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THE POLICY AND POLITICS OF IMMIGRANT RIGHTS¹

by SHOBA SIVAPRASAD WADHIA *

INTRODUCTION

The year 2006 marked the ten-year anniversary of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA). In 1996, President Clinton signed these two pieces of legislation into law.² While the stated goals of these bills were to deter illegal immigration, prevent terrorism, and provide for an effective death penalty, the consequences were much broader. A number of measures contained in this legislation make it more difficult for immigrants to see a judge prior to deportation, impose excessive punishment for immigrants who fit under “tough-sounding” labels, increase the number of immigrants who can be detained by the government without an opportunity to ask for bond, and remove the ability of judges and immigration officers to consider an individual’s equities, circumstances, and other factors when determining if he should be deported.

I first met Ronnie in the late 1990s inside a small room within an office suite situated on Dupont Circle, Washington, D.C. Ronnie was born in Punjab, India and raised in and around the District of Columbia for most of his life. Born in the same year, Ronnie and I met in our twenties. He had a clean-shaven haircut, what some might call a “crew” cut. Ronnie was in love with a girl he met in high school — her name was Nellie. His eyes lit up when he spoke of Nellie. Months later, he told me about his plans to marry her. Ronnie appeared detached from his father and uncle, both of whom were naturalized U.S. citizens. I observed this distance between many of my male Indian friends and their elder male relatives. Ronnie

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1. Select portions of this article are drawn from a previously published article, Shoba S. Wadhia, *Immigration: Mind Over Matter*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 243 (2005).

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRAIRA]; Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA].

was American in every way — his dress, his accent, and his dreams. Within minutes of our first meeting, I learned that he had a green card, a criminal record due to some credit card infractions, and a charging document from the now defunct Immigration and Naturalization Service. As a consequence of new immigration restrictions passed by Congress in 1996, Ronnie's criminal record prevented him from applying for most forms of relief from removal, despite his twenty-plus years of living in America and his apple pie dreams. As a young attorney, I collected the details of Ronnie's life and conditions in India to build a case that he would be unsafe if deported to India. The immigration judge made a decision from the bench, denied Ronnie relief, and ordered that Ronnie be removed from the United States. The immigration judge turned to Ronnie and stated sympathetically, "I don't make the laws, Congress makes the laws." Intellectually, I was crushed in observing how an immigration judge rejected my arguments for why Ronnie qualified for protection under the U.N. Convention Against Torture. Emotionally, I was saddened by the prospect of a spirited young man like Ronnie being denied a second chance. Personally, I was haunted by the image of a young Indian like me, one who grew up eating ice cream cones and loving those around him, being exiled to a land where many of the dangerous possibilities presented in my legal brief became his reality.

This article examines how immigration policies over the past decade have affected immigrant rights, scrutinizes administrative and legislative efforts to improve or eliminate these measures, and makes recommendations for advancing a due process agenda in the future. The first part of this article analyzes administrative and legislative proposals under four themes: 1) checks and balances, 2) punishment does not fit the crime, 3) judicial review, and 4) detention. The second part of this article identifies efforts to redress measures emanating from the 1996 immigration laws and policies issued after September 11, 2001. For example, it analyzes legislation introduced in the House of Representatives and the Senate to restore discretion, efforts to engage the Department of Homeland Security³ on the

3. Following September 11, 2001, the reorganization of immigration was a subject of heated debate and the Homeland Security Act of 2002 passed swiftly through Congress in November 2002. The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). As a consequence, many immigration functions that once fell under the jurisdiction of the Immigration and Naturalization Service (INS) were transferred to a new cabinet level Department of Homeland Security. In all, twenty-two federal agencies were merged into the new Department. INS was abolished by statute, and immigration enforcement and services functions were split into three separate bureaus under the new Department.

Immigration services, also known as "United States Citizenship and Immigration Services," processes affirmative immigration matters such as applications for lawful permanent residence, asylum, and citizenship. U.S. Citizenship and Immigration Services, <http://www.uscis.gov/portal/site/uscis> (last visited Feb. 21, 2007).

Interior enforcement functions are housed under "Immigration and Customs Enforcement" (ICE), which handles immigration detention, investigations, removal, and other matters. Immigration and Customs Enforcement, <http://www.ice.gov/index.htm> (last visited Feb. 21, 2007). Border enforcement matters are housed within "Customs and Border Protection." U.S. Customs and Border Protection, http://www.cbp.gov/xp/cgov/import/cargo_summary/enforcement_discretion.xml (last visited Feb. 21, 2007).

The Office for Civil Rights and Civil Liberties and the Office of the Inspector General are two components in the Department of Homeland Security responsible for oversight and monitoring on a

complaint process and treatment of immigration detainees, and Supreme Court decisions raising issues on the interpretation of “aggravated felony.” Part three of this article summarizes the legislative debate around “comprehensive immigration reform” and attempts made by select Senators in 2006 to add basic safeguards in the legislation, such as expanded protections for asylum seekers; discretionary waivers for immigrants who can show strong equities and facts in their cases; and restrictions on retroactively applying new immigration penalties. Part four of this article describes why some efforts to restore basic protections for immigrants have been challenging for advocates and Members of Congress, and makes recommendations for moving a due process agenda forward.

I. TEN YEARS IN REVIEW — IMMIGRATION POLICIES AND IMMIGRANT RIGHTS

A. *Checks and Balances*

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

*James Madison*⁴

The 1996 laws created or modified a number of immigration laws that vest the immigration agency with sole authority to remove an immigrant from the United States. In many cases, immigrants are denied the opportunity to have an agency decision reviewed in an administrative or judicial court of law. As a consequence, agents are immunized from erroneous decisions and immigrants are wrongfully removed from the United States.

The 1996 immigration laws created “expedited removal” — a design which requires immigration officers to issue removal orders to immigrants who arrive in

range of matters, including immigration detention and fair treatment of immigrants. Office for Civil Rights and Civil Liberties, http://www.dhs.gov/xabout/structure/editorial_0371.shtm (last visited Feb. 21, 2007); Office of Inspector General, <http://www.dhs.gov/xoig/> (last visited Feb. 21, 2007).

The Executive Office for Immigration Review was retained in the Department of Justice and is responsible for “conducting immigration court proceedings, appellate reviews, and administrative hearings.” United States Department of Justice Executive Office for Immigration Review, <http://www.usdoj.gov/eoir/> (last visited Feb. 21, 2007). Select visa matters were retained by the Department of State. U.S. Department of State, <http://www.state.gov/aboutstatedepartment/> (last visited Feb. 21, 2007). The care and custody of unaccompanied children was transferred to the Office of Refugee Resettlement of the Department of Health and Human Services. Office of Refugee Resettlement, <http://www2.acf.dhhs.gov/programs/orr/programs/uac.htm> (last visited Feb. 21, 2007). As a consequence of further organizational changes in 2006, the Department of Homeland Security now includes a Policy Directorate responsible for “developing and integrating Department-wide policies, planning, and programs in order to better coordinate the Department’s prevention, protection, response, and recovery missions.” Department of Homeland Security, Policy Directorate, http://www.dhs.gov/xabout/structure/editorial_0870.shtm (last visited Feb. 21, 2007). Select non-governmental organizations (NGOs), the immigration bar, and policymakers liaise regularly with these Executive Branch agencies to raise concerns on specific immigration matters and advocate for a fair and balanced immigration system.

4. THE FEDERALIST NO. 51 (James Madison).

the United States without proper documents or who attempt to enter the United States through fraud or misrepresentation.⁵ The expedited removal program lacks basic safeguards. Those who are subject to expedited removal are removed without an administrative hearing or appeal, are eligible for very limited judicial review, and are subject to mandatory detention.⁶ Immigrants who are removed through expedited removal are barred from entry into the United States for a period of five years.⁷ Expedited removal essentially gives immigration officers the power to charge, try, and exile immigrants. Before the 1996 laws, only a trained immigration judge was allowed to issue an order of deportation.

The expedited removal program contains a limited exception for immigrants who claim to be lawful permanent residents, admitted as refugees or U.S. citizens.⁸ Similarly, immigrants who express a fear of persecution or torture in their home country are referred for a “credible fear” interview during which an asylum officer conducts a threshold screening to determine if there is a “*significant possibility*, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.”⁹ Individuals pending a credible fear interview are held in mandatory detention.¹⁰ If an asylum officer determines that no credible fear exists, he or she is required to issue a removal order without further hearing or review. Thereafter, the alien may request a prompt review of the negative credible fear determination.¹¹ If a favorable credible fear determination is made, the immigrant is given the opportunity to apply for refugee-related relief before an Immigration Judge. The Attorney General has the option to release or “parole” immigrants from detention.¹² Guidance issued by legacy INS outlines a list of factors that should be used to determine whether an immigrant should be released on parole. According to this guidance, “Parole is a viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct.”¹³

Refugee advocates have raised legitimate concerns about the expedited removal process and its impact on asylum seekers and others fleeing harm in the

5. Immigration and Nationality Act § 235(b)(1)(A) (2006) [hereinafter INA]. Pursuant to INA § 235(b)(1)(F), expedited removal does not apply to aliens who are natives or citizens of a “country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.”

6. INA § 242(a)(2)(A).

7. *Id.* § 212(a)(9)(A).

8. 8 C.F.R. 235.3(b)(5) (2002).

9. INA § 235(b)(1)(B). Under INA § 235(b)(1)(E), “asylum officer” is defined as:

[A]n immigration officer who (i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of [asylum] applications, and (ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

10. *Id.* § 235(b)(1)(B).

11. *Id.*

12. *Id.* § 212(d)(5)(A); 8 C.F.R. § 235.3.

13. Memorandum from Office of Field Operations, Expedited Removal, Additional Policy Guidance (Dec. 30, 1997), available at <http://www.aila.org/content/default.aspx?docid=20278>.

country from which they have fled. For example, numerous reports point to the government's failure to apply the parole criteria uniformly.¹⁴ In addition, statistics show that immigration officers may fail to refer genuine refugees for a credible fear interview. On February 8, 2005, the United States Commission on International Religious Freedom issued a report on the treatment of asylum seekers in expedited removal and found that in "15 percent (12/79) of observed cases when an arriving alien expressed a fear of return to the inspector, the alien was not referred. Moreover, among these twelve cases were several aliens who expressed fear of political, religious, or ethnic persecution, which are clearly related to the grounds for asylum. Of particular concern, in seven of these twelve cases, the inspector incorrectly indicated on the sworn statement that the applicant claimed he had no fear of return."¹⁵

When expedited removal was first implemented and in the several years that followed, it was applied only to immigrants arriving at ports of entry. However, the 1996 immigration laws authorize the government to subject any group of individuals, who entered without inspection in the last two years, to expedited removal.¹⁶ Since September 11, 2001, the program has been expanded administratively to certain aliens apprehended inside the United States. In November 2002, the Department of Homeland Security issued regulations that extended expedited removal to certain non-Cuban immigrants arriving in the United States by sea in the last two years.¹⁷ In August 2004, the Department of Homeland Security issued regulations expanding the program to certain aliens apprehended within fourteen days of entry and within 100 miles of the border patrol sectors at Tucson, Arizona and Laredo, Texas.¹⁸ In September 2005, the Department extended this policy to all southern border patrol sectors.¹⁹ In January 2006, the expedited removal program was further expanded to those aliens caught along the U.S.-Canadian border or U.S. coastal areas.²⁰ In effect, the expedited removal program now applies to the entire U.S. border and coastal areas.

