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COMMENT

Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies

Introduction

For the permanent resident alien in the United States, criminal activity is dangerous business. A multitude of pitfalls awaits the alien who violates United States law. Conviction of an aggravated felony can be a grounds for inadmission or deportation, can eliminate the alien's right to affirmative relief from removal, and can even disqualify him from naturalization. Since the 1980s, Congress has paid particular attention to criminal aliens, expanding inadmissibility and deportation grounds, decreasing the availability of discretionary relief, and narrowing the procedures involved in some criminal removal procedures. The matter is further complicated by the number of actors involved in making immigration policy. All three branches of government actively participate in various aspects of immigration. Congress determines immigration law and the removal grounds for resident aliens. The Department of State and Department of Justice, particularly the Attorney General, the Immigration and Naturalization Service (INS), and the Executive Office of Immigration Review (EOIR), carry out the bulk of congressional wishes. Finally, the courts review the constitutionality of the actions of those who make and enforce immigration policy. Not surprisingly, the particular agendas of each branch do not necessarily coincide, and often these branches pursue contradictory policies, sometimes within themselves. Even more complex is how this practice affects regional areas.

In an attempt to shed light on the direction and focus of immigration law in relation to arbitrary deportations of aliens convicted of aggravated felonies, this paper discusses decisions each branch has made. Part I deals with the history of removal law since 1988, tracing specifically the definition of aggravated felony as it has expanded to enormous proportions. Part II looks at legislative intent within the last decade in light of the rise in alien criminal population in United States prisons and Congress' specific attempt to alleviate the problem. Part III discusses administrative decisions and the administration's inability to make direct policy, which swings from rigid adherence to legislative intent on the one hand, to the other extreme of acceptance of extraordinary cases that necessitate deviation from traditional deportation decisions. Part IV examines judicial decisions and the courts' hesitation to support wholeheartedly congressional desire. Contrary to congressional wishes, the courts have allowed for at least procedural due process rights of resident aliens. Part V addresses particular cases and policy within the Tenth Circuit and addresses which direction the Tenth Circuit has taken on similar issues in immigration law in
comparison with Congress, the executive branch, and the other courts. Part VI analyzes the various agendas of each branch and offers some suggestions about how to balance congressional wishes, the demands on the executive branch, and the protections available in the courts. In addition, various windows of relief for the aggravated felon facing deportation are examined.

I. History of Removal Law Since 1988

The Anti-Drug Abuse Act of 1988 (ADAA)\(^1\) introduced the concept of "aggravated felony" to the Immigration and Naturalization Act of 1952 (INA). For the first time, aggravated felonies constituted a separate basis for deportability under the INA.\(^2\) This provision for deportability is significant because, unlike the grounds for removal for crimes involving moral turpitude, convictions for aggravated felonies need not be committed within five years from admission. Such convictions can affect a resident alien throughout his lifetime, and without regard to the potential or actual sentence. Thus, an alien may receive a suspended sentence or part-term sentence, but his crime will still fall under the characterization of aggravated felony. The ADAA defined aggravated felony as "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."\(^3\) This list was modest, but was the first to include drug offenses. There remained confusion, though, as to whether a conviction must occur after the enactment of the ADAA for the ADAA to apply to deportation hearings.\(^4\) Congress later expressly addressed this confusion by making the Act retroactive for automatic stays of deportation.\(^5\)

The ADAA, in addition to the aggravated felony definition, decreased the procedural availabilities for aggravated felons. Section 7347 mandated expeditious proceedings, requiring that the proceedings be completed before the alien is released from his current sentence.\(^6\) Following release from the alien's sentence until the conclusion of the deportation hearing, the Attorney General had to take the aggravated felon into custody.\(^7\) Other limitations on the aggravated alien felon's rights included the elimination of voluntary departure,\(^8\) the creation of a presumption

\(^4\) ADAA § 7342, 102 Stat. at 4469-70.
\(^7\) See ADAA § 7347.
\(^8\) See ADAA § 7347(a).
\(^9\) See ADAA § 7347(b).
of deportability,\textsuperscript{10} and the reduction of the time period in which an aggravated felon may appeal from six months to sixty days.\textsuperscript{11} The ADAA also prohibited a deported aggravated felon from applying for admission to the United States for a ten-year period.\textsuperscript{12} Courts upheld such provisions, adhering to the established policy that Congress has plenary power over aliens and may deport them at any time for any reason.\textsuperscript{13} Additionally, the ADAA does not violate the Eighth Amendment's cruel and unusual punishment provision because deportation is not criminal in nature.\textsuperscript{14}

Two years later, Congress passed the Immigration Act of 1990 (ImmAct90), which expanded the definition of aggravated felony.\textsuperscript{15} ImmAct90 added certain violent crimes, illicit trafficking in a controlled substance, and money laundering,\textsuperscript{16} and extended the aggravated felony definition to violations of federal law, state law, and certain foreign convictions.\textsuperscript{17} ImmAct90 added to the definition of murder, "any crime of violence . . . for which the term of imprisonment imposed . . . is at least five years."\textsuperscript{18} A crime of violence is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or . . . involves a substantial risk that physical force . . . may be used in the course of committing the offense."\textsuperscript{19} In addition, ImmAct90 expanded the definition of drug offenses under the definition of aggravated felony to "any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act)."\textsuperscript{20} Upon conviction of an illicit trafficking offense, the alien is then labeled an aggravated felon.\textsuperscript{21} Other crimes, including money laundering, were also added to the list of aggravated felonies.\textsuperscript{22}

As for procedural protections, ImmAct90 decreased the availability of procedural remedies for aliens convicted of aggravated felonies.\textsuperscript{23} For example, ImmAct90

\begin{footnotesize}
\begin{enumerate}
\item See ADAA § 7347(c).
\item See ADAA § 7347(B).
\item This is an increase from the previous requirement of five years. ADAA § 7349.
\item See LeTourneur v. INS, 538 F.2d 1368 (9th Cir. 1976).
\item See id. § 501(a)(2), (3).
\item See id. § 501(a)(4)-(6).
\item Id. § 501(a)(3).
\item Id.
\item ImmAct90 § 501(a)(2).
\item See Hayes, supra note 5, at 254.
\item See ImmAct90 § 501(a)(3).
\item This list includes shortening the period for an aggravated felon to petition a court of appeal to review a final deportation order to 30 days, ImmAct90 § 502(a), clarifying the law concerning mandatory INS detention of aggravated felons upon release from custody, ImmAct90 § 504(a), eliminating the presidential or gubernatorial pardon to avoid deportation, ImmAct90 § 506(a), removing the power of a trial judge to request deportation before completion of his sentence, ImmAct90 § 505(a), precluding
\end{enumerate}
\end{footnotesize}
denied section 212(c) discretionary waivers which were available to an alien "who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years." A year later, in the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Congress changed the language of section 212(c) to deny discretionary relief for multiple aggravated convictions, the sentences of which originally, as individual crimes, would have been insufficient in duration to constitute the five-year sentencing requirement under ImmAct90. Thus, two or more smaller crimes would increase an alien's crimes to aggravated felonies and therefore would deny an alien a discretionary waiver against deportation proceedings.

Congress believed that the penalties were insufficiently severe to deter alien resident crime. Three years later, in the Violent Crime Control and Law Enforcement Act of 1994, Congress changed the penalty for re-entry by an aggravated felon from fifteen to twenty years.

Again, Congress felt that criminal penalties were insufficient for deterrence of alien resident crime in the United States and therefore broadened the statutory definition of "aggravated felon" in the Immigration and Nationality Technical Corrections Act of 1994 (INTCA). The new definition included federal and state crimes such as use of fire or explosives, gun related crimes, thefts and burglaries, receipt of stolen property, RICO violations with a five-year sentence imposed, kidnapping for ransom, child pornography, prostitution, espionage, treason, alien smuggling, and immigration document fraud.

