

Oppose H.R. 3697, Criminal Alien Gang Member Removal Act

H.R. 3697 creates new grounds of removal for “gang members,” but the bill’s overbreadth would capture many individuals who have no involvement in any gang activity whatsoever. The bill even allows for the denial of admission to individuals, including the immediate relatives of US citizens, based on the mere *belief* of an association with criminal activity.

WHY MEMBERS SHOULD OPPOSE H.R. 3697

Denies Admission to Individuals on the Mere *Belief* of Wrongdoing.

- The bill denies the admission of many categories of immigrants—including persons sponsored for family- and employment-based green cards, as well as certain lawful permanent residents returning from abroad—based on nothing more than an immigration officer having a “reason to believe” of an affiliation to gang or certain other criminal activity.
- Under this bill, many immigrants could be denied admission or even deported with little due process based on no real evidence of a gang affiliation. The “reason to believe” standard is a low burden of proof similar to probable cause, and it does not require a conviction or even an arrest. The government need only have grounds to “believe” an affiliation to certain wrongdoing.

Classifies Religious Workers and Humanitarian Aid Workers as Gang Members.

- The bill refers to a broad range of criminal activity, including the “harboring” of immigrants under INA § 274. This “harboring” provision is not restricted to those in the business of smuggling immigrants, but includes anyone who provides shelter, transportation, or support to undocumented immigrants.¹ The federal courts have found that “harboring” includes offering a known undocumented individual a place to stay.² This statute has been used against religious workers, as well as persons who live with undocumented family members.³
- As noted above, the bill would not even require a criminal conviction (or even an arrest) in order to support a finding of harboring for purposes of this provision. Instead, the *mere belief* of involvement in harboring could be used to classify individuals as criminal gang members.
- This provision could thus be used against religious or humanitarian workers who provide aid to undocumented immigrants.⁴ The bill thus would turn nuns who assist undocumented immigrants into gang members overnight. And it is retroactive, so any non-citizen religious or humanitarian aid worker who has harbored an undocumented immigrant in the past could be detained and deported.

Targets Vulnerable Populations, Many of Whom Are Fleeing Gangs and Gang Activity. This bill targets vulnerable populations by finding that any such “gang members” are not eligible for asylum, TPS, parole, or Special Immigrant Juvenile status. Many immigrants, particularly children, are fleeing gang activity and have been victims of sexual assault and other abuse at the hands of gang members in their home country. This bill could be used to deny them the ability to obtain humanitarian protection in the United States and would instead return these children back to brutally violent situations.

Covers Other Conduct Unrelated to Gang Activity. This bill would cover other relatively benign conduct, such as personal drug use. For example, the bill covers groups that commit felony drug offenses. Under the bill, groups of epilepsy or cancer patients who take medical marijuana consistent with state law would be classified as criminal gangs. So would high school kids who do nothing more than regularly gather to smoke

¹ See, e.g., *U.S. v. Shum*, 496 F.3d 390 (5th Cir. 2007).

² *United States v. Xiang Hui Ye*, 588 F.3d 411, 415-416 (7th Cir. 2009).

³ *Id.*; *U.S. v. Acosta De Evans*, 531 F.2d 428 (9th Cir. 1976).

⁴ Kristina M. Campbell, *Humanitarian Aid is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 *Syracuse L. Rev.* 71 (2012).

marijuana behind the school bleachers after school. This provision is retroactive, and there is no exception for juvenile conduct.

Unconstitutional Designation Process. The bill provides a process for the Secretary of Homeland Security or the Attorney General to designate a group as a “criminal gang,” but this procedure would violate due process. The designation may be based on secret *ex-parte* classified evidence that the person has no opportunity to contest. And once a designation becomes final (even if the person did not even know about it), the person can be removed without any ability to contest the designation in removal proceedings.

Part of a Larger Mass Deportation Plan. This bill is a portion of the mass deportation bill known as the “Davis Oliver Act” (H.R. 2431), which has been cited as a priority for the Trump Administration. Anti-immigrant groups such as Numbers USA and the Center for Immigration Studies support the Davis Oliver Act because it would lead to the mass incarceration and deportation of millions of immigrants.

WHAT THE BILL DOES

- The bill creates a new definition for the term “criminal gang,” which is defined as:
 1. An ongoing group, club, organization, or association of 5 or more persons that has as one of its primary purposes the commission of certain listed offenses, including:
 - a felony drug offense, including felony simple possession of marijuana (*this could be read to include high school kids who regularly gather to smoke marijuana*);
 - bringing in and harboring certain aliens (*this would cover those who provide sanctuary to undocumented immigrants, including clergy*);
 - identity fraud offenses (including knowingly possessing a false identity document);
 - crimes involving obstruction of justice; and burglary.
 2. A group that has been designated as a criminal gang by the DHS Secretary, in consultation with the Attorney General, using the above criteria.
- Individuals are inadmissible if the government knows or has “reason to believe” the person (1) is in such a gang, (2) has ever been in such a gang, or (3) has participated in the activities of such a gang knowing or having reason to know that such activities will promote, further, aid or support the gang’s illegal activities. *Under this bill, immigrants could be denied admission with little due process based on no real evidence of a gang affiliation.* The “reason to believe” standard is a low burden of proof similar to probable cause, and it does not require a conviction or even an arrest. This would allow the government to deny admission based on flimsy, circumstantial evidence.
- The Secretary of Homeland Security or the Attorney General may designate a group as a criminal gang by publishing a notice in the Federal Register. The designation may be based on secret *ex-parte* classified evidence that the person has no opportunity to contest. If the person fails to timely contest the notice, even if he or she was unaware of it, he or she can be removed without any ability to contest the designation in removal proceedings.
- Anyone who is alleged to be a gang member by DHS is subject to mandatory detention and is ineligible for bond, regardless of whether the person poses a threat to public safety or a flight risk. This would expand mass detention and expedite the removal of anyone the government claims is a gang member.
- This bill targets vulnerable populations by finding that such alleged “gang members” are not eligible for asylum, temporary protected status (TPS), parole, or special immigrant juvenile status (for unaccompanied alien children who have demonstrated abuse, abandonment or neglect).