In addition, Congress has proposed to expand expedited removal statutorily. Below are highlights of two related bills introduced in the 109th Congress that contain provisions on expedited removal.²¹ In December 2005, the House of

14. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME 1: FINDINGS AND RECOMMENDATIONS 22 (2005), *available at* http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/Volume%20I.pdf [hereinafter Commission Report or USCIRF Recommendations]; HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 12 (2004), *available at* http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf.

15. Commission Report, *supra* note 14, at 53.

16. Expedited Removal, 8 C.F.R. § 235.3(b)(1)(ii) (2006); INA § 235(b)(1)(A).

17. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002).

18. Designating Aliens For Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

19. Press Release, Department of Homeland Security, DHS Expands Expedited Removal Authority Along Southwest Border (Sept. 14, 2005), *available at* http://www.dhs.gov/xnews/releases/press_release_0750.shtm.

20. Press Release, Department of Homeland Security, Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006), *available at* http://www.dhs.gov/xnews/releases/press_release_0845.shtm.

21. This legislative summary is not exhaustive — it does not include every immigration bill

Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005.²² This bill is popularly known as the “Sensenbrenner Bill” and includes dozens of measures that excessively punish immigrants and people who help them. On the topic of expedited removal, the bill mandates that the Secretary of Homeland Security apply expedited removal to undocumented immigrants who are nationals of countries non-contiguous to the United States, if they are apprehended within 100 miles of the border and within fourteen days of entry.²³

In May 2006, the Senate passed the Comprehensive Immigration Reform Act of 2006.²⁴ This is popularly known as the “Senate Immigration Reform Bill.” As with the House Sensenbrenner Bill, the Senate Immigration Reform Bill mandates that the Secretary of Homeland Security apply expedited removal to undocumented immigrants who are nationals of countries non-contiguous to the United States if they are apprehended within 100 miles of the border and within fourteen days of entry.²⁵

While neither of these bills passed into law, they reflect a frightening trend by the government to eliminate basic protections for immigrants already inside the United States and to perpetuate a program that effectively immunizes the prosecutor, exiles the victim, and erodes basic principles of checks and balances. Increasing expedited removal further opens the door for immigration inspectors to erroneously classify individuals as unlawful immigrants. Rep. Zoe Lofgren (D-CA) vividly explained the dangerous impact of proposals for expanding expedited removal to 100 miles beyond the border. Rep. Lofgren noted:

First, on the expedited removal provision, I think it is important to note that expedited removal is an abbreviated process that basically is no process [at] all. It is an officer who is playing an immigration function who essentially acts as prosecutor, judge, jury, the entire decision maker. There is no review, there is no due process whatsoever Now, I am from California, northern California, which is more than 100 miles from the southern land border, but in the Homeland Security Committee²⁶ we had a substantial discussion about what in California is 100 miles from the border, and it includes

introduced in the 109th Congress, nor does it highlight every provision included in the bills described. Please read the actual bills for a closer study.

22. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005) [hereinafter House Sensenbrenner Bill].

23. *Id.* § 407.

24. The Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006) [hereinafter Senate Immigration Reform Bill].

25. *Id.* § 227.

26. The House of Representatives and the U.S. Senate have a committee and subcommittee structure, each having jurisdiction over a particular subject matter or field. Immigration matters generally fall within the jurisdiction of the House and Senate Judiciary committees. Given the overlap between homeland security and related “border security” matters, the House Homeland Security and the Senate Homeland Security and Governmental Affairs Committees also have jurisdiction over select immigration issues. Traditionally, bills are first considered in a committee and then brought to the “floor” for further debate and a final vote. When a bill is on the “floor,” it means that it is being considered by the entire chamber (House or Senate).

Disneyland. Disneyland is not the border I think it is important to note we are concerned about the due process of rights of American citizens, American citizens and legal residents of the United States; because there is no process to protect the rights of Americans who could be perceived by an individual as not lawfully present.²⁷

While expedited removal continues to be expanded, concerns and flaws about the program, as well as related recommendations by non-governmental organizations (NGOs), the United States Commission for International Religious Freedom (USCIRF) and other advocates, have been largely ignored. For example, USCIRF's February 2005 report issued recommendations which include improved quality assurance procedures, more consistent implementation of the parole criteria, creation of a new office in the Department of Homeland Security (DHS) to handle issues related to asylum and expedited removal, detention standards and conditions appropriate for asylum seekers, and a streamlined adjudications process for asylum seekers, among others.²⁸ One recommendation put forth by the Commission was realized when DHS appointed a new Senior Advisor for Refugee and Asylum Policy within the Policy Directorate.²⁹ More than two years since the issuance of the USCIRF report, and despite more than one dozen inquiries by advocates to DHS officials about responding to the Commission's recommendations, DHS has not yet provided a formal response. Similarly, in February 2007, USCIRF issued a two-year "report card" to assess how well DHS and DOJ had implemented its 2005 recommendations. In its press release, USCIRF chair Felice D. Gaer noted, "[W]e see no significant difference between the situations of then and now—with the exception that Expedited Removal was expanded in spite of our explicit recommendation to hold off on that."³⁰

B. Punishment Does Not Fit the Crime

My object all sublime
I shall achieve in time —
To let the punishment fit the crime —
The punishment fit the crime;
And make each prisoner pent
Unwillingly represent
A source of innocent merriment!
Of innocent merriment!

27. COMM. ON THE JUDICIARY, BORDER PROTECTION, ANTITERRORISM, AND ILLEGAL IMMIGRATION CONTROL ACT OF 2005, H.R. REP. NO. 109-345, pt. 1, at 404-05 (2005).

28. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME 1: FINDINGS AND RECOMMENDATIONS (2005), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/Volume%20I.pdf.

29. Press Release, Department of Homeland Security, DHS Names Senior Advisor for Refugee and Asylum Policy (Feb. 7, 2006), available at http://www.dhs.gov/xnews/releases/press_release_0850.shtm.

30. Press Release, U.S. Commission for International Religious Freedom, USCIRF Finds Disappointing Response from Departments of Justice and Homeland Security to its Recommendations on Expedited Removal Process (February 8, 2007), available at <http://www.uscirf.gov/mediaroom/press/2007/february/20070208Response.html>.

*W.S. Gilbert & Arthur Sullivan, A More Humane Mikado*³¹

The 1996 immigration laws expanded the definition and penalties associated with “aggravated felony,” a term contained in the Immigration and Nationality Act.³² The penalties associated with the 1996 aggravated felony definition are severe and include mandatory detention and deportation, disqualification from most forms of relief from removal, and retroactive application of the term.³³

The aggravated felony label was initially fashioned in 1988 through the passage of the Anti-Drug Abuse Act of 1988, and was applied to murder, drug trafficking crimes, and certain illicit trafficking offenses.³⁴ The aggravated felony definition was later expanded in 1994, with the passage of the Immigration and Nationality Technical Correction Act of 1994. This bill extended the aggravated felony label to select crimes of violence, fraud and theft offenses, money laundering, child pornography, and document fraud, among others.³⁵

Together, IIRAIRA and AEDPA transformed the aggravated felony term by expanding the definition to a far-reaching level. Specifically, AEDPA expanded the term by increasing the types of crimes which can constitute an “aggravated felony,” while IIRAIRA modified the sentencing and/or monetary terms related to many pre-existing offenses listed in the aggravated felony definition. The aggravated felony definition now spans more than two pages of the statute book. In practice, the aggravated felony has been interpreted broadly to reach misdemeanor offenses such as shoplifting and other types of conduct that would not normally be considered “aggravated” or “felonious.” Below is a sampling of the crimes listed as “aggravated felonies” under the Immigration and Nationality Act:

murder, rape, or sexual abuse of a minor;³⁶

illicit trafficking in controlled substance (as described in section 802 of Title 21, the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18);³⁷

illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);³⁸

31. W.S. GILBERT & ARTHUR SULLIVAN, *A More Humane Mikado*, in THE MIKADO (1885).

32. INA § 101(a)(43).

33. *Id.*

34. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70 (1988), amending INA § 101(a), and adding, “The term aggravated felony means murder, any drug trafficking crime or any illicit trafficking in any firearms or destructive devices . . . or any attempt or conspiracy to commit any such act, committed within the United States.”

35. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320-22 (1994) [hereinafter INTCA]; see also Socheat Chea, *The Evolving Definition of an Aggravated Felony* (1999), <http://library.findlaw.com/1999/Jun/1/126967.html#3>.

36. INA § 101(a)(43)(A).

37. *Id.* § 101(a)(43)(B).

38. *Id.* § 101(a)(43)(C).

a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at least one year;³⁹

a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;⁴⁰

an offense that: (i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000;⁴¹

an offense: (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud); and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;⁴² and

an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year.⁴³

IIRAIRA further expanded the aggravated felony label by applying the term retroactively.⁴⁴ By making the aggravated felony term retroactive, individuals can be charged as an aggravated felon for conduct that occurred several years ago, even if such activity was not classifiable as an aggravated felony or even a deportable offense at the time it took place. The consequences of an aggravated felony are significant and include mandatory detention without bond, mandatory deportation, and ineligibility for most forms of immigration relief. The statute specifically

39. *Id.* § 101(a)(43)(F).

40. *Id.* § 101(a)(43)(G).

41. INA § 101(a)(43)(M).

42. *Id.* § 101(a)(43)(P).

43. *Id.* § 101(a)(43)(R).

44. *Id.* § 101(a)(43), amended by IIRAIRA § 321(b) (1996), reads: "Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph."

subjects immigrants with aggravated felonies to “mandatory detention.”⁴⁵ This means that immigrants can be held in a custody center without being given the opportunity to request bond from a judge to show he is not a flight risk or danger to the community.

Deportation expresses the removal of a “deportable” alien. Deportation is a harsh punishment and in some cases can force an immigrant to separate from his family, give up a steady job, and/or return to a country where he may not speak the language or know a family member. Recognizing these consequences, one Supreme Court case has held:

We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.⁴⁶

Pursuant to the IIRAIRA, individuals with aggravated felonies are also ineligible to apply for most forms of immigration relief. The immigration laws recognize that even “deportable aliens” may have favorable reasons, like long-term residence and a U.S. citizen family, for being granted a “pardon” or “relief” from removal. However, immigrants who are convicted as aggravated felons are categorically barred from most forms of immigration relief such as asylum, voluntary departure, cancellation of removal, and registry. By placing a statutory bar to most relief, the 1996 definition of an “aggravated felony” also affected judges because they lost their authority to consider the individual factors and equities in specific cases. For example, an elderly father with two children with U.S. citizenship, who has lived and resided in the United States as a lawful permanent resident for several years, remained fully employed, and free from any wrongdoing, but who carries an old criminal record for a fraud offense that is subsequently labeled as an aggravated felony, can be separated from his family, detained, and denied the opportunity to explain to a judge why he deserves to stay in the United States.