With the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress reduced the five-year sentence requirement for document fraud. Congress also added commercial bribery, counterfeiting, forgery, obstruction of justice, and bribery crimes to the definition of aggravated felony, provided that a sentence of at least five years was imposed. New aggravated felonies also included a second conviction involving gambling offenses, transportation for prostitution, and illegal re-entry if an alien already has a conviction for an aggravated felony.
Other procedural changes included section 414 of the AEDPA, which added that "an alien found in the United States who has not been admitted to the United States after inspection . . . shall be subject to examination and exclusion by the Attorney General." This means that anyone found in the United States not inspected will be subject to exclusion procedures in a removal hearing, and will not be subject to deportation proceedings.

Also in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) to toughen the laws against crime. The definition of aggravated felony was broadened to include rape and sexual abuse of a minor. The IIRAIRA also reduced the sentence for crimes of violence, theft, receipt of stolen property, and document fraud, from a five-year minimum to a one-year requirement. It also radically reduced the requirements for fraud, deceit, and tax evasion. As for the applicability of the Act, the IIRAIRA adds that "notwithstanding any other provision of the law (including the effective date), the term 'aggravated felony' applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

Congress wanted to shorten the deportation process in order to decrease the number of aggravated felons in the prisons. IIRAIRA also provides for expedited removal of criminal aliens, allowing for "initiation and, to the extent possible, the completion of removal proceedings, and any administrative appeals thereof . . . before the alien's release from incarceration for the underlying aggravated felony. This section is designed to prevent the release into society of dangerous criminal aliens during the removal proceedings, and also allows for criminals to be deported as soon as their sentences are finished.

II. Legislative Intent and Debate

Several constitutional sources arguably support broad congressional power over immigration. Congress "may regulate commerce with foreign nations" under Article I, Section 8, Clause 3 of the Constitution. Congress has power over migration and importation of persons under Article I, Section 9, Clause 1. Section 8 of Article

33. AEDPA § 414.
34. See Jules E. Coven, Changes to Grounds of Exclusion and Deportation: Changed Definition "Aggravated Felony" and New Bars for EWI's and Overstays under the Anti-terrorism and Effective Death Penalty Act of 1996, 964 PLI/CORP 93, 99 (1996). The significance of being subject to exclusion proceedings and not deportation proceedings is that many of the procedural safeguards exist in the latter. In the latter case, an alien is considered to have entered, and thus procedural due process rights begin. A greater interest is at stake for those who have entered and are forced to leave than for those who are attempting to enter.
35. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 321, 8 U.S.C.A. § 1347 (1996). The dollar amount was reduced from $200,000 to $10,000. Id.
36. IIRIRA § 321(b).
40. This provision was probably centrally concerned with the slave trade. STEPHEN H. LEGOMSKY,
I of the Constitution gives Congress the power to "establish a uniform rule of naturalization." Congress has power to declare war, which implies the power to regulate who is an enemy and who is admitted. In addition, Congress has implied powers based on the sovereignty of the United States. Congress has used these powers in creating the basic framework for immigration policy, and the United States Supreme Court has consistently upheld this structure under the guise of the plenary power doctrine. As discussed above, Congress passed several acts throughout this century limiting the grounds for immigration and providing the bases for removal or exclusion. The courts have continuously upheld the plenary powers of Congress over immigration. Aliens can be deported for any reason that Congress determines is not in the best interest of the government.

Unfortunately, as the levels of immigration rose in the United States, so did the levels of criminal activities attributable to these aliens. The percentage of aliens in the prison population rose as well. INS made suggestions to expedite the deportation process to reduce the overall problem of prison crowding.

Congress recognized the seriousness of the criminal alien problem and the need for stiffer penalties to combat the large number of crimes committed by aliens. Beginning in 1988, Congress began to focus its attention on the criminal activity of resident aliens within United States borders by passing the Anti-Drug Abuse Act of 1988 (ADAAA), which first introduced the concept of "aggravated felony" to immigration law and removed several procedural remedies previously available to suspend deportation procedures. Two years later, Congress passed the Immigration Act of 1990. Congress was concerned with the low priority INS placed on the alien criminal problem and felt that INS did a poor job of investigating, detaining, and deporting alien criminals from the United States. Congress worried that aliens were abusing the system, using meritless and frivolous arguments to delay deportation proceedings. As a remedy, Congress sought to introduce summary

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42. See id. art. I, § 8, cl. 11.
43. See United States v. Curtiss-Wright Export Co., 299 U.S. 304, 315-18 (1936) (holding that Congress had an extra-constitutional federal power to manage external affairs).
45. See Reno v. Flores, 507 U.S. 292 (1992); Fiallo v. Bell, 430 U.S. 787 (1977); McJunkin v. INS, 579 F.2d 533 (9th Cir. 1978) (holding that Congress can impose conditions on the privileges of resident aliens that could not be imposed on citizens).
47. See REPORT ON CRIMINAL ALIENS, supra note 37, at 3.
48. See id. at 5.
49. See id. at 18.
deportation procedures\textsuperscript{55} as a means of reducing the grounds for staying deportations. Congress was taking great steps towards "dismissing all criminal aliens' appeals as a matter of law."\textsuperscript{56}

Continuing the trend of harsher penalties and grave reductions of procedural rights for resident aliens convicted of aggravated felonies, Congress made broad changes in the judicial review of deportation, exclusion, and removal under IIRAIRA.\textsuperscript{57} Congress completely eliminated section 106 of the Immigration and Naturalization Act. This provision allowed for the review of deportation orders by the courts of appeal through a "petition to review" and for review of exclusion orders through district court habeas corpus proceedings.\textsuperscript{58} Congress had created two primary mechanisms by which a legal permanent resident convicted of an aggravated felon could be forced out of the United States.\textsuperscript{59} First, he could be ordered deported by a federal judge at a criminal sentencing hearing.\textsuperscript{60} This procedure provides for direct appeal, though the reviewing judge has little discretion when dealing with an aggravated felon.\textsuperscript{61} Congress established a second mechanism for deportation of criminal aliens through an administrative hearing. Here, Congress entirely removed the availability of judicial review.\textsuperscript{62} The legislature created an all but irrefutable presumption that all aggravated felons are a "danger to the community of the United States."\textsuperscript{63}

Despite the overall tendency of Congress to be harsh in its treatment of convicted aggravated felons, there has been some support for a more temperate and moderate position dealing with convicted felons. Rep. Barney Frank (D.-Mass.) called the congressional attitude toward deportation "inhumane, disruptive not just to individuals, but to other countries, and wholly unjustified."\textsuperscript{64} Despite this opposition,

\textsuperscript{57} See id. at 44-47.
\textsuperscript{58} See 8 U.S.C. § 1105(a) (1994).
\textsuperscript{59} See Hill, supra note 56, at 44-45.
\textsuperscript{60} See 18 U.S.C. 3583(d) (1994).
\textsuperscript{61} See Hill, supra note 56, at 45.
Notwithstanding any other provision of law, no 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)(ii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(i) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(I).
\textit{Id.}
\textsuperscript{63} Hill, supra note 56, at 45 (arguing that often it is unfair to impose this standard on aliens convicted of more minor crimes such as shoplifting, which could be part of the new aggravated felony definition).
\textsuperscript{64} 143 CONG. REC. H7012-01 (Sept. 9, 1997). Representative Frank was writing about the potential cruelties of a strict policy of deportation for those committing aggravated felonies. One man in a drug recovery center was charged with possession of heroin in 1989. This man had been in the United States almost his entire life, had contributed much, had just had an accident in a factory, and had committed no other crimes. He was being deported, which would have put an extreme hardship on him and his
the courts consistently note that Congress remains true to the general intent of facilitating the deportation of undesirable aliens. Currently, the majority in Congress has been more than pleased with the direction immigration policy has taken, expressing strong support for new programs that successfully identify and deport criminal aliens in city detention facilities. This support has included Rep. Ron Packard's (D.-Cal.) backlash against Janet Reno's suspension of a large number of deportation proceedings despite a congressional mandate to the contrary.

