TEXAS PRACTICE ALERT - LAKEN RILEY ACT (S. 5 - 199TH CONGRESS)

WHAT IS THE LAKEN RILEY ACT?

The Laken Riley Act ("LRA")[1], signed into law by President Trump on January 29, 2025, amends parts of the Immigration and Nationality Act ("INA") relating to Immigration and Customs Enforcement ("ICE") authority to detain noncitizens who have committed certain criminal offenses.[2] Specifically, the LRA amend Section 236 of the INA to expand dramatically the circumstances under which a noncitizen is subject to "mandatory detention." Individuals subject to mandatory detention are not eligible for an immigration bond, leaving decisions about any possible release pending the outcome of their removal case exclusively in the hands of ICE.

Under the newly amended Section 236, noncitizens living in the United States without permission or, in some instances, individuals lawfully admitted into the United States, become subject to mandatory detention following an arrest for a newly expanded list of criminal offenses. Many of these offenses are specifically enumerated in the amended Section 236(c)(e)(ii) of the INA and include mostly nonviolent property offenses such as shoplifting, theft, and burglary. Others, however, relate to violent crimes, including assault on a law enforcement officer, or any offense in which "serious bodily injury" or death occurs. Troublingly, in a significant deviation from most of the previously enumerated grounds for mandatory detention under INA Section 236, noncitizens subject to the amended provisions of Section 236(e) can be detained indefinitely without bond, not only where they were convicted of the newly added offenses, but simply because they were charged with, or even just arrested for, such an offense.

The practice of ICE issuing detainers for noncitizens booked into jails soon after their initial arrest is not new. However, historically those individuals would have been afforded the opportunity under the INA to present a bond application to an Immigration Judge and had the possibility of resolving both their criminal and immigration cases outside of detention. In effect, for many noncitizens, including those simply accused of nonviolent crimes, the LRA instead allows ICE to supplant criminal due process with immigration detention and, possibly, removal, a process in which there are significantly fewer constitutional and procedural safeguards, and where access to legal representation is significantly restricted.

ICE continues to have broad discretion to release noncitizens from detention under the parole authority granted to them under INA Section 235. This authority is likely to be exercised sparingly, however, considering recent Executive Orders significantly curtailing its use.[3] Additionally, the LRA runs the risk of creating a significant chilling effect on ICE's exercising its parole authority as it gives blanket standing to state officials to challenge practically any decision to grant parole down the level of an individual case.[4]

WHO IS AFFECTED?

Prior to the LRA, Section 236(c) of the INA stipulated that mandatory detention could apply to noncitizens living in the U.S. without permission as well as noncitizens lawfully admitted into the U.S., including nonimmigrant visa holders, asylees, refugees, and lawful permanent residents ("LPRs") depending on the offense committed. The newly added Section 236(c)(1)(E) calls for mandatory detention where:

1. Text of S. 5: Laken Riley Act (Passed Congress version) - GovTrack.us.
2. See, INA §212(d)(5); 235(b); INA §236, INA §241(a)(2); INA §242(f); INA §243.
3. See, EO 14159 - Protecting The American People Against Invasion - The White House.
4. INA §235(b)(3); INA §236(f).

(1) The noncitizen is deemed inadmissible under INA §212(a)(6)(A), relating to entry/presence without permission, INA §212(a)(6)(C), relating to material misrepresentations to obtain and immigration benefit and false claims to U.S. citizenship, or INA §212(a)(7) relating to documentation requirements for individuals traveling to the U.S. on immigrant or nonimmigrant visas. [5]

AND

(2) "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, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person." [6]

The LRA gives deference to local definitions of the above-enumerated crimes. See Appendix 2.