Before the IIRAIRA, certain lawful permanent residents who had committed crimes were eligible to apply for a form of relief known as a “212(c)” waiver. Immigrants were required to meet rigid statutory requirements and also show that relief was warranted as a matter of discretion. Former § 212(c) of the Immigration and Nationality Act (INA) states:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation,

45. *Id.* § 236(c)(1).

46. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (citing *Delgadillo v. Carmichael*, 332 U.S. 388 (1947)).

and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General [T]his subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.⁴⁷

While the eligibility requirements for applying for a 212(c) waiver were strict, and the decision to grant or deny a waiver purely discretionary, the existence of such a waiver left a narrow window open for the government to consider compelling equities such as long-time residence, family ties, and employment in the United States, among other factors.

The Illegal Immigration Reform and Immigrant Responsibility Act also incorporated a new definition for the term “conviction” that goes beyond the ordinary interpretation for the term “conviction.” According to the statute:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where — i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.⁴⁸

The length of a criminal sentence can play a significant role in the immigration process when determining whether an individual is subject to removal under the immigration laws or is eligible for related relief. IIRAIRA defines sentencing broadly and includes the actual sentence imposed, regardless of whether the sentence was suspended. The immigration statute specifies:

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.⁴⁹

This rule applies to all immigrants, including green card holders and can potentially reach individuals who never spent a single day in jail.

Together, the expansion of aggravated felony, mandatory consequences triggered by this label, retroactive application of aggravated felony, and modifications to the conviction and sentencing definitions undermine basic principles to afford detainees an opportunity to request bond before a judge or

47. INA § 212(c) (1994), *repealed by* Pub. L. No. 104-208, Div. C, tit. III, § 304(b), Sept. 30, 1996, 110 Stat. 3009-597.

48. INA § 101(a)(48)(A), *amended by* IIRAIRA § 322(a)(1)(A).

49. INA § 101(a)(48)(B), *amended by* IIRAIRA § 322(a)(1)(B).

officer, to construe and apply deportation in the narrowest possible terms, and to enable judges to use discretion and stay deportation when immigrants demonstrate compelling equities like long-time residence and the presence of U.S. citizen family.

Many immigration bills introduced in the 109th Congress proposed to expand the definition of aggravated felony. For example, one bill introduced by Senator Dianne Feinstein (D-CA) would expand the types of passport and document fraud related offenses that constitute an aggravated felony.⁵⁰ Similarly, the House Sensenbrenner Bill expands the aggravated felony term as it applies to “alien smuggling,” illegal entry, and illegal presence.⁵¹ In addition, the bill creates a new aggravated felony label for “soliciting, aiding, abetting, counseling, commanding, inducing, [or] procuring” an aggravated felony.⁵² The House Sensenbrenner Bill also “clarifies” that the aggravated felony term applies “even if the length of the term of imprisonment is based on recidivist or other enhancements.”⁵³ Finally, the bill amends the criminal code to include a host of new document fraud-related penalties and then incorporates such conduct into the aggravated felony definition.⁵⁴ All of these expansions apply retroactively.

Likewise, the Senate Immigration Reform Bill includes a provision that would make a third drunk driving offense an aggravated felony, regardless of the State in which the convictions occurred, or whether the offenses are classified as misdemeanors or felonies under State law.⁵⁵ Similar to the House Sensenbrenner Bill, but slightly less offensively, the Senate Immigration Reform Bill creates new definitions for conduct related to illegal entry, illegal presence, and “document fraud” and imports many of these offenses into the aggravated felony definition.⁵⁶ Similarly, the Senate Immigration Reform Bill creates a new aggravated felony label for “soliciting, procuring, commanding or inducing another, attempting, or conspiring to commit” and “clarifies” that the aggravated felony term applies “even if the length of the term of imprisonment is based on recidivist or other enhancements.”⁵⁷ As a consequence of two successful amendments offered and passed during the Senate immigration reform debates, the changes made to the aggravated felony definition by this bill do not apply retroactively.

C. The Third Branch

Many Americans consider the nation’s judicial system to be the institution that most distinguishes the United States and holds democratic society together. The third branch of government acts as a check on legislative and executive power to ensure that the U.S. Constitution is upheld and that no one branch of government becomes too powerful. This separation of powers is essential to

50. S. 524, 109th Cong. § 1 (2005).

51. House Sensenbrenner Bill, H.R. 4437, 109th Cong. §201 (2005).

52. *Id.* § 201(a)(3).

53. *Id.* § 201(a)(4)(ii).

54. *Id.* §§ 213, 216.

55. Senate Immigration Reform Bill, S. 2611, 109th Cong. §225 (2006).

56. *Id.* §§ 203, 206-08, 222.

57. *Id.* § 203.

preserving liberty.⁵⁸

The Illegal Immigration Reform and Immigrant Responsibility Act and the Anti-Terrorism and Effective Death Penalty Act include a number of limitations on the ability of immigrants to challenge their immigration cases in a court of law. These limitations also raise questions about Congress's power to limit federal court jurisdiction.⁵⁹ This section examines a few of these changes.

IIRAIRA amended the Immigration and Nationality Act to bar court review for most matters associated with expedited removal.⁶⁰ Review through habeas is limited to three circumstances: 1) whether the petitioner is an alien, 2) whether the petitioner was ordered removed under such section, and 3) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee, or has been granted asylum.⁶¹ In addition, the statute allows for certain challenges to the implementation of the expedited removal program to be made in the United States District Court for the District of Columbia.⁶²

In the asylum context, IIRAIRA barred courts from reviewing any determination related to the statutory bars to asylum, such as whether the asylum applicant filed her application within one year of her arrival date, whether the alien filed a previous asylum application, and whether there are changed circumstances relating to why the applicant did not file her application for asylum within one year.⁶³

IIRAIRA also eliminated judicial review on discretionary denials of relief from removal.⁶⁴ The statute specifies that no court shall have jurisdiction to review discretionary decisions regarding the granting of relief such as criminal and fraud based waivers of inadmissibility, cancellation of removal, voluntary departure, and adjustment of status or "any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this [subchapter] to be in the discretion of the Attorney General or of the Secretary of Homeland Security."⁶⁵ Asylum decisions are specifically exempted from this bar on jurisdiction.⁶⁶ The statutory bar to review of discretionary denials of relief from removal has been upheld and reinforced by numerous courts.⁶⁷ The practical

58. Leadership Conference on Civil Rights Education Fund and the American Bar Association, *American Justice Through Immigrants' Eyes* (Aug. 5, 2004) (citing *Mistretta v. United States*, 488 U.S. 361 (1989)); THE FEDERALIST NO. 47 (Alexander Hamilton).

59. See David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481 (1998).

60. INA § 242(a)(2)(A), amended by IIRAIRA § 308.

61. *Id.* § 242(e)(2).

62. *Id.* § 242(e)(3).

63. *Id.* § 208(a)(3).

64. *Id.* § 242(a)(2)(B).

65. INA § 242(a)(2)(B).

66. *Id.*

67. MARY KENNEY, AM. IMMIGRATION LAW FOUND., *FEDERAL COURT JURISDICTION OVER DISCRETIONARY DECISIONS AFTER READ ID: MANDAMUS, OTHER AFFIRMATIVE SUITS AND PETITIONS FOR REVIEW*, PRACTICE ADVISORY 6 (2006). See, e.g., *De La Vega v. Gonzales*, 436 F.3d 141 (2d Cir. 2006) (holding that hardship determination for cancellation is discretionary and therefore un-

impact of this bar is significant because it prevents courts from reviewing denials of discretionary relief, even when the fate of an alien subject to such a denial is detention and removal from the United States. For instance, non-citizens with ten years of residence in the United States and qualifying U.S. citizen relatives may apply for relief from removal if they can show that the family will suffer “exceptional and extremely unusual hardship.”⁶⁸ Federal courts, however, are barred from reviewing the hardship determination because it is deemed discretionary.⁶⁹ Thus, for example, a person who has lived in the United States for more than ten years, has three U.S. citizen children for which he is the sole breadwinner, and an ailing mother who is a naturalized U.S. citizen and dependent on her son for all her medical, personal, and emotional needs will have no judicial recourse if the immigration agency determines that his family will not suffer the requisite hardship.

IIRAIRA also barred individuals from seeking review of their detention if the basis for keeping them in detention was a discretionary decision made by the Attorney General. For example, if an immigrant is denied bond by the administrative appellate judge then he may not challenge this denial before a federal court. The statute specifies:

The Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.⁷⁰

IIRAIRA also virtually eliminated court of appeals review of removal orders for immigrants removable based on criminal reasons.⁷¹ By no means complete, the above-described sampling of changes to judicial review is nonetheless striking.

Nearly ten years after IIRAIRA and AEDPA, the REAL ID Act of 2005 made a number of additional changes to the judicial review process.⁷² First, the statute provides judicial review of “constitutional claims” or “questions of law” irrespective of the sections in the statute which limit or eliminate review.⁷³ This change enabled immigrants previously barred from seeking review in the courts of appeals, such as those with certain criminal convictions or those subject to

reviewable); *Martinez-Rosas v. Gonzales*, 424 F.3d 926 (9th Cir. 2005) (same); *Bugayong v. INS*, 442 F.3d 67, 2006 U.S. App. LEXIS 6230 (2d Cir. 2006) (denial of an INA § 212(h) waiver in connection with an adjustment application was discretionary and therefore unreviewable).

68. INA § 240A(b)(1)(D).

69. *Id.* § 242(a)(2)(B).

70. *Id.* § 236(e).

71. INA § 242(a)(2)(C). According to the statute:

[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).

72. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) [hereinafter REAL ID Act].

73. INA § 242(a)(2)(D).

expedited removal, to seek review if the basis of their claim raises a constitutional claim or question of law.⁷⁴ The REAL ID Act also limits habeas corpus jurisdiction by noting that, “in every provision that limits or eliminates judicial review or jurisdiction to review, the terms ‘judicial review’ and ‘jurisdiction review’ include habeas corpus.”⁷⁵ Furthermore, the REAL ID Act restricts review on decisions made by immigration judges in asylum and other removal cases by barring any court from reversing a determination made by the judge with respect to the availability of corroborating evidence, “unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.”⁷⁶ This could prevent federal judges from rectifying mistakes made by administrative judges, who now have nearly unfettered authority to determine whether an asylum seeker must be returned to a country from which he or she fled.