President Clinton recently proposed the Immigration Reform Transition Act of 1997 (IRTA) in an effort to ensure the complete transition to the new cancellation of removal provision of the IIRAIRA. Clinton urged that the legislation would protect various foreign interests and aid relief from unfair decisions for individuals directly affected by the removal of protection from deportation under the IIRAIRA.

III. Administrative Decisions

In the Immigration and Naturalization Act of 1990 (ImmAct90), Congress delegated additional authority to the executive branch on issues of immigration. Courts have consistently held that the power of expelling aliens, an essential power of the legislative and executive branches of government, may be freely exercised through the executive branch. The Department of Justice has the power and burden of administrating and enforcing the Immigration and Naturalization Act and "all other laws relating to the immigration and naturalization of aliens." More specifically, the Attorney General has the power to delegate responsibilities to lesser agencies within the Department of Justice. Therefore, much of the day-to-day duties of immigration fall to the Immigration and Naturalization Service. Activities such as handling visa petitions, adjustments of status (e.g., from nonimmigrant to immigrant), and both deportation and exclusion procedures are handled by the INS. However, the INS does not have complete control over every aspect of immigration. Both the immigration courts and the Board of Immigration Appeals (BIA), which are bodies independent from the INS, handle the bulk of immigration review. The immigration courts preside over removal hearings and may participate in rescinding

family and there was no remedy available to him for review. Frank argues that surely Congress did not mean to punish such people.

65. See Nason v. INS, 394 F.2d 223, 224 (2d Cir. 1968).
66. See 143 CONG. REC. H2617-02 (May 14, 1997).
67. See 143 CONG. REC. E1439-02 (July 16, 1997).
68. See 143 CONG. REC. H5775-01 (July 24, 1997).
69. See 143 CONG. REC. H5775-01 (July 24, 1997); 143 CONG. REC. S8089-05 (July 24, 1997).
70. See 8 U.S.C. § 1103(a) (1994) ("The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens.").
71. See Circella v. Sahli, 216 F.2d 33, 34 (7th Cir. 1954).
73. See id. § 103.
74. See id. § 101(b)(4).
adjustments of status.\textsuperscript{76} Their decisions are final unless appealed to the BIA.\textsuperscript{77} The BIA mainly handles immigration judges' decisions on removal.\textsuperscript{78} The Attorney General may review decisions of the BIA which the Chair or majority of the Board refers for review, which the Commissioner of the INS refers for review, and which the Attorney General directs the Board to refer to him.\textsuperscript{79}

The Immigration Act of 1990 gives the Attorney General the authority to deport undesirable aliens.\textsuperscript{80} Deportation of certain criminal aliens became compulsory under 8 U.S.C. § 1251(a)(2)(A)(i) and 8 U.S.C. § 1253(h)(2)(B)(4). Additionally, the Attorney General is not to deport any person when the deportation would threaten his life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{81} Consistent with its concern over the rise in aggravated felonies, Congress created one exception to this rule. The Attorney General may deport an alien in spite of a threat to his life or liberty if he finds that the alien convicted of a particularly serious crime "constitutes a danger to the community of the United States."\textsuperscript{82}

Recently, the INS has responded to attacks concerning gross inefficiencies in finding, processing, and deporting criminal alien felons.\textsuperscript{83} In addition, unusually lengthy deportation proceedings often leave criminals incarcerated long after completion of their sentences.\textsuperscript{84} In response to these criticisms and to the growing concerns over the amount of crime committed by permanent resident aliens, the INS began the Alien Criminal Apprehension Program (ACAP) to remove criminal aliens from the United States in a quick and efficient manner.\textsuperscript{85}

Unlike Congress, which has continually pursued the single goal of increasing deportations by expanding the criminal grounds for removal, the executive department, represented by the Attorney General, the INS, the BIA, and the immigration courts, is less successful in maintaining one consistent policy. One area in which the INS, the BIA, and the Attorney General have pursued conflicting goals is the nature, both procedural and substantive, of the 212(c) discretionary waiver for relief. Legal permanent residents, whether or not they had previous convictions of crimes, had enjoyed the possibility of a waiver of exclusion or deportation under section 212(c) of the Immigration and Naturalization Act if they had a "lawful unrelinquished domicile of seven consecutive years in the United States."\textsuperscript{86}
Immigration Act of 1990, however, limited the 212(c) waiver, making it unavailable for legal permanent residents who committed an aggravated felony and had served at least five years for the crime.\textsuperscript{87} In 1996, Congress passed the AEDPA.\textsuperscript{88} Section 440(d) of AEDPA bars section 212(c) relief for aliens "deportable by reason of having committed any criminal offense,"\textsuperscript{89} which includes an aggravated felony, regardless of the sentence imposed or served. Immediately after the passage of the AEDPA, the INS argued that section 440(d) applied "in all pending and subsequently initiated deportation cases, regardless of whether the conduct or events triggering the section's restrictions predated the AEDPA."\textsuperscript{90} The BIA rejected the position of the INS, holding that section 440(d) may not be applied retroactively to an alien who sought 212(c) relief before the enactment of the AEDPA.\textsuperscript{91} The Attorney General, on petition for review, vacated the BIA's decision, concluding that section 440(d) should be applied to all pending 212(c) cases, since "nothing in the language of the newly enacted statute specifies either that it is to be applied in pending deportation proceedings, or that it is not to be."\textsuperscript{92} To solve this dilemma, Congress repealed section 212(c) by the IIRAIRA,\textsuperscript{93} replacing 212(c) with a new form of prospective relief called cancellation of removal.\textsuperscript{94}

The BIA not only floundered in its consideration of the procedural aspects of the 212(c) discretionary waiver, but it also had trouble in establishing consistent policy for substantive 212(c) relief waiver considerations for aliens convicted of aggravated felonies. For example, in a series of decisions, the BIA indicated that aggravated felons were eligible for 212(c) waivers. In \textit{In re Meza},\textsuperscript{95} the BIA held that because the definition of aggravated felony "refers to several types or categories of offenses, . . . [the respondent] is not precluded from establishing eligibility for section 212(c) relief based on his conviction for an aggravated felony."\textsuperscript{96} In \textit{In re Marin},\textsuperscript{97} the BIA held that 212(c) relief is not granted by a mere showing of eligibility, but remains a discretionary matter for the Attorney General.\textsuperscript{98} In \textit{In re Roberts},\textsuperscript{99} the BIA required "a balancing of the social and humane considerations presented in an alien's favor against the adverse factors evidencing his undesirability as a permanent

\textsuperscript{89} AEDPA § 440(d).
\textsuperscript{90} Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).
\textsuperscript{91} See generally \textit{In re Soriano}, Int. Dec. 3289, 3289 (B.I.A. June 27, 1996).
\textsuperscript{92} \textit{Id.} at 3294.
\textsuperscript{93} IIRIRA § 304(b).
\textsuperscript{94} See \textit{Id.} § 304(a)(3).
\textsuperscript{96} \textit{Id.} at 259-60.
\textsuperscript{98} See \textit{Id.} at 382-83.
Although an aggravated felony conviction is an adverse factor in gaining 212(c) relief, aggravated felons may show positive factors demonstrating the need for relief, though it is not necessary to meet heightened standards merely because the offense constitutes an aggravated felony. The BIA will also look at incarceration and rehabilitation as discretionary factors.

