

Congress of the United States
Washington, DC 20510

October 30, 2023

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
U.S. Department of Homeland Security
245 Murray Lane, SW
Washington, DC 20528

Dear Attorney General Garland and Secretary Mayorkas:

As Chairs of the Senate Judiciary Committee and the Senate Judiciary Subcommittee on Immigration, Citizenship, and Border Safety and Ranking Members of the House Judiciary Committee and the House Judiciary Subcommittee on Immigration Integrity, Security, and Enforcement, we are concerned that current procedures for making immigration bond determinations allow for the prolonged detention of noncitizens without adequate due process, raising serious constitutional issues. Such detention has had disastrous effects on noncitizens and their families—plunging families into poverty and exacerbating medical or mental health conditions for detained individuals or their loved ones at home.¹ We urge you to amend current immigration bond procedures to mitigate these concerns and improve access to due process in the immigration detention system.

Although the immigration system is civil, not criminal in nature, the Immigration and Nationality Act permits noncitizens to be detained while they await their immigration hearings.² Those who have not been charged or convicted of serious crimes may be released on bond.³ Although the statute does not compel this application,⁴ the Department of Homeland Security (DHS) regulations and Board of Immigration Appeals (BIA) case law both currently place the

¹ Regina Day Langhout *et al.*, “Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities,” *American Journal of Community Psychology* 62 (July 2018), <https://onlinelibrary.wiley.com/doi/10.1002/ajcp.12256>.

² 8 U.S.C. § 1226

³ 8 U.S.C. § 1226

⁴ *Hernandez-Lara v. Lyons*, 10 F.4th 19, 49-53 (1st Cir. 2021). There is a circuit split as to whether or not placing the burden on a noncitizen detainee to prove they are not a danger to property or persons or a flight risk is presumptively unconstitutional, but Courts have not found the statute to compel this reading. *See id.* and *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020) (finding that due process requires the government to bear this burden) *versus Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1212 (9th Cir. 2022) and *Miranda v. Garland*, 34 F.4th 338, 365-66 (4th Cir. 2022) (reaching the contrary conclusion).

burden on a noncitizen detainee to prove they are not a danger to property or persons or a flight risk.⁵ This policy places a higher burden on immigrants—regardless of whether or not they have committed a crime—than is commonly placed on defendants in the federal criminal legal system, where the government in most cases must justify the necessity of detention.⁶ This requirement is particularly onerous for unrepresented asylum seekers and other immigrant detainees who lack counsel. Additionally, immigration judges are not required to consider individuals’ ability to pay when setting bond amounts, leaving many to face prolonged detention simply because of their financial circumstances. Immigration bonds can be hundreds of thousands of dollars, imposing huge costs that families are unable to afford.⁷ By contrast, the federal Bail Reform Act forbids the imposition of financial conditions which the defendant cannot meet.⁸

While some noncitizens simply cannot meet the high bar to have a bond set under current procedures or pay the prohibitively high bond if one is set, others have no access to a bond proceeding at all because Immigration and Customs Enforcement (ICE) officers consider them to be subject to mandatory detention or custody.⁹ The criminal grounds for mandatory custody are extremely broad, sometimes subjecting noncitizens without a criminal record to years of detention.¹⁰ For example, ICE may subject an individual to mandatory detention if there is “a reason to believe” that the person has been involved in trafficking in controlled substances, even if the individual was never convicted of such a crime.¹¹ Overall, data from August 13, 2023 shows that 18,825 out of 30,184—or 62.4 percent—of individuals currently held in ICE detention have no criminal record.¹² Persons should have, at a minimum, the ability to appeal a determination that would subject to them to long-term detention without an opportunity to seek bond, especially those persons without a criminal record.