The specific inadmissibility grounds listed in INA Section 236(c)(1)(E)(i-ii) should be read to focus on individuals who were never lawfully admitted into the U.S. and are thus subject to INA 212 grounds of inadmissibility rather than 237 grounds of deportability; that is, immigrants who entered unlawfully and lack status or are only present on a provisional status such as DACA, TPS, or some other deferred action status. However, experienced practitioners will note that, intentionally or otherwise, ICE frequently misapplies the INA when making decisions to detain and remove certain individuals. Practitioners should be mindful of the risks that LRA poses to noncitizens in a variety of procedural postures. [7]

Moreover, while retroactive application of immigration laws is generally disfavored by the courts and would likely face constitutional challenges, there are no explicit safeguards within the LRA against its retroactive application.[8] The risks of misapplication of the LRA to non-citizens in Texas are particularly pronounced given the ongoing blurring of the lines between state and federal immigration enforcement and the dearth of immigration law expertise at the state level. Accordingly, practitioners should be prepared to litigate vigorously decisions regarding detention and bond, arguing either that their client is not subject to INA 212(c)(1)(E) because of their status, or because charges predating the enactment of the LRA do not apply.[9]

5. INA §236(c)(1)(E)(i).
6. INA §236(c)(1)(E)(ii).
7. For instance,
- Non-detained asylum seekers in removal proceedings;
- Individuals lawfully admitted into the U.S., but where previous inadmissibility grounds have not yet been waived, such as asylees, or DACA beneficiaries who have entered the U.S. on advance parole but not yet become LPRs;
- U and T Visa holders, where ICE disregards their previously approved waivers of inadmissiibility;
- LPRs where prior inadmissibility grounds were not properly waived by USCIS.
- LPRs seeking admission into the U.S. with prior enumerated convictions found to be subject to INA Sections 212(a)(6)(A) and (C) or 212(a)(7).

8. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 245 (1994) ("Even absent specific legislative authorization, application of a new statute to cases arising before its enactment is unquestionably proper in many situations. However, where the new statute would have a genuinely retroactive effect–*i.e.,* where it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed–the traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result."); *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that that the repeal of discretionary relief did not apply retroactively to respondent.); *Vartelas v. Holder*, 566 U.S. 257 (2012) (holding that provisions in IIRIRA could not be applied retroactively to LPR who committed felony years prior to new provision's effective date.)

9. For additional details about how to challenge mandatory detention after a misapplication of the LRA, see this advisory published by the National Immigration Project (NIP).

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WHAT ARE THE IMPLICATIONS OF STATE ENFORCEMENT UNDER THE LAKEN RILEY ACT?

The LRA's grant of standing to state attorneys general is particularly significant in Texas, where the Attorney General's Office has historically maintained an active role in immigration enforcement litigation. Under the new law, state AGs' authority to challenge some federal immigration decisions has expanded dramatically, requiring only a minimal showing of harm to the state or its resident, including financial harm amounting to more than $100 in damages to establish standing.

Below are the three major provisions granting new powers to state attorneys general:

INA § 235(b) - Inspection of Applicants for Admission

The LRA creates new state enforcement power specifically focused on detention and removal requirements under the Act. State attorneys general can now bring suits if they believe DHS is not properly enforcing the LRA's mandatory detention provisions for listed offenses. However, this authority is narrowly focused on enforcing the LRA's specific requirements, rather than granting broad power to challenge any DHS detention or removal decision. As with other LRA provisions, states need only show minimal harm to themselves or their residents (including financial harm in excess of $100) to establish standing, and courts must expedite these cases.

INA § 236 - Apprehension and Detention of Aliens

The LRA fundamentally alters the scope of judicial review for immigration detention decisions. Previously, federal law barred any judicial review of the Secretary of Homeland Security and/or the federal Attorney General's decisions regarding detention, release, bond, or parole. The LRA upends this limitation, instead creating a one-way challenge system: state attorneys general now CAN challenge federal decisions by DHS/EOIR to grant bond, grant parole, or release someone from detention, but state attorneys general CANNOT challenge decisions to deny or revoke bond/parole or continue detention. This asymmetric review power aligns with the law's broader goal of expanding detention authority.