The BIA took a different position on the substantive nature of 212(c) discretionary waivers in several other cases. In In re Edwards, the BIA held that the conviction of a violent crime or drug offense requires a higher showing of unusual or outstanding circumstances to warrant discretionary relief under 212(c). In addition, a showing of rehabilitation is often required. The BIA also considered when a conviction must have occurred in order for an aggravated alien felon to be disqualified from the 212(c) relief waiver in In re A-A-. In this case, the INS began deportation proceedings against a permanent resident alien convicted of murder prior to enactment of the ADAA. The respondent sought section 212(c) relief, which the judge denied in his exercise of judicial discretion. On appeal, the BIA held that "the aggravated felony definition applied retroactively to all ADAA-defined aggravated felonies, and that as such, the bar to 212(c) relief also applied to all such convictions." This decision of the BIA was the first to hold that the definition of aggravated felony applied retroactively to all ADAA crimes, and therefore any conviction barred 212(c) relief.

IV. Judicial Decisions

The courts have firmly established Congress' plenary power over immigration. Although the judiciary does not generally question Congress' wisdom in providing for deportation of certain classes of aliens, there is a presumption that Congress did not completely preclude judicial review of administrative actions. The United

100. Id. at 297.
101. See id. at 298.
104. See id. at 194.
105. See id.
107. See id. at 493.
108. Section 212(c) was repealed in Pub. L. No. 104-208, Did. C, Title III, § 304(b), 110 Stat. 3009-597 (1996).
110. Hayes, supra note 5, at 250.
111. See id.
112. See Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (recognizing an inherent federal power to exclude aliens); Nishimura Ekio v. United States, 142 U.S. 651, 655 (1892) (rejecting due process limits on the exercise of that power); Fong Yue Ting v. United States, 149 U.S. 698, 699 (1893) (extending the principle of Chae Chan Ping and Nishimura Ekio to both deportation and exclusion).
States Supreme Court has also held in favor of "restrict[ed] access to judicial review only upon a showing of clear and convincing evidence of a contrary legislative intent." Congress did limit the availability of judicial review, however, in cases of administrative removal hearings when an alien is convicted of an aggravated felony.

This decision has serious impacts. Under the IIRIRA, the presumption that all aggravated felons have been convicted of a particularly serious crime and are a "danger to the community" is apparently irrebuttable. This means that upon a conviction of an aggravated felony, a permanent resident alien is not entitled to judicial review, except in extraordinary situations. The Seventh Circuit in Garcia v. INS, affirmed this position, holding that Congress clearly intended absolutely to bar aggravated felons entirely from receiving a stay of deportation.

Congress has delegated the question of what constitutes a "danger to the community" to the Attorney General. Under this delegation, the Attorney General has the sole authority to regulate offenses and interpret statutes as to the extent that it will render an alien to be a danger to the community if convicted of an aggravated felony. Since those convicted of aggravated felonies are denied discretionary waivers, only the 212(h) extreme hardship waiver is available, and only under an extremely limited number of circumstances. The extreme hardship waivers under section 212(h), however, are also not eligible for appeal, because "no court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection." Thus, an alien is without judicial remedy if the Attorney General concludes that no extreme hardship exists and allows deportation proceedings to continue.

Not every decision of the executive branch allows such protections against judicial review. When the courts are called upon to interpret, for example, a decision made by the Board of Immigration Appeals or the INS, a question arises: In light of the statute, how much deference should be given to the administrative decision? The

115. Id. at 671.
117. Hill, supra note 56, at 45.
118. 7 F.3d 1320 (7th Cir. 1993).
119. See id.
121. Section 212(h) provides:
- No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of the initiation of proceedings to remove the alien from the United States.

INA § 212(h).
122. 8 U.S.C. §§ 1182(h), 212(b) (as amended by the IIRIRA §348(a)).
level of deference given to an administrative interpretation of law typically involves a double inquiry.\textsuperscript{123} The court must first decide whether to apply the administration's statutory construction\textsuperscript{124} or whether the question falls within the sole province of the judiciary.\textsuperscript{125} If the agency decision is one of policy, the court must defer to any "reasonable" agency decisions.\textsuperscript{126} On the other hand, questions of statutory construction are within the province of the judiciary, because "it is emphatically the province and duty of the judicial department to say what the law is."\textsuperscript{127} In addition, any action taken by an administrative agency can be reviewed under an arbitrary and capricious test.\textsuperscript{128} This test requires that an administrative action be upheld "if any state of facts reasonably can be conceived that would sustain" the agency's decision.\textsuperscript{129} Essentially, if Congress' intent is clear, then it is the court's job to enforce that intent.

In an overwhelming number of deportation cases involving aggravated alien felons, the courts have favored complete deference to executive interpretations of legislation, provided the interpretation is reasonable. In \textit{Cepero v. Board of Immigration Appeals},\textsuperscript{130} the U.S. District Court for the District of Kansas gave deference to the BIA's interpretation of the phrase "particularly serious crime," despite the absence of a definition of the phrase in the statute.\textsuperscript{131} In \textit{Al-Salehi v. Immigration \& Naturalization Service},\textsuperscript{132} the Tenth Circuit held that where Congress has not spoken clearly, the agency's interpretation should be given deference and should stand if it is reasonable.\textsuperscript{133} Only in unreasonable cases would judicial interpretation be justified. In \textit{Mosquera-Perez v. Immigration \& Naturalization Service},\textsuperscript{134} the First Circuit gave deference to the agency charged with interpretation of the statute when...
the statute was silent on the issue.\textsuperscript{135} The Eleventh Circuit used a slightly different test in \textit{U.S. v. Chuwurua},\textsuperscript{136} holding that unless the language of a statute would lead to absurd results, its plain meaning controls.\textsuperscript{137} In \textit{Bedoya-Valencia v. Immigration & Naturalization Service},\textsuperscript{138} the court gave deference to the Attorney General when "he articulated a determination not to depart further from the statutory text, and the absence of any constitutional mandate to do so."\textsuperscript{139} Clearly, the courts are willing to defer to administrative interpretations of statutory language when that interpretation is reasonable, and when policy decisions are delegated to the executive branch by Congress in absence of clear language within the statute.

However, courts have not blindly followed every agency's interpretation of immigration statutes. The courts faced the problem of the reasonableness of the Attorney General's decision to make section 440(d) of the AEDPA retroactive. This decision effectively denied 212(c) discretionary waivers to those aliens convicted of aggravated felonies who were previously eligible and had applied for the 212(c) waivers. In \textit{Mojica v. Reno},\textsuperscript{140} the court overturned the Attorney General's decision on the retroactivity of section 440(d). Using the test set forth in \textit{Landgraf v. USI Film Products},\textsuperscript{141} the Court considered steps the judiciary must take in order to determine the temporal effect of the 440(d) provision. First, courts should examine the statutory provision to ascertain if any constitutional bars to retroactive implementation exist.\textsuperscript{142} Courts should then determine if the statute expresses a congressional design favoring retroactivity.\textsuperscript{143} If neither is present, then the court must interpret the statute against retroactivity.\textsuperscript{144} Applying this standard, the court in \textit{Mojica v. Reno} found that Congress expressed no clear intent in favor of retroactivity in section 440(d) of the AEDPA.