Other proposed legislation, including the House Sensenbrenner Bill, includes a number of immigration enforcement measures that limit or eliminate judicial review. For example, one section of the bill eliminates review for individuals with revoked visas.⁷⁷ Section 805 of the bill creates an unprecedented certification system in which a single judge determines whether a case is worthy of judicial review. The single judge determines certification on the standard of whether the applicant has “made a substantial showing that the petition for review is likely to be granted.”⁷⁸ This section dictates that a case cannot proceed to a panel for review until a certificate of reviewability has been issued.⁷⁹ If the single judge does not issue a certificate within a specific timeframe, then the petition for review is presumed denied and any temporary protection, such as a stay of removal, is eliminated.⁸⁰

Another section of the House Sensenbrenner Bill requires every non-immigrant visa applicant to waive his or her right to any review or appeal of an immigration officer’s decision at the port of entry as to the alien’s admissibility, and give up his or her right to contest, other than on the basis of an application for asylum, any action for removal of the alien.⁸¹ This means that every student, businessperson, and tourist would sign away his or her rights to any review or due process as a precondition to being issued a visa.

74. See KENNEY, *supra* note 67, at 10-11 (citing to the following case examples where courts have found they have jurisdiction under INA § 242(a)(2)(D): *Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006) (whether the Board applied the correct legal standard to determine if a crime was “particularly serious” for purposes of withholding of removal); *Mendez-Reyes v. Attorney General of U.S.*, 428 F.3d 187 (3d Cir. 2005) (whether the withdrawal of an application for admission constitutes a break in physical presence for cancellation); *Hamdan v. Gonzales*, 425 F.3d 1051 (7th Cir. 2005) (whether the immigration judge’s denial of an adjustment application violated *res judicata*); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006 (9th Cir. 2005) (whether the agency’s interpretation of the hardship standard for cancellation violated international treaties)).

75. REAL ID Act, 119 Stat. at 310, codified as INA § 242(a)(5). Before the REAL ID Act, where judicial review was barred by the statute, individuals could bring certain claims before the district court via a petition for habeas corpus. *INS v. St. Cyr.*, 533 U.S. 289 (2001).

76. REAL ID Act, 119 Stat. at 305, codified as INA § 242(b)(4).

77. House Sensenbrenner Bill, H.R. 4437, 109th Cong. § 802(a) (2005).

78. *Id.* § 805(b).

79. *Id.*

80. *Id.*

81. *Id.* § 806(a).

The House Sensenbrenner Bill also creates a number of judicial review bars to the naturalization process. For example, it virtually eliminates the right to seek federal court intervention when a naturalization applicant is facing long-term delays in the processing of his application.⁸² Currently, the district court may adjudicate the naturalization application when the government has failed to act within the statutorily mandated time period. In fact, thousands of individuals currently face delays of months or even years on their naturalization applications. Many of the delays are related to hold ups on “name checks” conducted by the Federal Bureau of Investigation (FBI). For example, last August the Council on American Islamic Relations and the American Civil Liberties Union sued the government for unreasonably delaying the processing of naturalization applications of ten plaintiffs. As reported in the press:

US Immigration law states that the CIS must decide whether to grant citizenship within 120 days of completion of the naturalization exam. If it fails to make a decision before the time limit, an applicant can request a court hearing. The group is demanding that the US district court hold a hearing and grant citizenship to the plaintiffs, as well as order the FBI to conduct ‘name checks’ for all applicants within 90 days and for CIS to make its decision within the legally allotted period.⁸³

Class actions on naturalization delays have also been filed in Central California, New York, and Northern Illinois.⁸⁴

Titled as “Conforming Amendments,” section 609(f) of the House Sensenbrenner Bill also precludes review in a number of administrative determinations associated with naturalization. It states, in part:

[N]o court shall have jurisdiction to determine, or to review a determination of the Secretary made at any time regarding, for purposes of an application for naturalization, whether an alien is a person of good moral character, whether an alien understands and is attached to the principles of the Constitution of the United

82. *Id.* § 609(e). Specifically, section 609(e) reads:

If there is a failure to render a final administrative decision under section 335 before the end of the 180-day period after the date on which the Secretary of Homeland Security completes all examinations and interviews conducted under such section . . . the applicant may apply to the district court for the district in which the applicant resides for a hearing on the matter. Such court shall only have jurisdiction to review the basis for delay and remand the matter to the Secretary for the Secretary's determination on the application.

83. Shreema Mehta, *Immigrants Sue Over Naturalization Delays*, THE NEW STANDARD, Aug. 3, 2006, <http://newstandardnews.net/content/index.cfm/items/3493/printmode/true>.

84. See *Natz Delay Litigation*, AMERICAN IMMIGRATION LAW FOUNDATION, updated Dec. 7, 2006, (citing *Alsamman v. Gonzales*, No. 06-2518 (N.D. Ill. filed May 4, 2006)); *Yakubova v. Chertoff*, 06 Civ. 3203 (E.D.N.Y. filed June 28, 2006); and *Aziz v. Gonzales* (C.D. Cal. filed Aug. 1, 2006). For more information, see the website of the American Immigration Law Foundation, http://www.aifl.org/lac/natz_delay0806.shtml#336 (last visited Feb. 28, 2007).

States, or whether an alien is well disposed to the good order and happiness of the United States.⁸⁵

Recent lawsuits show that the government has made significant errors with respect to “good moral character” determinations on naturalization applications. In a well-known case, a man by the name of Kichul Lee received a fine of \$152 for collecting fifty-one oysters along a Washington state beach, exceeding the state law limit. Lee was new to the country and was unaware of the state’s limit on the number of shellfish one could collect. DHS determined that Lee’s violation amounted to a lack of “good moral character” and thereafter denied him citizenship.⁸⁶ A related lawsuit was certified as a class action, to address the hundreds of additional cases where immigrants were being denied citizenship based on the government’s erroneous determinations on good moral character. A settlement in this lawsuit was reached in 2005, requiring the DHS to “improve its process for deciding good moral character issues in citizenship cases, and . . . to reopen denial of citizenship applications.”⁸⁷

The Senate Immigration Reform Bill includes some limitations on judicial review with respect to naturalization applications.⁸⁸ Like the House Sensenbrenner Bill, it contains a section that limits a district court’s review of a delayed naturalization case.⁸⁹ The Senate Immigration Reform Bill, however, also includes a “substantial evidence” standard of review on select naturalization-related determinations, noting that “the court shall review for substantial evidence the administrative record and findings of the Secretary of Homeland Security regarding whether an alien is a person of good moral character, understands and is attached to the principles of the Constitution of the United States, or is well disposed to the good order and happiness of the United States. The petitioner shall have the burden of showing that the Secretary’s denial of the application was contrary to law.”⁹⁰ The Senate Immigration Reform Bill also includes some positive reforms to the administrative court process by increasing the number of immigration and Board of Immigration Appeals judges, among other changes.⁹¹

The sheer quantity of legislative proposals to reduce or eliminate judicial review is troubling, especially when considering the current restrictions associated with IIRAIRA and REAL ID, limitations placed on the administrative appellate

85. House Sensenbrenner Bill, H.R. 4437, 109th Cong. § 609(f) (2005). The current law provides:

A person whose application for naturalization under this title is denied, after a hearing before an immigration officer under section 336(a), may seek review of such denial before the United States district court for the district in which such person resides in accordance with chapter 7 of title 5, United States Code. Such review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application.

INA § 310(c).

86. Lornet Turnbull, *Goal of U.S. Citizenship Reached*, SEATTLE TIMES, Feb. 9, 2005, available at http://seattletimes.nwsourc.com/html/localnews/2002174823_citizens09m.html.

87. See Law Offices of Gibbs, Houston, Pauw, <http://www.gbp-law.net> (last visited Feb. 17, 2007).

88. Senate Immigration Reform Bill, S. 2611, 109th Cong. § 204 (2006).

89. *Id.* § 204(g).

90. *Id.* § 204(d).

91. *Id.* tit. VII.

court on immigration cases,⁹² and the failure by the government to follow existing standards, such as those associated with naturalization cases.

D. Detention

June 11, 1998

Since the day I came to America [September 28, 1997], I have not committed any crime. I have never been in any type of prison system but when I came here they locked me up like I'm some kind of criminal . . . they locked me up along with inmates, people that have committed crimes . . . that's why I fear for my life. . . . The situation here is no good for me, because they don't offer the basic needs in which to live. The food they give us is not enough to live on. When I request something from the officers they either deny me or tell me to write a request form, which they deny afterwards anyways. I don't have an attorney for I cannot afford one. I escaped from my country's army to come to America, but if I go back now to Iran, the consequences will be deadly.

*P.H. from Iran, Nacogdoches County Jail, Nacogdoches, Texas*⁹³

Detention is a prominent feature of the U.S. immigration system. The 1996 immigration laws greatly expanded the number of immigrants in detention. Currently, DHS operates a detention system that includes “over 400 local and state facilities acquired through intergovernmental service agreements (IGSA); seven contract detention facilities; eight ICE owned facilities and five Bureau of Prisons (BOP) facilities.”⁹⁴ In 2005, DHS detained 237,667 immigrants, and the average daily detention population was about 20,000.⁹⁵ More recent statistics show that the average daily detention population is approximately 28,000.⁹⁶ This section examines a few of the detention laws and policies passed since 1996.

As a consequence of the 1996 immigration laws, broader categories of immigrants are subject to “mandatory detention,” which means that they are held in custody without an opportunity to request bond and without regard to whether they pose a flight risk or danger to the community. Mandatory detention applies to most

92. For more information about the administrative appellate process and related limitations, see Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878-905 (Aug. 26, 2002) (detailing the appellate process).

93. Human Rights Watch, Letters from Detainees, Sept. 1998, http://www.hrw.org/reports98/us-immig/Ins989-01.htm#P84_2206.

94. United States Immigration and Customs Enforcement, Detention Management Program, Jan. 26, 2007, <http://www.ice.gov/partners/dro/dmp.htm>.

95. MARY DOUGHERTY ET AL., IMMIGRATION ENFORCEMENT ACTIONS: 2005 4 (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf.

96. *Crossing the Border: Immigrants in Detention and Victims of Trafficking: Hearing Before the H. Subcomm. On Border, Maritime, and Global Counterterrorism* (2007) (statement by John Torres, Director of Detention and Removal Operations, U.S. Immigration and Customs Enforcement) available at <http://homeland.house.gov/SiteDocuments/20070315162647-42745.pdf>.

immigrants who face deportation for criminal or security-related reasons.⁹⁷ This can include individuals with misdemeanor infractions and those who may have never served a single day in jail. The INA spells out a limited exception for certain witnesses, potential witnesses, persons cooperating with a criminal investigation, and their close associates and family members.⁹⁸ The 1996 immigration laws also extended mandatory detention to immigrants subject to “expedited removal.” As indicated by the statute, “Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”⁹⁹

In November 2000, the former Immigration and Naturalization Service (INS) published standards for detainees held in immigration custody. The standards were a result of negotiations between government agencies, NGOs, and the American Bar Association and became effective in January 2001. The Detention Standards cover thirty-eight areas, among them telephone access, visitation, access to legal materials, transfers, and group “know your rights” presentations.¹⁰⁰ According to the website of Immigration and Customs Enforcement (ICE):

The standards further the goals of ICE to provide safe, secure and humane conditions for all detainees in ICE custody. ICE is committed to ensuring that its detention standards are met by all facilities utilized for detention. The Detention Standards Compliance Unit conducts over 350 annual inspections of authorized detention facilities to measure compliance with the ICE National Detention Standards.¹⁰¹

Despite the stated goals and efforts by ICE to encourage enforcement of the Detention Standards, the reality is that many detention standards are frequently violated. For many years, and well before the Department of Homeland Security

97. The Immigration and Nationality Act states:

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227 (a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

INA § 236(c)(1).