The Supreme Court upheld the statute allowing for detention during removal proceedings, but has recognized that the application of the statute—including its mandatory detention provisions—can raise constitutional concerns in individual cases.¹³ As of August 2023, the median wait time for detained cases is 43 days,¹⁴ but nearly 1000 noncitizens have been in ICE custody for more than six months, and nearly 300 have been detained for more than a year.¹⁵ Cases of prolonged detention

⁵ See, 8 U.S.C. § 1226; 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); and *Matter of Adeniji*, 22 I.&N. Dec. 1102 (BIA 1999); *Matter of Guerra*, 24 I.&N. Dec. 37 (BIA 2006) and successive decisions.

⁶ National Conference of State Legislatures, *Legal Presumptions to Guide Courts Making Pretrial Determinations*, updated June 2020, <https://www.ncsl.org/civil-and-criminal-justice/legal-presumptions-to-guide-courts-making-pretrial-determinations>.

⁷ Freedom for Immigrants, *Freedom for Immigrants’ National Immigration Detention Bond Fund*, <https://www.freedomforimmigrants.org/national-bond-fund> (last accessed July 23, 2022).

⁸ 18 U.S.C. § 3142(c)(2)

⁹ ICE posts information about the detained population monthly at <https://www.ice.gov/detain/detention-management>. As of March 2023, 59% of those in ICE custody are categorized by ICE as subject to mandatory detention. 8 U.S.C. § 1225(b); 8 U.S.C. § 1226(c)(1).

¹⁰ 8 U.S.C. § 1226(c).

¹¹ 8 U.S.C. § 1226(c)(1) and § 1182(a)(2)(C).

¹² See Transactional Records Access Clearinghouse (TRAC) Immigration, https://trac.syr.edu/immigration/quickfacts/detention.html#detention_nocrim (last accessed 8/31/2023).

¹³ *Jennings v. Rodriguez*, 138 S.Ct. 830, 851 (2018); see also *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019).

¹⁴ EOIR Adjudicatory Statistics, *Median Completion Time for Detained Cases*, <https://www.justice.gov/eoir/page/file/1163626/download>.

¹⁵ Immigration and Customs Enforcement, *FY 2023 ICE Statistics*, <https://www.ice.gov/detain/detention-management>

have resulted in several successful habeas challenges, with courts finding cases of immigration detention to be presumptively unreasonable, and therefore unconstitutional, absent an individualized custody determination.¹⁶

We encourage your Departments to take action to reduce the likelihood of such due process failures in our immigration bond system. Specifically, we urge you to amend your Departments' guidance and regulations to—

- 1) Shift the burden of proof to the government in immigration bond proceedings, as is done in criminal proceedings;
- 2) Require consideration of a noncitizen's ability to pay when making a determination on bond amount;
- 3) Give noncitizens determined by ICE to be subject to mandatory detention an opportunity to request a review of such determination; and
- 4) Schedule periodic assessments for all those in immigration detention to determine whether detention has become or will likely become unreasonably prolonged, such that due process requires an individualized bond hearing.

Thank you for your time and consideration. We look forward to working with you in advancing due process protections for those in ICE custody.

Sincerely,



Richard J. Durbin

Chair

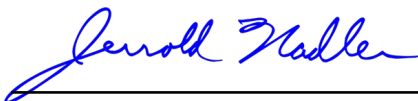
Senate Judiciary Committee



Alex Padilla

Chair

Subcommittee on Immigration,
Citizenship, and Border Safety



Jerrod Nadler

Ranking Member

House Judiciary Committee



Pramila Jayapal

Ranking Member

Subcommittee on Immigration
Integrity, Security, and Enforcement

¹⁶ See, e.g., *Muse v. Sessions*, 409 F. Supp. 3d 707, 713 (D. Minn. 2018); *Vargas v. Beth*, 378 F. Supp. 3d 716, 726, 727 (E.D. Wis. 2019); *Duncan v. Kavanagh*, 439 F. Supp. 3d 576, 588 (D. Md. 2020); *Portillo v. Hott*, 322 F. Supp. 3d 698, 709 (E.D. Va. 2018); *Baez-Sanchez v. Kolutwenzew*, 360 F. Supp. 3d 808, 815-16 (C.D. Ill. 2018).