Additionally, constitutional barriers may prevent retroactivity.\textsuperscript{145} Consequently, the government cannot prevent application for 212(c) waivers nor prevent timely filed 212(c) applications from being determined on the merits.\textsuperscript{146} The Supreme Court found that the due process requirement for retroactive legislation is "conditioned upon a rationality requirement beyond that applied to other legislation."\textsuperscript{147} The \textit{Mojico} court found that Congress offered no purpose for a retroactive application of 440(d) and that the statute did not expressly provide for retroactivity.\textsuperscript{148} The BIA strongly

\textsuperscript{135} See id. at 556.
\textsuperscript{136} 5 F.3d 1420 (11th Cir. 1993).
\textsuperscript{137} See id. at 1423.
\textsuperscript{138} 6 F.3d 891 (2nd Cir. 1993).
\textsuperscript{139} Id. at 897.
\textsuperscript{140} 970 F. Supp. 130 (E.D. N.Y. 1997).
\textsuperscript{141} 511 U.S. 244 (1994).
\textsuperscript{142} See id. at 247.
\textsuperscript{143} See id.
\textsuperscript{144} See id.
\textsuperscript{145} See Mojica, 970 F. Supp. at 168.
\textsuperscript{146} See id. at 169.
\textsuperscript{148} See Mojica, 970 F. Supp. at 169.
criticized the Attorney General's opinion in *In re Soriano*,\(^{149}\) which offered absolutely no rationale for her decision to make the rule retroactive.\(^{150}\) Deference to administrative agencies is typically the rule unless retroactivity is involved in deportation matters.

Traditionally, courts have taken a dim view of the congressional harshness in deportation cases. Courts consider deportation to a country to which a legal permanent resident has not been since his childhood and in which he has no friends or family to be extremely severe. Justice Black wrote that "to banish [an immigrant] from home, family, and adopted country is punishment of the most drastic kind."\(^{151}\) This is not to say that courts view deportation as punishment. On the contrary, courts consistently hold that deportation proceedings are not criminal in nature, and therefore retroactivity provisions do not violate the constitutional ban on ex post facto laws\(^{152}\) and are not cruel or unusual punishment.\(^{153}\) However, courts impose on a criminal defense counsel a duty to advise his alien client of the consequences of a guilty plea to immigration.\(^{154}\) The *Mojica* court noted that thirteen states require deportation advisories in a criminal plea.\(^{155}\)

Courts have, however, followed Congress’ harshness in other areas, often construing language against the defendant alien. The Fifth Circuit held that an indeterminate sentence of four to ten years qualified as being a term of imprisonment for at least five years under United States Sentencing Guidelines section 2L1.2(b)(2).\(^{156}\) The Eighth Circuit found that "indeterminate sentences have long been held sentences for the maximum term for which the defendant might be imprisoned."\(^{157}\)

In *Kofa v. Immigration & Naturalization Service*,\(^{158}\) the Fourth Circuit considered whether eligibility for withholding of deportation requires a separate determination of "dangerousness to the community" for an alien convicted of an aggravated felony. The court stated that if the court is construing a statute which has been construed by an agency, then under *Chevron*, the court is obligated to follow the two-prong test.\(^{159}\) In doing so, the court held that Congress' intent was clear. No separate determination of dangerousness to the community is warranted;\(^{160}\) an alien is simply barred from discretionary relief upon conviction of an aggravated felony.

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149. *In re Soriano*, Int. Dec. 3289 (Feb. 21, 1997).
153. *See LeTourneur v. INS*, 538 F.2d 1368 (9th Cir. 1976).
158. 60 F.3d 1084, 1086. (4th Cir. 1995).
159. *See id.* at 1087-88; *see supra* note 124.
160. *See Kofa*, 60 F.3d at 1095.
V. Tenth Circuit and Oklahoma Cases

The Tenth Circuit and the Oklahoma Supreme Court have had many opportunities to adjudicate deportation questions. One of the policies the courts profess to follow is that of construing deportation statutes in favor of the alien. This position was articulated by the Tenth Circuit in *United States v. Quintana*,164 in which the court held that "statutes relating to deportation of aliens are liberally construed in favor of the alien concerned as the deportation penalty can be harsh."165 Despite this language, recent cases demonstrate a clear trend not to follow this policy, but to defer to the INS and the BIA's statutory interpretations, virtually never siding with the petitioning alien.

Throughout 1995, the Tenth Circuit generally upheld congressional intent, maintaining a strict adherence to a policy presumptively against the permanent resident alien convicted of an aggravated felony, despite the earlier *Quintana* decision.166 The court dealt with several issues concerning deportation of aggravated felons. The issues included whether there is an absolute bar to withholding of deportation after a criminal conviction,167 whether an aggravated felon could compel the Attorney General to initiate deportation proceedings,168 whether persecution in one's home country mitigated the bar against relief waiver,169 whether an indeterminate sentence constituted an aggravated felony,170 and whether an alien already deported after a felony conviction had standing to sue.171 As to each issue, the Tenth Circuit ruled against the criminal alien.172

In 1996, the Tenth Circuit followed the trend of pure deference to established INS and BIA policy. The court considered various issues including the temporal significance of the ADAA definition of "aggravated felony,"173 whether the district court could order deportation as a condition of supervised release,174 whether *Miranda* warnings were necessary in INS deportation proceedings,175 whether a defendant's rights were violated when an immigration judge refused to hear asylum and withholding of deportation claims,176 and whether the law relating to illegal re-entry after deportation based on aggravated felony conviction constituted sentence

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161. 914 F.2d 1409 (10th Cir. 1990).
162. *Id.* at 1410; *see also* INS, v. Errico, 385 U.S. 214, 225 (1966) (holding that doubts as to the correct construction of a deportation statute are generally resolved in favor of the alien).
163. *See Quintana*, 914 F.2d at 1409.
164. *See generally* Al-Salehi v. INS, 47 F.3d 390 (10th Cir. 1995).
165. *See generally* Hernandez-Avalos v. INS, 50 F.3d 842 (10th Cir. 1995).
168. See *id.* at 311.
169. *See Nguyen*, 53 F.3d at 311; *Hernandez-Avalos*, 50 F.3d at 848; *Al-Salehi*, 47 F.3d at 391; Cepero, 882 F. Supp. at 1579.
enhancement.174 In all cases, the court decided against the alien petitioner, showing preference for deference to administrative decisions.175

In 1997, the Tenth Circuit continued its line of decisions in two major areas, determinations of aggravated felony in relation to illegal re-entry after deportation,176 and prohibition of review of deportation order following conviction of an aggravated felony.177 In all cases, the Tenth Circuit ruled against the criminal alien.178

A. Notification of Rights or Obligations

Notification of rights and obligations is significant in deportation procedures, especially in light of the fact that the defendants are aliens, facing an unfamiliar immigration law. Often aliens do not have adequate English language skills to understand the laws or the proceedings. In addition, deportation has been held to be a civil matter; thus, many of the protections, such as Miranda warnings, do not apply.179 On the other hand, the Supreme Court has held that some level of procedural due process is required.180 The amount of due process, therefore, remains unanswered. The following Tenth Circuit cases reflect a limited view of procedural due process.

In United States v. Montoya-Robles,181 the court questioned whether an aggravated felon was entitled to Miranda warnings before or during deportation proceedings. The court held that the defendant had no Miranda rights before or during deportation proceedings because Miranda rights are prophylactic measures to protect a person's right against self-incrimination.182

In United States v. Lopez-Serrato,183 the defendant was charged with illegal re-entry after deportation upon conviction of an aggravated felony — possession of marijuana. The defendant argued that he did not receive a form notifying him of penalties for re-entry at the time of deportation, although the defendant had been deported and given notice three times earlier. The court concluded that no one has the right to commit a crime, and the due process clause only protects those with a

174. See generally United States v. Valdez, 103 F.3d 95 (10th Cir. 1996).
175. See Valdez, 103 F.3d at 97; Aranda-Hernandez, 95 F.3d at 980; Phommachanh, 91 F.3d at 1386; Cabrera-Sosa, 81 F.3d at 1001; Montoya-Robles, 935 F. Supp. at 1201.
176. See generally United States v. Lopez-Serrato, No. 97-4017 (10th Cir. 1997) (unpublished decision listed in table at 120 F.3d 271); United States v. Anaya, 117 F.3d 447 (10th Cir. 1997); United States v. Cisneros-Cabrera, 110 F.3d 746 (10th Cir. 1997).
177. See generally Griesenov v. INS, 121 F.3d 572 (10th Cir. 1997).
178. See Griesenov, 121 F.3d at 573; Lopez-Serrato, 120 F.3d at 272; Anaya, 117 F.3d at 448; Cisneros-Cabrera, 110 F.3d at 748.
179. See Kershner, 228 F.2d at 142.
182. See id. at 1201.
183. 120 F.3d 271 (10th Cir. 1997).
protected right.\textsuperscript{184} Therefore, the INS is under no obligation to notify an alien being deported of the criminal penalties for re-entry.\textsuperscript{185}