INA § 243 - Penalties Related to Removal

The LRA expands state oversight of visa policies by allowing state attorneys general to challenge the State Department's compliance with visa restriction requirements. Specifically, states can now sue if they believe the State Department has failed to properly discontinue granting visas to citizens, subjects, nationals, and residents of countries as required by law. This creates another avenue for state enforcement of federal immigration policy, though limited to visa issuance decisions. As with other LRA provisions, states need only demonstrate minimal harm to bring such challenges, and courts must prioritize these cases for expedited review.

The implications for immigration practitioners in Texas are substantial given these new state powers across detention, removal, and visa issuance decisions. Practitioners should prepare for increased scrutiny of any favorable exercises of discretion by federal authorities, particularly bond grants and releases from detention. When preparing bond or parole requests, extensive documentation of humanitarian factors and public benefit will be crucial, with particular attention to demonstrating positive economic impact to counter potential state claims of harm. For mandatory detention cases, practitioners should carefully document any arguments that clients fall outside the LRA's provisions to litigate the issue in Joseph hearings if necessary and prepare to respond quickly to state challenges of federal enforcement decisions. For clients from countries potentially subject to visa restrictions, practitioners should monitor State Department notices and consider expedited processing where possible.

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The recent slew of Texas executive orders[10] and the memorandum of understanding between the Texas National Guard and federal authorities[11] has created the framework for unprecedented information sharing between state and immigration authorities. This coordination means practitioners should expect faster identification of individuals subject to the LRA's provisions and rapid state responses to federal release decisions. The situation remains fluid, but practitioners should prepare for an environment where state authorities play an increasingly active role in immigration enforcement and litigation, with federal courts required to expedite review of these challenges.

SITUATIONS WHERE A NONCITIZEN COULD BE SUBJECT TO MANADTORY DETENTION UNDER LRA

- Roy is a DACA beneficiary from Mexico who entered the U.S. unlawfully as a child. He was recently involved in a serious traffic accident in which the other driver did not survive. Roy was not found to be at fault. However, at the time of the accident he was driving with an expired license and received a citation. Because Roy was charged with a crime in which death occurred, he could be subject to mandatory detention if he were encountered by ICE.

- Linda is an immigrant from El Salvador who entered the U.S. without permission decades ago. Recently, while checking out at the supermarket, Linda's youngest child ran out of the store and toward the parking lot. In her haste to catch him, Linda ran after him while still carrying a gallon of milk. Linda does not speak English, and the supermarket security guard does not speak Spanish. The police arrived and, because the value of the gallon of milk was under $100, Linda was cited for shoplifting as a Class C misdemeanor and issued a ticket. Linda could be subject to mandatory detention for being charged with a theft offense.

PRACTITIONER TAKEAWAYS

Given the newfound risks of arrest under the LRA, immigration practitioners should proceed carefully when advising clients of their potential vulnerability to mandatory detention.

- Advise all clients, particularly those without status, with prior removal orders, or those with provisional or temporary status, of the overall heightened risk of detention following an arrest. Clients should have safety plans in place ahead of time. Clients implicated under LRA should understand that, pursuant to newly adopted policy memoranda, there is now a significant risk of arrest at Immigration Court or criminal court hearings as well as parole officer check ins.[12]
  - Advise clients that certain theft charges (e.g. shoplifting where the merchandise in question is under $100 in value) under Texas state law may result in a citation rather than arrest. Nevertheless, under the text of the LRA, individuals cited under such statutes could face arrest and detention from ICE. As there is no automatic right to counsel, affected individuals should consult with counsel prior to paying any associated fines.
  - Similarly, while the LRA defers to state law definitions regarding criminal offenses, there is a significant risk that immigration officials could apply their own interpretation of "serious bodily injury" to make arrest and detention determinations for individuals involved in any sort of physical altercation. This could have grave implications for individuals arrested in the context of domestic violence, for instance, where they may not have been the aggressor, but were nevertheless charged with assault.