98. *Id.* § 236(c)(2).

99. *Id.* § 235(b).

100. United States Immigration and Customs Enforcement, Detention Operations Manual, Oct. 12, 2006, <http://www.ice.gov/partners/dro/opsmanual/index.htm>.

101. United States Immigration and Customs Enforcement, Detention Management Program, Jan. 26, 2007, <http://www.ice.gov/partners/dro/dmp.htm>.

absorbed jurisdiction over the detention standards, NGOs raised related concerns with officials at legacy Immigration and Naturalization Service. More recently, advocates have raised similar concerns with the components of DHS responsible for monitoring, investigating, and processing individual and systemic complaints regarding non-compliance with the detention standards. These agencies include Immigration and Customs Enforcement, the Office for Civil Rights and Civil Liberties, and the Office of Inspector General.¹⁰² In June 2003, the Department of Justice's Inspector General (IG), Glenn Fine, issued a report to highlight the treatment of 762 detainees held in custody as a result of a post 9-11 investigation.¹⁰³ Specifically, the IG Report focused on:

- Issues affecting the length of the detainees' confinement, including the process undertaken by the FBI and others to clear individual detainees of a connection to the September 11 attacks or terrorism in general;
- Bond determinations for detainees;
- The removal process and the timing of removal; and
- Conditions of confinement experienced by detainees, including their access to legal counsel.¹⁰⁴

IG Fine concluded that many of these "special interest" detainees were held in punitive conditions, mistreated by prison personnel, and held without basic safeguards, such as access to counsel.¹⁰⁵

For example, the IG Report analyzed a new Department of Justice-issued regulation known as the "48 hour rule" that changed the timeframe INS had to make a charging determination following an alien's arrest. The regulation specifies:

[A] [charging] determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of

102. In January 2007, the Department of Homeland Security's Inspector General (IG) issued a report to highlight the treatment of immigration detainees held at five facilities. The audit focused on detention standards regarding: (1) Health Care, (2) Environmental Health and Safety, (3) General Conditions of Confinement, and (4) Reporting of Abuse, and found instances of non-compliance at all five facilities. *See generally* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES (2006), available at http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_07-01_Dec06.pdf.

103. OFFICE OF THE INSPECTOR GENERAL, DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003), [hereinafter IG REPORT], <http://www.usdoj.gov/oig/special/0306/index.htm>.

104. *Id.* at ch. 1.

105. *Id.* at chs. 7 and 8.

arrest . . . will be issued.¹⁰⁶

IG Fine found that legacy INS did not have a process for recording when a charging determination was made for aliens charged with immigration violations. The IG noted:

The INS does not keep a record of when the charging determination is made for aliens charged with immigration violations. This makes it impossible to determine how often the decision is made within the 48-hour time period required by federal regulations. For the same reason, it is impossible to determine how often the INS took advantage of the “reasonable time” exception to the 48-hour requirement, an exception that is based on “extraordinary circumstances.”¹⁰⁷

Before September 11, the regulations required all charges to be made within 24 hours of arrest.

Notably, the IG found that many special interest detainees were not notified about the charges against them until long after their detention.¹⁰⁸ The “Notice to Appear” (NTA) is a charging document issued to immigrants and the court in connection with a removal proceeding. An examination of the information contained in the NTA underscores the importance of timely service. The primary elements of the NTA are: 1) nature of the proceedings; 2) legal authority for the proceedings; 3) acts or conduct by the alien alleged to be in violation; 4) charges to be brought and the statutory provisions alleged to have been violated; 5) notice of the right to representation and a period of time to secure counsel, as well as a current list of pro bono counsel; 6) requirement of a written record of an address and telephone number, any changes to address or telephone number, as well as the consequences for failure to do so; and 7) time and place at which the proceedings will be held and the consequences for failing to appear at such proceedings.¹⁰⁹

While the statute requires the NTA to be served on the immigrant,¹¹⁰ the laws do not contain a timeframe during which that service must be performed. According to IG Fine, the INS identified a 72-hour policy for serving a NTA on the individual.¹¹¹ However, the IG Report shows that “special interest” detainees did not receive their NTA for weeks and, for some, more than a month after their arrest.¹¹² While the IG Report was limited to conditions at two facilities immediately following the September 11, 2001 attacks, many of the report’s

106. 8 C.F.R. § 287.3(d). *But see* 115 Stat. 350-52 (2001) (allowing suspected immigrants to be detainees for up to seven days, after which the government must initiate removal proceedings or file criminal charges).

107. IG REPORT, *supra* note 103, at ch. 3.

108. *Id.*

109. INA § 239(a)(1).

110. *Id.*

111. *See* IG REPORT, *supra* note 103, at ch. 3 (noting that the INS had a 72-hour goal).

112. *Id.*

findings related to detainee treatment and conditions of confinement are not isolated, but permeate the U.S. detention system. The “48-hour” regulation remains in the law, as does the absence of a regulatory or statutory timeframe during which the government must serve notice to the immigrant facing removal.

A number of legislative proposals include increases in detention bed-space for the purpose of holding immigrants. For example, the Sensenbrenner Bill includes a section that requires the Secretary of Homeland Security to:

[F]ully utilize (1) all available detention facilities operated or contracted by the Department of Homeland Security; and (2) all possible options to cost effectively increase available detention capacities, including the use of temporary detention facilities, the use of State and local correctional facilities, private space, and secure alternatives to detention, (subject to the availability of appropriations).¹¹³

The Comprehensive Immigration Reform Act of 2006 requires the Secretary of Homeland Security to “construct or acquire, in addition to existing facilities for the detentions of aliens, at least 20 detention facilities in the United States that have the capacity to detain a combined total of not less than 20,000 individuals at any time,” subject to the availability of appropriations.¹¹⁴ The bill also mandates DHS to construct or acquire additional detention facilities to accommodate the bed-space allocated under current laws and construct or acquire alternative detention facilities operated by the federal government if such use would be cost effective, among other requirements.¹¹⁵ DHS highlighted its own efforts to maximize detention capacity in a white paper titled “ICE Accomplishments in Fiscal Year 2006.” The paper noted:

In July 2006, ICE established the Detention Operations Coordination Center (DOCC), which allows ICE to maximize its detention capacity by monitoring detained dockets across the county in order to shift cases from field offices with limited detention space to those with available detention space. . . . The average daily population of immigrant detainees in ICE custody has risen from 19,000 to 26,000 since July, and ICE has increased detention capacity in the Southwest border area by deploying 6,300 new beds in 2006.¹¹⁶

The practice of excessive detention comes at a great monetary cost because the average cost for holding immigration detainees is about ninety dollars per day.¹¹⁷

113. House Sensenbrenner Bill, H.R. 4437, 109th Cong. § 402 (2005).

114. Senate Immigration Reform Bill, S. 2611, 109th Cong. § 233 (2006).

115. *Id.*

116. Press Release, Department of Homeland Security, Fact Sheet: ICE Accomplishments in Fiscal Year 2006 (Oct. 30, 2006), available at http://www.dhs.gov/xnews/releases/pr_1162228690102.shtm.

117. See, e.g., AM. BAR ASSOC., COMM’N ON IMMIGRATION, REPORT TO THE HOUSE OF DELEGATES, RECOMMENDATION (Feb. 2006), available at <http://www.abanet.org/publicserv/immigration/>

Detention also comes at a great human cost as thousands of immigrants held in confinement are separated from family members with limited access to counsel. For more than a decade, select Members of Congress, NGOs and others have pushed DHS to support “alternatives” to detention. Many point to the Vera Institute of Justice’s “Appearance Assistance Program.” At the request of legacy INS, Vera tested whether community supervision (an alternative used by the criminal justice system) could improve appearance in court and compliance with court rulings without increasing reliance on detention.¹¹⁸ The Vera Institute conducted the project between 1997 and 2000 and found that ninety-one percent of participants in the intensive program attended all required hearings and that supervision is generally more cost effective than detention.¹¹⁹ The Vera project concluded:

The addition of supervision would improve compliance rates as well as INS capacity for case management and strategic planning. Supervision would provide the agency with better information about participants’ whereabouts, passage through the system, risk of flight, and eventual departure from the country

. . . .

The report recommends that the INS implement and evaluate additional experimental supervised release programs in several districts around the country and that the agency move toward a nationwide supervision program.¹²⁰

In fiscal year 2003, \$3,000,000 was appropriated for the use of “alternatives to detention,” and specifically:

[F]or alternatives to detention to promote community-based programs for supervised release from detention such as the Vera Institute for Justice’s Appearance Assistance Project or other similar programs. These funds shall not be available for new or existing detention facilities, including non-secure detention and/or shelter care detention facilities.¹²¹

Since 2003, DHS Immigration and Customs Enforcement has implemented two detention “alternatives”: the Intensive Supervision Appearance Program and the Electronic Monitoring Devices program.¹²²

107e_detention.pdf.

118. EILEEN SULLIVAN, VERA INSTITUTE OF JUSTICE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM, VOLUME I, i-iii (Aug. 2000), available at http://www.vera.org/publication_pdf/aapfinal.pdf.

119. *Id.* at ii-iii.

120. *Id.* at iii.

121. H.R. REP. NO. 108-10, at 626 (2003) available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr010.pdf.

122. United States Immigration and Customs Enforcement, Fact Sheets, Detention and Removal Operations: Alternatives to Detention (Mar. 12, 2007),

II. EFFORTS TO IMPROVE OR ELIMINATE OVERREACHING IMMIGRATION MEASURES

Over the past decade, considerable efforts have been made to improve overreaching immigration measures through legislation, administrative advocacy, and litigation.¹²³ This section summarizes a few of these efforts.