\textbf{B. Convictions and Sentences}

Sentencing is another area in which the Tenth Circuit continued its trend of administrative deference. In \textit{United States v. Cabrera-Sosa},\textsuperscript{186} the court considered whether a conviction of illegal drug possession prior to the 1988 Anti-Drug Abuse Act was an aggravated felony. Defendant was deported based on a conviction of selling cocaine and arrested upon re-entry. He claimed that the definition of "aggravated felony" does not include offenses prior to the ADAA, which introduced the definition of aggravated felony.\textsuperscript{187} The court disagreed, holding that defendant's conviction was an aggravated felony under the ADAA.\textsuperscript{188}

In \textit{Nguyen v. Immigration & Naturalization Service},\textsuperscript{189} the Tenth Circuit considered whether the BIA was correct in considering an indeterminate sentence of imprisonment as an aggravated felony and denying a petition for relief from deportation. Petitioner received an indeterminate sentence of three to eight years for an aggravated felony. The court agreed with the BIA policy of considering indeterminate sentences as being the maximum sentence imposed and held that the petitioner was not eligible for waiver of deportation.\textsuperscript{190}

Whether a prior conviction for an aggravated felony is an element of section 1326(b)(2) or a condition triggering an enhanced penalty was taken up by the court in \textit{United States v. Valdez}.\textsuperscript{191} Section 1326\textsuperscript{192} provides that an alien who has been convicted and deported and then re-enters the United States shall be fined, imprisoned, or both. The court noted that the plain language of the statute suggests that section 1326 is a sentence enhancement provision and adopted the majority position.\textsuperscript{193}

In \textit{United States v. Cisneros-Cabrera},\textsuperscript{194} the court questioned whether a severe sentence enhancement was valid even though the state court invalidated the conviction upon which the enhancement was based. The state court invalidated the defendant's conviction after he re-entered the United States. The court examined the statute and determined that it was clear on its face. The defendant triggered the penalty by re-entry with a valid conviction.\textsuperscript{195} This decision was based on the

\begin{thebibliography}{99}
\bibitem{184} \textit{See id.} at 272.
\bibitem{185} \textit{See id.}
\bibitem{186} 81 F.3d 998 (10th Cir. 1996).
\bibitem{187} \textit{Id.} at 1000.
\bibitem{188} \textit{See id.} at 1001.
\bibitem{189} 53 F.3d 310 (10th Cir. 1995).
\bibitem{190} \textit{See id.} at 311.
\bibitem{191} 103 F.3d 95 (10th Cir. 1996).
\bibitem{192} 8 U.S.C. §1326 (1994)
\bibitem{193} \textit{See Valdez}, 103 F.3d at 97.
\bibitem{194} 110 F.3d 746 (10th Cir. 1997).
\bibitem{195} \textit{See id.} at 748.
\end{thebibliography}
previous year's decision in Valdez holding that the statute was a sentence enhancement rather than an element of the crime of re-entry.\textsuperscript{196}

The court again addressed whether a prior aggravated felony conviction was an element of offense or a sentence enhancement in United States v. Anaya.\textsuperscript{197} Defendant claimed that the district court erred in admitting evidence of his prior conviction of an aggravated felony. The court upheld its previous holding that a previous conviction is a sentence enhancement, and not an element of an offense of illegal re-entry. The court agreed that the district court erred, but concluded that the error had no bearing on the substantial rights of the party.\textsuperscript{198}

C. Relief from Deportation

A third area in which the Tenth Circuit and district courts within the Tenth Circuit have evidenced harshness toward deportation of aliens convicted of aggravated felonies is in judicial review of relief from deportation. The following cases illustrate both procedural and substantive unwillingness to disrupt administrative decisions.

In Cepero v. Board of Immigration Appeals,\textsuperscript{199} the United States District Court for the District of Kansas addressed the question of whether an alien may seek withholding of deportation when convicted of a crime of particular seriousness, when there is a well-founded ground of persecution in the alien's home country. The court held that the petitioner was not entitled to relief because he could be deported to a country in which he would not face persecution. The court further found that an aggravated felony conviction completely denies the availability of a withholding of deportation.\textsuperscript{200}

In United States v. Phommachanh,\textsuperscript{201} the Tenth Circuit was faced with the problem of whether a district court had the authority to order deportation, as a condition of supervised release, of a permanent resident alien convicted of an aggravated felony. The defendant was convicted of carrying a firearm while committing a crime of violence and ordered deported as a condition of his supervised release. The Tenth Circuit ruled that this was improper, finding the district court had the authority instead to turn the defendant over to the INS for deportation.\textsuperscript{202} The Tenth Circuit cited Immigration & Naturalization Service v. Cardoza-Fonseca\textsuperscript{203} as mandating that ambiguities in statutory language must be construed in favor of the alien.\textsuperscript{204} In doing so, the court found that Congress was explicit in delegating responsibility between the executive and judicial branches on the issue of deportation.\textsuperscript{205}

\textsuperscript{196} See Valdez, 103 F.3d at 97.
\textsuperscript{197} 117 F.3d 447 (10th Cir. 1997).
\textsuperscript{198} See id. at 448-49.
\textsuperscript{200} See id. at 1578-79.
\textsuperscript{201} 91 F.3d 1383 (10th Cir. 1996).
\textsuperscript{202} See id. at 1385.
\textsuperscript{203} 480 U.S. 421, 449 (1987).
\textsuperscript{204} See Phommachanh, 91 F.3d at 1385.
\textsuperscript{205} See id. at 1386.
D. Standing for Appeal

The final area in which the Tenth Circuit deferred to administrative interpretations involves the convicted alien's standing for appeal of deportation orders. Recent cases illustrate that the Tenth Circuit is unwilling to undermine the Attorney General's decisions.

In Al-Salehi v. Immigration & Naturalization Service, the court dealt with the issue whether there was an absolute bar preventing petitioning for withholding of deportation. Petitioner's appeal was denied by the immigration judge. The BIA found that the immigration judge properly determined that petitioner's criminal conviction conclusively denied his request for relief. The Tenth Circuit agreed, holding that the administrative construction enforced by the BIA is entitled to deference, regardless of mitigating circumstances as to the alien's danger to the community.

In Hernandez-Avalos v. Immigration & Naturalization Service, the court examined whether an aggravated felon could compel the INS to initiate deportation proceedings. Four separate alien petitioners argued, based on 8 U.S.C. § 1252(I), that the Attorney General should begin deportation procedures as soon as possible after conviction. The Tenth Circuit held that the Immigration and Nationality Technical Corrections Act of 1994 precluded a private right of action against the government and against the Attorney General. Additionally, aliens convicted of deportable offenses were subject to the "zone of interest test" to determine if they had standing to seek mandamus to compel the Attorney General to begin proceedings. The court concluded that aliens convicted of deportable offenses did not have standing to seek mandamus.

In Stolp v. Immigration & Naturalization Service, the Tenth Circuit examined whether an alien convicted of an aggravated felony and already deported had standing to appeal. The INS began deportation proceedings, determining that he was ineligible for a 212(c) discretionary waiver. Petitioner asked both for review and for a stay of deportation. The stay was denied and the petitioner was deported. The court held that because petitioner had already been deported, the court was without jurisdiction to hear a claim.

