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LOCK UP FALSELY ARRESTED ADJUSTMENT APPLICANTS AND TEENAGE SHOPLIFTERS, OR BE SUED: THE HOUSE'S "LAKEN RILEY ACT"

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On March 7, 2024, the Republican-led U.S. House of Representatives passed the "Laken Riley Act", H.R. 7511. The bill was named after a murder victim from Georgia, whose "alleged murderer", as the bill describes him, had been paroled into the United States from Venezuela and had previously been arrested for driving a scooter without a license (with a child who was not wearing a helmet) and for shoplifting. The bill describes its primary purpose as "To require the Secretary of Homeland Security to take into custody aliens who have been charged in the United States with theft".

Perhaps because the Laken Riley Act has little chance of passing the Senate or becoming law, there has been little public analysis of its details, although its initial passage by the House was covered by major media such as the New York Times and CNN. At least one press release has correctly observed that "Under the Laken Riley Act, a Dreamer who lives in a hostile state could be subject to indefinite detention simply because someone says they suspect them of a petty crime." As it turns out, however, some of the details are even worse than that press release suggests.

The text of the Laken Riley Act would add a new paragraph (1)(E) to the list of those subject to mandatory detention during removal proceedings in INA § 236(c), 8 U.S.C. § 1226(c), covering "any alien who . . .

> *(i) is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 212(a), and*
> *(ii) is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential*

> *elements of any burglary, theft, larceny, or shoplifting offense,"*

H.R. 7511, § 3(1). It would require that "The Secretary of Homeland Security shall issue a detainer for an alien described in paragraph (1)(E) and, if the alien is not otherwise detained by Federal, State, or local officials, shall effectively and expeditiously take custody of the alien." Id. § 3(3). In addition, it would allow lawsuits by "The attorney general of a State, or other authorized State officer" to file lawsuits challenging the release of aliens in alleged violation of INA § 236 and various other sections of law relating to immigration. Id. at § 4(a.)-(f.).

The most obvious problem with this new language would be that, as the above-quoted press release flagged, it does not require a conviction, only that one be "charged with" or "arrested for" the crimes in question. Mandatory detention following an arrest or charge that need not even lead to a conviction would be bad enough if it only applied to people who one would otherwise reasonably expect to be placed in removal proceedings, since even they are entitled under the Constitution to due process of law—and there has been at least one recent and notorious incident of an asylum-seeker being accused of a more serious crime than shoplifting before being exonerated. But for reasons that may be less obvious, the Laken Riley Act would go significantly farther even that that.

One problem is the breadth of the inadmissibility grounds which, together with any charge or arrest for burglary, theft, larceny or shoplifting, would trigger the mandatory detention. The reference to one "inadmissible under paragraph (6)(A). . . of section 212(a)" would cover anyone who entered without inspection, even if they have since been, for example, granted asylum, at least as the law has been interpreted by the Board of Immigration Appeals. INA § 212(a)(6)(A)(i) states that "An alien present in the United States without being admitted or paroled . . . is inadmissible", and the BIA held in Matter of V-X-, 26 I&N Dec. 147 (BIA 2013), that a grant of asylum is not an "admission" for these purposes, leaving asylees subject to the grounds of inadmissibility (although with the proviso that they cannot be removed unless their asylum status is terminated). That scenario would at least bear some distant, tenuous resemblance to the cases that the authors of H.R. 7511 presumably thought they were trying to address, although the thought of an asylee, granted permission to stay in the United States for safety from persecution, being subject to mandatory detention due to potentially false charges of theft or shoplifting, is nonetheless

horrifying. But the reach of H.R. 7511's cited grounds of inadmissibility is even broader, and stranger, than this.

The ground of inadmissibility under INA § 212(a)(7), which applies to documentation requirements such as having a proper immigrant or nonimmigrant visa or passport, was presumably included in the Laken Riley Act order to capture parolees, as Laken Riley's alleged murderer had been paroled into the United States. While the bill's authors may have had in mind those who first arrive in the United States on parole, however, the language of the bill is broad enough to cover those who use advance parole to leave and re-enter the United States while they have a pending application for an immigration benefit, most commonly an application for adjustment of status to that of a Lawful Permanent Resident (green card holder). They, too, will upon their return be technically inadmissible for lack of an immigrant visa, until their applications for adjustment of status are granted, and so INA § 212(a)(7) is the ground of inadmissibility under which they would be charged if placed in removal proceedings. Under the Laken Riley Act, therefore, an applicant for adjustment of status who travels on advance parole, and is later incorrectly charged with or arrested for theft or shoplifting, would need to be detained by immigration authorities until the completion of those removal proceedings. If visa numbers had become unavailable since the filing of that adjustment application (what is commonly known as "retrogression"), the proceedings could potentially drag on for years until a visa number became available again, and during all of that time, the Laken Riley Act would mandate detention of the adjustment applicant.

Another problem with the structure of the Laken Riley Act is that while a "conviction" under immigration law has been defined to exclude many juvenile delinquency proceedings, as explained by the BIA in Matter of Devison, 22 I&N Dec. 1362 (BIA 2000), there is no such case law regarding an arrest or charge, nor does the text of the Laken Riley Act include any such carve-out. Thus, the Laken Riley Act would apparently subject even a teenager charged with shoplifting under juvenile delinquency procedures to mandatory immigration detention, if that teenager had previously entered without inspection or traveled on advance parole, and had not yet become a Lawful Permanent Resident.

It gets worse. If state authorities had not considered it worthwhile to detain the falsely accused adjustment applicant or teenage shoplifter while sorting out a minor criminal charge, section 3(3) of the Laken Riley Act would mandate that

DHS "effectively and expeditiously take custody of the alien." And if DHS did not do this, according to section 4(b) of the Laken Riley Act, the attorney general of any state that could claim at least $100 in damage could sue them "to obtain appropriate injunctive relief." So an attempt by DHS to be somewhat reasonable in enforcing these overly broad criteria under unjust circumstances would simply lead to litigation, and possibly a court order to more rigorously enforce the Laken Riley Act's peculiar requirements.

The author's own Representative in Congress, Jerrold Nadler, was quoted by CNN as having described the actions of Republicans in putting forward the Laken Riley Act as "exploiting death for a partisan stunt" and "throwing together legislation to target immigrants in an election year." That description appears accurate. The legislation having been thrown together hastily, to exploit Laken Riley's tragic death for partisan purposes, may help explain why the House would have passed legislation mandating the indefinite detention of falsely accused adjustment applicants and teenage shoplifters. But it does not excuse it.