10. See Office of the Texas Governor press release announcing state executive orders GA-50 through 54 with links.
11. See Memorandum of Understanding between U.S. Customs and Border Protection and the Texas National Guard; see also, John C. Mortiz, "Texas National Guard soldiers now have authority to makes arrests at U.S.-Mexico border," *Austin American-Statesman*, published on Feb. 3, 2025.
12. See, e.g. EOIR PM 25-06, "Cancellation of Operating Policies and Procedures Memorandum 23-01."

- Be prepared to move for a "Joseph Hearing" and thoroughly litigate bond eligibility before the Immigration Judge, where ICE improperly applies INA Section 236(c)(1)(E).[13]
- Be prepared to file habeas corpus petitions where ICE and/or the Immigration Judge rely on erroneous interpretations of the statute to apply it retroactively, or to individuals who should not be implicated under state law definitions.
- Clearly enumerate all potential INA Section 212 grounds on applications for waivers of inadmissibility to ensure that they are disposed of early in the immigration process.
- Conduct rigorous FOIA investigations of all new clients prior to filing for relief to ensure any applicable inadmissibility grounds were waived prior to adjustment of status, and to avoid inadvertent misrepresentations on future applications.
- Complete applications for adjustment of status with extra diligence to avoid accidental misrepresentations.
- Review your LPR clients' criminal and immigration history carefully prior to them taking any trips abroad and advise clients at risk to notify you if they plan to travel abroad.

13. *Matter of Joseph*, 22 I&N Dec. 660 (BIA 1999). See the Immigrant Legal Resource Center's practice advisory on bond litigation for more information.

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APPENDIX 1: OFFENSES TRIGGERING MANDATORY DETENTION UNDER INA § 236(C)

OFFENSE CATEGORY	DESCRIPTION	RELEVANT STATUTE (INA)	WHO IS AFFECTED?	TRIGGERS MANDATORY DETENTION UNDER INA § 236(c)?
Aggravated Felonies	Includes murder, rape, sexual abuse of a minor, drug trafficking, firearm trafficking, violent crimes with a sentence of **1 year or more**, fraud offenses with a loss exceeding **$10,000**, and other serious offenses.	INA §101(a)(43); INA §236(c)(1)(B)	**LPRs, other lawfully admitted noncitizens.**	Yes, under **INA §236(c)(1)(B).**
Crimes Involving Moral Turpitude (CIMT)14	If committed by someone lawfully **within five years** of admission (or **10 years for LPRs**) and punishable by at least **one year** in prison, or **two separate CIMTs.** OR If committed by someone present without permission **at any time**.	INA §236(c)(1)(A); INA §212(a)(2)(A)(i)(I); INA §237(a)(2)(A)(i)	**LPRs, other lawfully admitted noncitizens, and individuals present without permission.**	Yes, under **INA §236(c)(1)(A) and (C)**.

14. Offenses under INA § 237(a)(2)(E) (domestic violence, stalking, child abuse, or violating a protection order) do not independently trigger mandatory detention under INA § 236(c). However, they can result in mandatory detention if they also qualify under another category, such as: Aggravated felony (e.g., domestic violence with a sentence of 1+ years); Crime involving moral turpitude (if meeting the CIMT definition).

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OFFENSE CATEGORY	DESCRIPTION	RELEVANT STATUTE (INA)	WHO IS AFFECTED?	TRIGGERS MANDATORY DETENTION UNDER INA § 236(c)?
Controlled Substance Offenses	Any drug-related offense, except for a single offense of possession of 30 grams or less of marijuana for personal use.	INA §236(c)(1)(B); INA §212(a)(2)(A)(i)(II); INA §237(a)(2)(B)(i)	**LPRs, other lawfully admitted noncitizens, and individuals present without permission.**	Yes, under INA § 236(c)(1)(A) and (B).
Firearm Offenses	Any conviction related to the **illegal possession, use, sale, or trafficking** of firearms or destructive devices.	INA §236(c)(1)(B); INA §237(a)(2)(C)	**LPRs, other lawfully admitted noncitizens.**	Yes, under **INA §236(c)(1)(B)**.
Multiple Criminal Convictions	Two or more convictions where the **aggregate sentence** is **5 years or more** in prison. INA 212(a)(2)(B) OR Two CIMT convictions regardless of sentence imposed. INA 237(a)(2)(A)(ii)	INA §236(c)(1)(A); INA §212(a)(2)(B);	**LPRs, other lawfully admitted noncitizens (under 237), and individuals present without permission (under 212).**	Yes, under **INA §236(c)(1)(A).**