206. 47 F.3d 390 (10th Cir. 1995).
207. See id. at 391.
208. 50 F.3d 842 (10th Cir. 1995).
209. "In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceedings as expeditiously as possible after the date of conviction." 8 U.S.C. § 1252 historical note (Supp. IV 1998).
211. See Hernandez-Avalos, 50 F.3d at 844.
212. Mount Evans Co. v. Madigan, 14 F.3d 1444, 1452 (10th Cir. 1994) (quoting Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400 (1987)) (holding that the test is whether "Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law").
213. See Hernandez-Avalos, 50 F.3d at 847.
214. See id. at 848.
215. No. 94-9339 (10th Cir. 1995) (unpublished decision listed in table at 59 F.3d 179).
216. See id.
In *United States v. Aranda-Hernandez*, the Tenth Circuit examined whether an immigration judge's refusal to hear a defendant's asylum and withholding of deportation claims violated the defendant's right to effective appeal. The defendant claimed that he was deprived the right of effective appeal when the immigration judge refused to consider his petition for withholding deportation. The court held that when there are substantive determinations in an immigration hearing which later result in a criminal sanction, there must be effective review of the administrative procedure. However, the court did not find such abuse in denying the petition and held that such a refusal did not violate defendant's rights to an effective appeal.

Whether the Antiterrorism and Effective Death Penalty Act prohibited appellate review of a deportation order was taken up by the Tenth Circuit in *Grieveson v. Immigration & Naturalization Service*. The INS found the petitioner deportable because he committed a controlled substance violation. The BIA dismissed his appeal. Several months after the AEDPA became effective, petitioner filed his petition for review. The court concluded that his appeal was absolutely barred by the AEDPA, which provides that "any final order of deportation against an alien who is deportable by reason of having committed a criminal offense . . . shall not be subject to review by any court."

**VI. Analysis and Suggestions**

Congress has followed a policy of increasingly strict controls on immigration policy regarding alien criminals. Since 1988, several acts have expanded the definition of "aggravated felony" to encompass even somewhat trivial offenses, and have made aggravated felony deportation applicable regardless of when in an alien's past the crime occurred. Congress also intended to allow no possibility of judicial review for administrative decisions of deportation. In delegating its authority, Congress encourages a hardline position against criminal aliens. Because Congress has plenary power over immigration, one cannot argue that it has abused that power in denying due process rights to criminal aliens. The courts agree with respect to substantive due process rights, deferring completely to congressional plenary power. Congress has been extremely consistent in its policy choices. While crime may be a significant problem with permanent resident aliens, a categorical approach of denying to hear mitigating circumstances, such as family hardship, contributions to society, redemption from criminal life, or potential persecution is unjustified. Allowing mitigating factors may dull the sharp edge of the current deportation

217. 95 F.3d 977 (10th Cir. 1996).
218. See id. at 980.
219. See id. at 980-81.
220. 121 F.3d 572 (10th Cir. 1997).
222. Grieveson, 121 F.3d at 574 (noting that 8 U.S.C. § 1105(a) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) and replaced by 8 U.S.C. § 1252, though in the present case the pre-IIRAIRA standards applied).
223. See Harisiades, 342 U.S. at 583.
statutes with little harmful effect to the law. As it was shown earlier, it is the intent of Congress that both the range of relief mechanisms be curtailed and that judicial review be eliminated.

The executive branch has been even harsher towards the alien. Contradictory policies have forced the INS, the BIA, and the Attorney General into using even more heavy handed tactics with alien criminals than perhaps even Congress intended. Disagreements have arisen as to the extent of the waiver provisions, general disconcern for the surrounding situation and mitigating circumstances of a criminal's life after his crime, and the temporal applicability of statutes. Although the administration is overworked, two faults remain: the overall lack of concern for the alien, and incomprehensible inconsistency within its policy-making bodies.

Part of the reason for congressional and administrative ill-will towards aliens stems from a general anti-immigrant sentiment prevalent in the United States.\(^{224}\) In addition, this sentiment "blurs the distinction between legal and illegal migration."\(^{225}\) This backlash has prompted Congress to discriminate severely against both legal and illegal aliens\(^ {226}\) and has spilled over into recent congressional decisions to restrict administrative and judicial remedies for aliens facing deportation.\(^ {227}\) Throughout this century, America as a whole can be characterized as xenophobic.\(^ {228}\)

Strictness toward criminality does not seem to constitute fairness toward the alien. Congress may have gone too far in reacting to public opinion, denying legitimate members of the community access to basic rights, such as due process and equal protection of the laws. All constitutional attacks on congressional decisions seem fruitless considering Congress' almost absolute plenary power, and would necessitate overturning almost two hundred years of immigration jurisprudence.

A. Analysis of Possibilities for Relief in the Courts

Generally, courts are more sympathetic to the plight of the criminal alien than Congress has historically been. Courts have tempered the harshness of Congress with thoughts of procedural due process and minimal protection of judicial review, but courts are also bound by the wishes of Congress. Only when Congress has overstepped its bounds have the courts sought to restrict its actions. This has led to inconsistency within the courts. Several cases simply repeat administrative decisions without in-depth analysis, while other cases protect the almost powerless resident alien convicted of a crime. Generally, courts have held that aliens who are in the United States, whether legally or clandestinely, enjoy procedural due process rights.


\(^{225}\) Id. at 710.

\(^{226}\) For example, welfare benefits are generally curtailed for legal permanent residents as of 1996.

\(^{227}\) See Scaperlanda, supra note 224, at 710.

In *Shaughnessy v. United States ex rel. Mezei*, the Supreme Court maintained that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Although citizens enjoy certain substantive protections, including freedom from arbitrary or substantially intrusive invasion by governmental action, in the areas of substantive due process rights, the courts have not afforded the same protections to resident aliens. The courts have deferred to the correctness of congressional action, as illustrated by *Harisiades v. Shaughnessy*, which held that "any policy towards aliens is vitally and intricately interwoven with . . . foreign relations, the war power, and the maintenance of a republican form of government." The Supreme Court maintained that "such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." The decision virtually eliminates substantive due process arguments for the noncitizen. It is not clear why the Constitution's Due Process Clause should apply only in part to resident aliens.

The courts have been inconsistent in the area of Equal Protection claims as well. Outside the specific framework of immigration law, which is the sole province of the federal government, when states classify persons solely on the basis of alienage, the courts claim to review such statutes under the "strict scrutiny" standard. This is not unusual, because aliens as a class perhaps meet the "discrete and insular" test, which triggers the application of strict scrutiny. Aliens are essentially politically powerless and their class has been traditionally discriminated against, at least as far back as 1798 with the Alien Act which permitted the President to expel from the United States any alien whom he deemed dangerous.

In spite of seemingly qualifying for protected status, a number of cases have reduced the test from "strict scrutiny" to "rational basis." In light of the fact that the Constitution has been interpreted to vest full authority in Congress in the area of immigration, it is difficult to rectify the inconsistent policies the courts have taken with regard to federal legislation as opposed to individual state actions. The solution lies in the fact that when a state classifies a group in such a way as to disadvantage aliens, it must be consistent with the federal government's permission for the alien to reside in the country. In *Plyer v. Doe*, the Supreme Court held that under the

229. 345 U.S. 206 (1953).
230. *Id.* at 212.
232. *Id.* at 588-89.
233. *Id.*
234. See *In re Griffiths*, 413 U.S. 717, 729 (1973) (holding that states may not prevent resident aliens from practicing law); Sugarman v. Dougall, 413 U.S. 634, 646 (1973) (holding that a state may not bar aliens from holding positions in the state civil service); Graham v. Richardson, 403 U.S. 365, 382 (1971) (holding that states cannot deny welfare benefits to aliens).
236. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).
Equal Protection Clause, illegal aliens of school age may not be charged a fee for public school education. The decision rested specifically on whether the state's ban comport ed with congressional policy on immigration. In Sugarman v. Dou gall, the Supreme Court made an important exception to this policy, holding that a state could prevent aliens from holding state elective offices and important non elective offices of state government.