The Restoration of Fairness in Immigration Act was introduced in 2003 by Rep. Conyers (D-MI)¹²⁴ and makes significant modifications to the 1996 immigration laws. For example, the Conyers Bill limits the use of expedited removal to an “extraordinary migration situation,” provides immigration judges for those subject to expedited removal, and restores judicial review.¹²⁵ The bill also restores discretion in decisions over detention by modifying the “mandatory detention” statute and requires the Attorney General to release an immigrant who can show he will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceedings.¹²⁶ The Conyers Bill provides a right to counsel for immigrants at their own expense in any bond, custody, detention, or removal proceedings before the Attorney General and in any appeal.¹²⁷ The bill provides more equitable definitions and applications of the terms “crime of moral turpitude,” “aggravated felony,” “conviction,” and “term of imprisonment.”¹²⁸ Similarly, the Conyers Bill broadens the discretionary relief available to certain lawful permanent residents and other immigrants with strong family ties in the United States and other equities.¹²⁹ The bill makes further changes to the asylum and refugee process by creating a separate basis for asylum if an individual has suffered “gender-based persecution” at the hands of their home government and also ends the current one-year filing deadline applied in asylum cases.¹³⁰

Representatives Bob Filner (D-CA), Ed Pastor (D-AZ), Raúl Grijalva (D-AZ), José Serrano (D-NY) and Jim McDermott (D-WA) most recently introduced the Keeping Families Together Act in June 2005.¹³¹ The Filner Bill is less

<http://www.ice.gov/pi/news/factsheets/061704detfs2.htm>. Further analysis of these programs and related concerns is beyond the scope of this article. For more information, see Catholic Legal Immigration Network, Inc., Alternatives to Detention, <http://www.cliniclegal.org/Advocacy/detentionalternatives.html> (last visited Mar. 31, 2007) (defining and discussing alternatives to detention).

123. The administrative and legislative histories and laws described in this section are not exhaustive — it does not include every immigration bill introduced in the Congress, nor does it highlight every provision included in the bills described. Please read the actual bills or laws for a closer study.

124. The Restoration of Fairness in Immigration Act of 2003, H.R. 47, 108th Cong. (2003) [hereinafter Conyers Bill]. This bill is similar to the Restoration of Fairness in Immigration Act of 2002, H.R. 3894, 107th Cong. (2002).

125. *Id.* §§ 101-02, 111-17.

126. *Id.* § 131.

127. *Id.* § 136. Under current law, a right to counsel is limited to removal proceedings. See INA § 292.

128. *Id.* §§ 201-04.

129. *Id.* §§ 205-06. See also *id.* §§ 214, 311-13.

130. *Id.* §§ 401-02.

131. Keeping Families Together Act of 2005, H.R. 2865, 109th Cong. (2005) [hereinafter Filner Bill]. See also Keeping Families Together Act of 2003, H.R. 3309, 108th Cong. (2003); Keeping Families Together Act of 2001, H.R. 87, 107th Cong. (2001); Keeping Families Together Act of 1999, H.R. 3272, 106th Cong. (1999).

comprehensive than the Conyers Bill but still makes significant restorations to immigrant due process. For example, the Filner Bill modifies the aggravated felony definition, repeals the IIRAIRA definition for “conviction,” restores the availability for an INA section 212(c) discretionary waiver, and restores select judicial review provisions.¹³²

The Family Reunification Act has been introduced for the past several years. Representative Barney Frank (D-MA)¹³³ most recently introduced the bill on May 3, 2005.¹³⁴ In contrast to the Conyers and Filner Bills, the Frank Bill makes modest but important changes to the INA. The bill provides certain lawful permanent residents an opportunity to apply for “cancellation of removal” relief if they are able to meet certain statutory requirements related to status, such as presence in the United States.¹³⁵ These requirements vary based on the immigrant’s criminal record and age.¹³⁶ The bill also restores discretion for certain immigrants held in custody and includes a sunset of 2008 for provisions of the bill.¹³⁷ In past years, the Frank Bill has enjoyed broad support from Members of Congress in both parties.

The Child Citizen Protection Act of 2006 was introduced by Rep. Serrano in March 2006 and most recently in February 2007.¹³⁸ Subject to a few exceptions, the bill restores an immigration judge’s discretion to pardon removal of an immigrant who is the parent of a United States’ child citizen if the immigration judge determines that such a pardon is in the “best interests of the child.”¹³⁹

A more issue-specific bill, known as the Refugee Protection Act, makes several changes to the asylum and refugee process.¹⁴⁰ Among other things, this bill limits the application of “expedited removal” to “emergency migration situations.”¹⁴¹ It also enhances judicial review for certain asylum seekers and those subject to expedited removal, repeals the one-year filing deadline for asylum applications, and charges the Attorney General to develop more alternatives to detention for asylum seekers.¹⁴² Notably, the Refugee Protection Act has received support from both political parties. During the 107th Congress, the Refugee Protection Act was introduced in the House by Representatives Chris Smith (R-NJ), Howard Berman (D-CA), William Delahunt (D-MA), and others and was introduced in the Senate by Senators Patrick Leahy (D-VT), Lincoln Chafee (R-RI), Sam Brownback (R-KS), Susan Collins (R-ME), Dick Durbin (D-IL), Edward

132. Filner Bill, H.R. 2865 §§ 2, 5-7 (2005).

133. Family Reunification Act of 2005, H.R. 2055, 109th Cong. (2005) [hereinafter Frank Bill].

134. Frank Bill, H.R. 2055, 109th Cong. (2005); Family Reunification Act of 2003, H.R. 2585, 108th Cong. (2003); Family Reunification Act of 2002, H.R. 1452, 107th Cong. (2002); Family Reunification Act of 1999, H.R. 1485, 106th Cong. (1999).

135. Frank Bill, H.R. 2055, 109th Cong. § 2 (2005).

136. *Id.*

137. *Id.* §§ 5 and 10. Pursuant to § 10, the amendments of the bill sunset on the later of December 31, 2008 or three years after the date on which final regulations are issued.

138. The Child Citizen Protection Act, H.R. 1176, 110th Cong. (2007); The Child Citizen Protection Act, H.R. 5035, 109th Cong. (2006).

139. *Id.* § 1.

140. Refugee Protection Act of 2002, H.R. 4074, 107th Cong. (2002).

141. *Id.* § 101.

142. *Id.* §§ 101-02, 201.

Kennedy (D-MA), and others.¹⁴³ The bill was likewise introduced in the Senate chamber during the 106th Congress.¹⁴⁴

Following September 11, 2001, a handful of policymakers, advocates, and select Members of Congress grappled with developing a menu of possible legislative fixes to the Administration's most extreme 9-11 immigration policies. The Civil Liberties Restoration Act (CLRA) was introduced in both the Senate and House of Representatives in June 2004.¹⁴⁵ In April 2005, Howard Berman (D-CA) and William Delahunt (D-MA) introduced the CLRA in the House of Representatives.¹⁴⁶ The CLRA codifies a forty-eight hour timeframe during which an immigrant must be served with a Notice to Appear.¹⁴⁷ The bill also provides that, when the government is unable to satisfy this timeframe, the immigrant must be granted a hearing in front of an immigration judge within seventy-two hours for a determination of whether continued detention without service is justified.¹⁴⁸ In response to the government's decision to categorically deny bond to select groups of immigrants after September 11, 2001, the CLRA requires the government to make individual determinations of bond for all detainees based on whether the detainee poses a flight risk or a threat to public safety.¹⁴⁹ The provisions on bond do not alter the mandatory detention provisions currently in the statute.¹⁵⁰

Other provisions of the CLRA would terminate a post 9-11 selective enforcement program known as "special registration" and provide select individuals placed in removal proceedings as a result of the program with an opportunity to apply for an immigration benefit or relief; codify the presumption that immigration hearings are open to the public; and reform the administrative appellate process so that people in removal proceedings receive fair review and process; among other provisions.¹⁵¹ In June 2005, the House Judiciary Committee's Subcommittee on Immigration, Border Security, and Claims held an oversight hearing on four of the provisions found in the CLRA.¹⁵²

In addition to legislative efforts, lawyers, policymakers, and advocates have

143. Refugee Protection Act of 2002, H.R. 4074, 107th Cong. (2002); Refugee Protection Act of 2001, S. 1311, 107th Cong. (2001).

144. Refugee Protection Act of 1999, S. 1940, 106th Cong. (1999).

145. The Civil Liberties Restoration Act, S. 2528, 108th Cong. (2004); The Civil Liberties Restoration Act, H.R. 4591, 108th Cong. (2004) [hereinafter CLRA].

146. The Civil Liberties Restoration Act, H.R. 1502, 109th Cong. (2005).

147. *Id.* § 201.

148. *Id.* § 201.

149. *Id.* § 202.

150. *Id.* §§ 202-03.

151. *Id.* §§ 101, 204, 301. For a more in-depth examination of the CLRA, see Shoba S. Wadhia, *Immigration: Mind over Matter*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 201 (2005). See also National Immigration Forum, *Legislation: Restoring Our Civil Liberties*, <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=617> (last visited Mar. 31, 2007) (discussing federal immigration legislation).

152. *Immigration Removal Procedures Implemented in the Aftermath of the September 11th Attacks: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the House Judiciary Comm.*, 109th Cong. 109-54 (2005) (statement of Rep. Conyers et al., Members, House Judiciary Comm.), available at http://commdocs.house.gov/committees/judiciary/hju22188.000/hju22188_of.htm. For a more in-depth examination of this hearing, see Shoba S. Wadhia, *Immigration: Mind over Matter*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 201 (2005) (examining the CLRA).

spent considerable time calling for administrative changes to the immigration laws. For the past several years, NGOs have engaged officials in the Department of Justice and Department of Homeland Security on a range of due process issues, including conditions of detention, the complaint process, safeguards for asylum seekers, selective enforcement measures such as the “special registration” program, the treatment of Arabs, Muslims and South Asians as a consequence of September 11, 2001, among others. For example, one group of NGOs meets with officials at Immigration and Customs Enforcement Headquarters a few times each year to raise enforcement and due process concerns that have been unresolved at the local level. Similarly, another working group meets regularly with the Office for Civil Rights and Civil Liberties and the Office of Inspector General to exchange information on the above-stated issues. At each of these meetings, advocates are responsible for identifying issues of concern and offering a recommendation that falls within the jurisdiction of the office they are meeting with. Notably, some policy changes have been made as a result of administrative advocacy. For example, following the release of the IG Report, advocates met with former Under Secretary Asa Hutchinson and Officer for Civil Rights and Civil Liberties Daniel Sutherland numerous times to highlight issues of detainee treatment and conditions of detention and provided recommendations DHS could implement to increase fairness of process for immigrant detainees. As a result of this advocacy, Hutchinson issued guidance to Immigration and Customs Enforcement to systematize the timeframe and process for charging and serving immigrants with a “Notice to Appear.”¹⁵³

Finally, judicial cases brought before the U.S. Supreme Court have also addressed concerns originating from the 1996 immigration laws. In June 2001, the Supreme Court found that immigrants who pled guilty to certain crimes prior to April 24, 1996 should be given the opportunity to apply for a discretionary 212(c) waiver (repealed from the INA after the enactment of the 1996 immigration laws) because they were eligible at the time they pled guilty or pled *nolo contendere*.¹⁵⁴ This enabled a handful of lawful permanent residents with strong equities to explain to a judge why they deserved a second chance to stay in the United States. The Court also found that the 1996 immigration laws did not eliminate habeas corpus jurisdiction for immigrants who have been ordered to be removed.¹⁵⁵

In November 2004, the Court ruled unanimously in *Leocal v. Ashcroft*¹⁵⁶ that a lawful permanent resident’s conviction for driving under the influence does not constitute a “crime of violence” under 18 U.S.C. section 16 and for that reason does not extend to the “aggravated felony” definition under INA section

153. Memorandum from Asa Hutchinson, Border & Transp. Sec. Undersecretary, Dep’t Homeland Sec. on Guidance On ICE Implementation of Policy and Practice Changes Recommended by the Department of Justice Inspector General to Michael J. Garcia, Assistant Sec’y, U.S. Immigration & Customs Enforcement (Mar. 30, 2004), available at <http://immigrationforum.org/documents/TheDebate/DueProcessPost911/ICEGuidance.pdf> [hereinafter March 2004 Guidance]; see also Shoba S. Wadhia, *Immigration: Mind over Matter*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 201 (2005) (providing in-depth examination of the guidance on ICE implementation articulated in the March 2004 memorandum).

154. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

155. *Id.* at 314.

156. *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

101(a)(43)(F).¹⁵⁷ The Court remarked, “Drunk driving is a nationwide problem, as evidenced by the efforts of legislatures to prohibit such conduct and impose appropriate penalties. But this fact does not warrant our shoehorning it into statutory sections where it does not fit.”¹⁵⁸

In December 2006, the Supreme Court held in *Lopez v. Gonzales*¹⁵⁹ that a state drug possession felony that would classify as a misdemeanor under the federal law did not equate to an aggravated felony under INA section 101(a)(43)(B).¹⁶⁰ Writing for the majority, Justice Souter noted:

Reading [the federal statute] the Government’s way, then, would often turn simple possession into trafficking, just what the English language tells us not to expect, and that result makes [the Court] very wary of the Government’s position. . . . Congress can define an aggravated felony of illicit trafficking in an unexpected way. But Congress would need to tell us so, and there are good reasons to think it was doing no such thing here.¹⁶¹

Both of these cases reflect important decisions against the expansion of aggravated felony.

III. COMPREHENSIVE IMMIGRATION REFORM AND DUE PROCESS

Beginning in Spring 2005, there was striking support for “Comprehensive Immigration Reform” by Members of Congress, the White House, and other key authorities in the areas of religion, business, immigration, and labor. “Comprehensive Immigration Reform” is a formal term used by this bipartisan coalition to describe five basic reforms: 1) updating the family and employment-based immigrant visa categories, 2) creating an “earned” path to citizenship for certain immigrants employed in the United States without documentation, 3) providing a legal channel and path to permanent residency and eventual citizenship for the hundreds of thousands of immigrants that will enter the United States in the future to fill critical labor needs, 4) ensuring worker protections for American workers and immigrants alike, and 5) building real enforcement measures to deter U.S. employers and immigrants from violating the immigration laws once a reasonable set of rules have been enacted. In the House of Representatives, a bill known as the “Secure America and Orderly Immigration Act” was introduced by a bipartisan group of representatives and contained significant changes to the immigration system consistent with the principles outlined above.¹⁶² However, this bill was not the subject of debate in the House Judiciary Committee or on the House floor.

Another bill, introduced in the House of Representatives as the Save America

157. *Id.* at 4.

158. *Id.* at 13.

159. *Lopez v. Gonzales*, 127 S. Ct. 625 (2006).

160. *Id.* at 633.

161. *Id.* at 630.

162. Secure America and Orderly Immigration Act of 2005, H.R. 2330, 109th Cong. (2005).

Comprehensive Immigration Act of 2005 (SAVE), makes select reforms to the immigration system by providing a legal channel for certain immigrants living in the United States without documentation and by doubling the worldwide level for family-based immigrants.¹⁶³ It also allows the government to waive removal for certain immigrants with compelling equities and modifies select overreaching definitions from the 1996 immigration laws, among them “conviction,” “term of imprisonment,” and “aggravated felony.”¹⁶⁴ The SAVE Bill also makes several modifications to ensure greater fairness for refugees, certain Haitians and Liberians, and those granted temporary protected status.¹⁶⁵

In the Senate, several bills were introduced in late 2005 and 2006 that were aimed at reforming the immigration laws comprehensively.¹⁶⁶ In March 2006, the Senate Judiciary Committee began debate on a bill authored by Committee Chairman Arlen Specter (R-PA). Known as the “Chairman’s Mark,” this legislation combined elements from several pre-existing Senate immigration bills. The bill was passed with modifications on March 27, 2006 and thereafter reported to the Senate floor. The bill was debated on the Senate floor for several weeks and passed with significant changes on May 25, 2006.

Notably, many affirmative amendments related to due process were filed during the Senate immigration reform debate. A handful of these amendments were offered in the Senate Judiciary Committee or on the Senate floor. For example, Senators Joe Lieberman (I-CT) and Sam Brownback (R-KS) filed an amendment that would make modest improvements to the detention and asylum processes.¹⁶⁷ In his floor statement introducing this amendment, Senator Lieberman stated:

My amendment, the one that I’m honored to be introducing with Senator Brownback, will implement the Commission’s [United States Commission on International Religious Freedom] recommendations. It calls for sensible reforms that will safeguard the nation’s security, improve the efficiency of our immigration detention system and ensure that people fleeing persecution are treated in accordance with this nation’s most basic values.

Remember our purpose was stated in the original American document, the Declaration of Independence, that said the government was being formed to secure rights, liberty and the pursuit of happiness, which were the endowment of our Creator, not just to every American but to every child of God. And this nation

163. Save America Comprehensive Immigration Act of 2005, H.R. 2092, 109th Cong. (2005).

164. *Id.* tits. V and VI.

165. *Id.* tits. VIII-XI.

166. *See, e.g.*, Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005); Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438, 109th Cong. (2005); Securing America’s Borders Act, S. 2454, 109th Cong. (2006); Immigrant Accountability Act of 2005, S. 1919, 109th Cong. (2005); Strengthening America’s Workforce Act of 2005, S. 1918, 109th Cong. (2005); Employment Verification Act of 2005, S. 1917, 109th Cong. (2005); Strengthening America’s Security Act of 2005, S. 1916, 109th Cong. (2005).

167. Secure and Safe Detention and Asylum Act, Senate Amendment 4020, 109th Cong. (2006) [hereinafter Lieberman-Brownback Amendment].

has been, over the decades, a land of refuge for people seeking freedom and sanctuary from the deprivations that they endured in the countries they were in. And it is our attempt in this amendment to revitalize and make more credible and honest and true the asylum processes that our country has to implement those ideals.¹⁶⁸

In response to recommendations made by the United States Commission on International Religious Freedom, the Lieberman-Brownback Amendment establishes quality assurance procedures to ensure the accuracy and verifiability of signed or sworn statements taken by Department of Homeland Security employees exercising expedited removal authority and requires that recordings of interviews during this process be included in the record of proceeding that may be considered as evidence in any further proceedings involving the alien.¹⁶⁹ The Lieberman-Brownback Amendment also includes a limited review process for immigrants held in detention and requires the Attorney General or Secretary of Homeland Security to consider factors such as flight risk, public safety, and national security when making a decision to release an immigrant or continue his detention.¹⁷⁰ It also requires the Secretary of Homeland Security to ensure that standards governing conditions and procedures at detention facilities are fully implemented and enforced and further creates an “Office of Detention Oversight” to inspect detention facilities, establish a mechanism for processing complaints, report related findings to Congress, and investigate certain systemic issues relating to conditions of detention.¹⁷¹

Senator Lieberman also filed an amendment to exempt immigrants that are eligible for protective relief such as asylum, protection under the Convention Against Torture, or relief under the Violence Against Women Act from criminal prosecution under the Senate Immigration Reform Bill’s new “document fraud” penalties.¹⁷² While the above-mentioned amendments were “submitted” to the Senate Immigration Reform Bill, S. 2611, neither went to a vote.

Notably, a handful of amendments to ameliorate some of the harsh consequences of the Senate Immigration Bill’s new penalties were voted on and, in some cases, were successful. For example, an amendment offered by Senator Kennedy (D-MA) to eliminate the retroactive application of many of the bill’s new penalties, such as expansions to the aggravated felony label and heightened and/or new penalties for conduct labeled as “document fraud,” passed successfully in the Senate Judiciary Committee.¹⁷³ Similarly, a “Manager’s Amendment” offered by Senator Arlen Specter (R-PA), which among other things exempts people who are otherwise eligible for legalization from some of the bill’s new document-related penalties for a limited time period, passed on the Senate floor by a vote of fifty-six

168. Floor Statement of Senator Joe Lieberman on Senate Consideration of Immigration Reform Legislation, April 4, 2006, *available at* <http://lieberman.senate.gov/newsroom/release.cfm?id=253588> (last visited Mar. 31, 2007).

169. Lieberman-Brownback Amendment, Senate Amendment 4020, 109th Cong. (2006).

170. *Id.*

171. *Id.*

172. Senate Amendment 4036, 109th Cong. (2006).

173. S. 2611, 109th Cong. (2006) (offered in the Senate Judiciary Committee and incorporated in the Senate Immigration Reform Bill as introduced).

to forty-one.¹⁷⁴

Just two days before the close of the Senate immigration debate, Senator Dick Durbin (D-IL) introduced an amendment to the Senate Immigration Reform Bill authorizing the Department of Justice or Department of Homeland Security to grant a humanitarian pardon for immigrants who are deportable under some of the bill's new penalties but who can show extreme hardship to a family member who is a U.S. citizen or green card holder.¹⁷⁵ Senator Durbin gave a passionate speech on the Senate floor, noting:

We should treat people fairly. We shouldn't separate families if it would cause extreme hardship to American citizens. I am concerned that some of the enforcement provisions in this bill are so broad they may have unintended consequences. These provisions have the potential to sweep up long-term legal permanent residents and separate them from their American families. . . . In my Chicago office, 80 percent of the casework relates to immigration. I can tell you we encounter case after case that would break your heart. In so many cases, people who have lived and worked in the United States for a long period of time and have immediate family members who are Americans are falling between the cracks of the law. Most often, when we present these cases to Homeland Security they say that they are powerless to do anything because our immigration laws allow so little flexibility.¹⁷⁶

Senator Durbin described his amendment:

My amendment would . . . create a very limited waiver that would apply only in the most compelling cases — where deportation of an immediate family member would cause extreme hardship to an American citizen or legal permanent resident. The waiver would not be automatic. The burden would fall on the immigrant to prove that extreme hardship would occur if he or she were deported. In every case, the Government has complete discretion to deny the waiver Deportation is very serious. For an immigrant, it means permanent exile from family and home. And in some situations, it may even be a matter of life and death. . . . We already give the Government broad discretion to apprehend, detain, and deport undocumented immigrants. My amendment would give the Government limited discretion — very limited discretion — to show mercy in only the most compelling cases.¹⁷⁷

Practically, the Durbin Amendment presented an opportunity for a handful of

174. Senate Amendment 4188, 109th Cong. (2006). Before this amendment was passed, there was legitimate concern that many of the Senate Immigration Reform Bill's new document fraud penalties, contained in §§ 208-09 and 222, could potentially bar thousands of hardworking immigrants from applying for legalization.