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OFFENSE CATEGORY	DESCRIPTION	RELEVANT STATUTE (INA)	WHO IS AFFECTED?	TRIGGERS MANDATORY DETENTION UNDER INA § 236(c)?
Prostitution and Commercialized Vice	Engaging in, procuring, or attempting to procure prostitution, or operating a prostitution business.	INA §236(c)(1)(A); INA §212(a)(2)(D)	**Individuals present without admission**	Yes, under INA §236(c)(1)(A).
Human Trafficking & Smuggling	Involvement in severe forms of trafficking or smuggling of noncitizens, including family members.	INA §236(c)(1)(B); INA §212(a)(2)(H); INA §237(a)(1)(E)	**LPRs, other lawfully admitted noncitizens, and individuals present without permission.**	Yes, under **INA § 236(c)(1)(A) and (B)**.
Terrorist Activities & Security-Related Offenses	Any offense relating to terrorism, sabotage, espionage, or threats to national security.	INA § 236(c)(1)(D); INA § 212(a)(3); INA § 237(a)(4)	**LPRs, other lawfully admitted noncitizens, and individuals present without permission.**	Yes, under **INA §236(c)(1)(D) and (B)**.

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OFFENSE CATEGORY	DESCRIPTION	RELEVANT STATUTE (INA)	WHO IS AFFECTED?	TRIGGERS MANDATORY DETENTION UNDER INA § 236(c)?
Laken Riley Enumerated Offenses (added January 29, 2025)	Anyone found to be inadmissible under INA §§ 212(a)(6)(A); 212(a)(6)(C), or 212(a)(7). AND who is "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, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person."	INA 212(a)(6)(A), (C) and INA 212(a)(7)	**Individuals present without permission and <u>potentially</u> some lawfully admitted noncitizens and some LPRs.**	Yes, under INA §236(c)(1)(E).

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APPENDIX 2: RELEVANT CRIMINAL STATUTES IN TEXAS

CRIME	TEXAS PENAL CODE SITATION	DEFINITION AND ELEMENTS
Burglary	Texas Penal Code §30.02	A person commits burglary if they: (1) enter a habitation or a building (not open to the public) with intent to commit a felony, theft, or assault; (2) remain concealed inside with criminal intent; or (3) enter and commit or attempt to commit a felony, theft, or assault. Penalties vary based on whether the structure is a habitation, commercial building, or other type of premises.
Theft	Texas Penal Code §31.03	The unlawful appropriation of property with the intent to deprive the owner of it. Appropriation is unlawful if: (1) done without the owner's consent, (2) stolen property is knowingly received, or (3) a person fails to pay for services or items received. The penalty is based on the value of the property stolen.
Larceny	Covered under "Theft"	Texas does not use the term "larceny"; instead, it is covered under the general theft statute.
Shoplifting	Covered under "Theft"	Considered a form of theft; occurs when a person unlawfully takes merchandise from a retail store with intent to deprive the owner of the property. If the value of the stolen merchandise is below $100, it is typically a Class C misdemeanor; higher values increase the offense level.

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APPENDIX 2: RELEVANT CRIMINAL STATUTES IN TEXAS

CRIME	TEXAS PENAL CODE SITATION	DEFINITION AND ELEMENTS
Assault of a Law Enforcement Officer	Texas Penal Code §22.01(b)(1)	A person commits assault if they intentionally, knowingly, or recklessly cause bodily injury to a peace officer while the officer is performing their official duties. The offense is enhanced to a third-degree felony if committed against an officer performing their duties. Aggravated assault (causing serious bodily injury or using a deadly weapon) is a second-degree felony.
Serious Bodily Injury	Texas Penal Code §1.07(a)(46)	Bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.