trump Radicalized ICE," (Sept. 2018).

[20] *See* n. 7 *supra*.

[21] *See, e.g.*, Jeremy Raff, *The Atlantic*, "The 'Double Punishment' for Black Undocumented Immigrants," Dec. 30, 2017.

[22] *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Kawashima v. Holder*, 132 S.Ct. 1166 (2012); *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010); *Mathis v. United States*, 136 S. Ct. 2243, 2248 (U.S. 2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013); *Taylor v. United States*, 495 U.S. 575 (1990).

go any further would raise serious Sixth Amendment concerns. This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense."[23]

Like the burglary provision analyzed in *Mathis*, the crime of violence definition this bill amends is used as a sentencing enhancement under 8 U.S.C. § 1326(b)(2). As a result of switching to a conduct-based definition rather than "the simple fact of a prior conviction," the bill presents the same Sixth Amendment concerns that troubled the *Mathis* Court.

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A yes vote on H.R. 6691 is a vote for mass incarceration, for increased criminalization of communities of color, and for even further militarization of immigration enforcement. Members of Congress must vote no.

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[23] *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016).