175. Senate Amendment 4142, 109th Cong. (2006) [hereinafter Durbin Amendment].

176. 109 CONG. REC. S4949 (daily ed. May 23, 2006) (statement of Sen. Durbin).

177. *Id.*

immigrants facing removal under the Senate Immigration Reform Bill's new penalties to explain to the government why they should be given a second chance to stay in the United States.¹⁷⁸ Symbolically, the amendment echoed the sentiment of select Members of Congress, immigration policymakers, and communities seeking to restore American principles of discretion and due process back into the immigration process. Senator Durbin's courage to highlight these basic values in the midst of an otherwise politicized and passionate debate about illegal immigration and enforcement is significant. The Durbin Amendment was "tabled" on a vote of sixty-three to thirty-four.¹⁷⁹

Politically, the paralysis of many "positive" amendments such as those offered by Senator Lieberman,¹⁸⁰ combined with the failure of several others, including Senator Durbin's modest humanitarian waiver amendment, revealed a reluctance by Senators, both Democratic and Republican, to support measures that appeared to soften immigration enforcement. In reality, most of these amendments did not hamper the government's ability to "enforce" the law, but instead sought to roll back some of the Senate Immigration Reform Bill's most extreme penalties. In the spring of 2006, however, the only reality was perception and the perception was that ameliorative amendments labeled as "due process" were indications of "weak" enforcement.

On May 25, 2006, an immigration bill passed the Senate by a vote of sixty-two to thirty-six.¹⁸¹ The bill, titled the "Comprehensive Immigration Reform Act of 2006,"¹⁸² received support from a bipartisan group of Senators, including Senators Edward Kennedy (D-MA), John McCain (R-TX), Chuck Hagel (R-NE), Mel Martinez (R-FL), Arlen Specter (R-PA), Joe Lieberman (I-CT), and Susan Collins (R-ME).¹⁸³ The Senate Immigration Reform Bill includes a new worker program for up to 200,000 immigrants to enter annually to fill jobs in the United States and earn their way to permanent residence and citizenship over several years,¹⁸⁴ a legalization program and path to citizenship for qualified immigrants and their families living and working in the United States without papers,¹⁸⁵ increased family and employment-based visas,¹⁸⁶ heightened employer sanctions and border-related enforcement measures,¹⁸⁷ and fair labor protections for American and immigrant workers.¹⁸⁸ The Senate Immigration Reform Bill also includes new legal channels for select students and agricultural workers living in the United

178. *See id.* (evidencing that the practical effect of the provisions of the Durbin Amendment would be to allow immigrants an additional method of remaining in the United States under the limited circumstances presented by Senator Durbin).

179. 109 CONG. REC. S4955 (daily ed. May 23, 2006).

180. Lieberman-Brownback Amendment, Senate Amendment 4020, 109th Cong. (2006), Senate Amendment 4036, 109th Cong. (2006).

181. 109 CONG. REC. S5190 (daily ed. May 25, 2006).

182. Senate Immigration Reform Bill, S. 2611, 109th Cong. (2006).

183. 109 CONG. REC. S5190 (daily ed. May 25, 2006).

184. Senate Immigration Reform Bill, S. 2611, 109th Cong. tit. IV. (2006).

185. *Id.* tit. VI.

186. *Id.* tit. V.

187. *Id.* tits. I and III.

188. *Id.* tits. III and IV.

States without documentation.¹⁸⁹ While the Senate Immigration Reform Bill retained the architecture of the principles which embody “comprehensive immigration reform,” a study of the bill’s contents reveals many flaws, both as a matter of policy and practicality. Some of these flaws include: “enforcement” measures that restrict basic rights and protections for immigrants,¹⁹⁰ an overly complicated and unworkable scheme for legalizing undocumented immigrants,¹⁹¹ and an insufficient allotment of work visas for immigrants.¹⁹²

Under normal procedure, the House Sensenbrenner Bill and Senate Immigration Reform Bill would have been sent to a “conference committee,” during which select Members of Congress would reconcile differences between the bills. However, the House Republican leadership bypassed this process and instead spent the summer of 2006 holding local and national hearings around the country to criticize the Senate Immigration Reform Bill and damage public feelings towards immigrants. During the fall of 2006, select House Republicans rolled out a “Border Security Agenda” to memorialize their traveling summer theater and introduced pieces of the House Sensenbrenner Bill as stand-alone legislation, all of which passed the floor of the House.¹⁹³ Thereafter, select Members of the House attempted to include pieces of the House Sensenbrenner Bill in spending legislation, such as the Department of Homeland Security Appropriations Bill, but were largely unsuccessful.¹⁹⁴ In the end, the only proposals that passed were a “fence” bill that authorizes use of excessive miles of fencing and a “border tunnel” bill that makes it a crime to use or construct a border tunnel.¹⁹⁵ Overall, the House Republican strategy to speak loudly against immigration and enact punitive legislation backfired. This was due in large part to the presence of the Senate Immigration Reform Bill and leadership by key Senators who opposed immigration bills that failed to address immigration comprehensively.

IV. CHALLENGES TO ADVANCING IMMIGRANT RIGHTS AND RECOMMENDATIONS FOR MOVING FORWARD

The political climate over the past six years has made advocacy on due process difficult for immigrant rights’ advocates and like-minded Members of Congress. Immediately after September 11, 2001, former Attorney General Ashcroft instructed the FBI and other federal law enforcement personnel to use “every available law enforcement tool” to arrest persons who “participate in, or lend support to, terrorist activities.”¹⁹⁶ Immigration law became a principal tool

189. *Id.* tit. VI.

190. Senate Immigration Reform Bill, S. 2611, 109th Cong. tit. II. (2006).

191. *Id.* tit. VI.

192. *Id.* tits. IV and V.

193. Community Protection Act of 2006, H.R. 6094, 109th Cong. (2006); Immigration Law Enforcement Act of 2006, H.R. 6095, 109th Cong. (2006); Secure Fence Act of 2006, H.R. 6061, 109th Cong. (2006).

194. Department of Homeland Security Appropriations Act of 2007, H.R. 5441, 109th Cong. (2006).

195. H.R. 6061, 109th Cong. (2006); H.R. 5441, 109th Cong. (2006).

196. IG REPORT, *supra* note 103, at ch. 1 (citing to Memorandum from Attorney General John Ashcroft to United States Attorneys regarding the post-September 11th “Anti-Terrorism Plan” (Sept. 17, 2001)).

used by law enforcement to arrest, detain, and question immigrants suspected of having possible ties to terrorism. Many of the Justice Department's new immigration policies were issued without congressional oversight. The former Attorney General summarized his priorities in a speech before the U.S. Conference of Mayors:

Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.

Let the terrorists among us be warned: If you overstay your visa — even by one day — we will arrest you.¹⁹⁷

Under this backdrop, Members of Congress and the Administration found it difficult to advance legitimate issues of civil liberties without being viewed as weak on national security. In short, advocates were challenged by having to lobby on a set of issues that subsumed, and in some cases appeared to undermine, the priorities of border security, terrorism, and illegal migration. Reframing the issue to fit this political agenda was critical. For example, when advocates engaged congressional offices to support the Civil Liberties Restoration Act, the dialogue required an acknowledgement that fighting terrorism was a top priority and an explanation of how providing limited protections, like timely charges and notice for detainees, would not compromise the national security. Similarly, security experts and advocates explained how selective enforcement measures, like the "special registration" program, failed to make the nation safer and, in some cases, alienated whole communities from cooperating with the government. CLRA did not draw any Republican co-sponsors, despite the measured set of issues contained in the bill. At the same time, select Republican congressional staff expressed a passive support for the principles in CLRA but made clear their bosses' inability to support such a bill in a political climate where advancing such issues was perceived as a threat to or out of step with national security.

Efforts to advance due process have been less than successful. For example, the broader "due process" bills introduced in the past six years, among them the Restoration of Fairness in Immigration Act and the Keeping Families Together Act, served as good "message" bills, but did not advance to a vote by the House or Senate. Possible reasons for the standstill might include the breadth of issues contained in these bills, the absence of bipartisan support, and the politics involved. Likewise, during the 2006 Senate floor debate on immigration reform, most of the amendments framed as "due process" and without a connection to resolving issues of illegal immigration or enforcement were defeated. Additional complications arose after passage of the Senate Immigration Reform Bill. For example, some advocacy groups opposed the legislation, dismissed its strengths, and disseminated inaccurate materials about the content of the legislation, which made it even more

197. John Ashcroft, U.S. Attorney General, Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001), available at http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm.

difficult to identify and address the legitimate policy concerns contained in the Senate bill. However, a focus on supposed tensions between due process and “comprehensive immigration reform” in 2006 misses an overriding point that passing a flawed bill in the Senate that addressed immigration “comprehensively” prevented a punitive “enforcement-only” measure, like the House Sensenbrenner Bill, from becoming law.

In 2007, there is a narrow but incredible opportunity to pass comprehensive immigration reform, given the priority it has been given by the Administration and Members of the House and Senate. The compositional change in Congress also makes it more likely that the bill produced in the House and Senate will not include overreaching measures that undermine due process and an individual’s day in court. Similarly, the opportunity may arise to include a few positive rights measures into a “comprehensive immigration reform” bill, depending on the scope and frame of the issue. For example, it might be possible to attach language that codifies a timeframe for providing notice of the charges to a detained immigrant or eliminate the retroactive application of the aggravated felony definition. Much will depend on whether the language is added to the base of a comprehensive immigration reform bill or as an amendment, whether the language enjoys bipartisan support and support from the Administration and whether the messaging behind the language resonates with what Members of Congress (and their constituents) want to hear. To this end, an effective approach for moving due process in the short term might be to identify a narrow set of issues, to listen to the concerns and needs from congressional staff and Members of Congress, to be willing to discuss issues of due process under a different message frame, to build bipartisan support, and to be timely so that legislative language is prepared and available for a supportive Member of Congress.

Advancing due process reforms independently, through broad legislation similar to the Conyers and Filner Bills, may not occur until much later given the legislative priorities in 2007, the upcoming Presidential election in 2008, and the reality that many new members of Congress and select incumbents need to be personally educated on the evolution of immigrant due process issues and how individuals and their families are impacted. In addition, utilizing the approach above may heighten the opportunities to pass broad due process legislation into law in the long term.

Finally, enacting “comprehensive immigration reform” will improve due process in its own right. By bringing the undocumented immigrant population out of the shadows, regularizing the flow of immigrants coming in the future, and updating the family and employment-based visa quotas to comport with reality, millions of immigrants will have access to a legal system that contains basic safeguards, individual rights, and key protections.