It is interesting to note that the Sugarman exception has all but swallowed the rule for state discrimination. In Foley v. Connellie, the Court extended the Sugarman exception to state troopers. In Ambach v. Norwick, the Court extended the exception to public school teachers. And in Cabell v. Chavez-Salido, the Court extended the exception to deputy probation officers. The only case in which the Court did not find the exception applicable was in Bernal v. Fa ine, where a resident alien applied to be a notary public. The exception effectively reduces the burden on state regulation to a "middle scrutiny" or balancing of interests test, and not the "strict scrutiny" test from Plyer.

In the realm of federal action, the courts have taken a different approach. If the federal classification is only based on alienage, the courts use a balancing test since the federal government has the exclusive responsibility for supervising immigration. This test balances the federal government's interests in controlling immigration against the alien's right to fair treatment. The Court specifically upheld congressional power to discriminate in Matthews v. Diaz. The Court held that Congress could impose the double requirements that aliens reside in the United States for five years and be admitted for legal permanent residence before receiving Medicare.

The wavering of the courts is distressing. At least in part, this wavering may be attributable to public pressure and anti-immigrant sentiment. Although Congress did carve out certain minor safeguards within the immigration laws that protect the aggravated felon in spite of explicit intent to the contrary, the protections are very narrow. But, for the aggravated felon with certain mitigating factors in his favor, relief is possible, even when Congress has taken much of judicial review away from the courts.

The Tenth Circuit, however, adamantly and unwaveringly follows congressional intent and policy. The court decided several cases from 1995-1997 concerning immigration law and the rights of a permanent resident alien who is deportable for

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238. Id. at 230.
239. See id. at 224-25.
242. See id. at 300.
244. See id. at 81.
246. See id. at 447.
249. See id. at 87.
having committed an aggravated felony. The court's decisions reflect definite judicial confirmation of administrative decisions, following the hardline position of Congress. In every case surveyed, the Tenth Circuit sided against the resident alien, denying review if convicted of an aggravated felony, holding that there was an absolute presumption of "dangerousness to the community", affirming that withholding of deportation was unavailable regardless of mitigating circumstances, and denying judicial review of administrative decisions.

B. Suggested Possibilities for Relief Under the Immigration and Naturalization Act

There may be other alternatives available under the seemingly onerous congressional policy to the alien facing deportation. Congress has provided several remedies that may be applicable to the aggravated felon. It is not clear whether these remedies were intended or whether they are even applicable considering INS's day-to-day practice. The first potential source of relief is cancellation of removal. INA section 240A(b) offers cancellation of removal within the discretion of the Attorney General for those aliens who are either inadmissible or deportable. To qualify, the alien must have been physically present in the United States for a continuous period of ten years, must have been a person of good moral character for that same time, the deportation of the alien must be shown to result in extreme and unusual hardship to the alien's spouse, parent, or child who is a U.S. citizen, and the alien must not have been convicted of a crime under section 212(a)(2), 237(a)(2), or 237(a)(3). This leaves a small window of relief for the alien if he fulfills the conditions above and his aggravated felony was committed before he entered the United States. Additionally, his aggravated felony must not constitute a "crime of moral turpitude." This policy rewards the alien for good moral behavior and contribution to society, but is very narrow.

One problem with this small possibility of relief concerns the definition of "crime of moral turpitude." It may be possible under immigration law and practice for an alien to commit what is considered an aggravated felony and for it not be considered one of moral turpitude. Courts have held that the determination of moral turpitude is typically applied categorically, and not based on the facts of individual cases. A fairly detailed catalog of cases provides a list of crimes which do and do not involve moral turpitude. Crimes involving fraud, murder, some aggravated forms

250. One other note must be made. Such minor opportunities of relief, while technically available, perhaps are not really available to the alien without counsel who has no way of adequately arguing the law.


252. These are criminal and related grounds which involve an act of moral turpitude, a violation of a controlled substance, a person with multiple convictions, and traffickers in controlled substances. INA § 212(a)(2), 8 U.S.C. § 1182 (1994).

253. This section lists similar crimes as section 212(a)(2), but with the additional language, "any alien who is convicted of an aggravated felony at any time after admission." INA § 237(a)(2), 8 U.S.C. § 1182(a)(2) (Supp. IV 1998).


255. See Marciano v. INS, 450 F.2d 1022, 1031 (8th Cir. 1971).

of assault, and voluntary manslaughter generally involve moral turpitude. Crimes that
do not involve moral turpitude are simple assault and involuntary manslaughter.\textsuperscript{257} Comparing that list with crimes falling under aggravated felony,\textsuperscript{258} some of the lesser crimes listed as aggravated felonies perhaps do not involve moral turpitude. Arguably, there is a small chance of success, but only for a very limited type of case and even then, perhaps only for the alien with an extremely sympathetic case.

A second possibility for relief along the same lines of analysis as above is under INA section 240A(b)(3) — adjustment of status.\textsuperscript{259} The requirements for the Attorney General’s adjustment are the same as for section 240A(b)(1), but are limited by an annual 4000 maximum on adjustments and cancellations for the year.\textsuperscript{260} Whether adjustment of status benefits an alien is questionable, however. If an alien is already deportable on the grounds of an aggravated felony, adjusting his status may have no effect. Circumstances may, however, provide a more compelling case under one category of resident alien than under another, such as by adjusting to legal permanent resident based on an immediate family relationship.

Another route to adjustment of status is INA section 245.\textsuperscript{261} An alien may adjust his status if he is eligible to receive an immigrant visa, is admissible for permanent residence, and an immigrant visa is immediately available to him at the time his application is filed.\textsuperscript{262} The major hurdle is the admissibility requirement. If a person is excludable under section 212(a), then such relief is not available. Section 212(a)(2) contains the criminal grounds for inadmissibility. The conviction, admittance of a conviction, or commission of the acts which are the elements of a crime of moral turpitude or controlled substance violation make an alien inadmissible. This is modified by section 212(a)(2)(A)(ii), (iii), which makes exception in two circumstances: first, if the crime was committed when the alien was under eighteen and more than five years before the application, and second, if the maximum penalty for the crime did not exceed one year and the actual sentence imposed was less than six months.\textsuperscript{263} If the aggravated felony does not constitute moral turpitude or if it meets the criteria in section 212(a)(2)(A)(ii), (iii), the alien is admissible, and thus eligible for adjustment of status. Again, this is a narrow window.

A third type of relief for the alien convicted of an aggravated felony is registry under INA section 249. The permanent registry relief is for aliens having entered the United States prior to January 1, 1972, having continuous residence since that entry, having good moral character, and who are not ineligible for citizenship nor inadmissible under INA section 212(a) for having committed certain crimes of moral turpitude (with some exceptions for length of sentences.) If the alien can convince the Attorney General that an aggravated felony committed long ago does not fall within section 212 and the alien meets the other requirements, relief may be

\textsuperscript{257} See id.
\textsuperscript{259} See id. § 240A(b)(3), 8 U.S.C. § 1229(b).
\textsuperscript{260} See id.
\textsuperscript{261} See id. § 245, 8 U.S.C. § 1255.
\textsuperscript{262} See id.
\textsuperscript{263} Id. § 212(a)(2)(A)(ii),(iii), 8 U.S.C. § 1182.
available. This provision generally rewards those who have lived in the United States for a long time and have become an essential part of the community. This provision also has a less stringent requirement for continuous residence than does cancellation of removal, thus increasing the availability for relief, even in the case of the aggravated felon.

A final form of lasting relief is a private bill or legislation which provides permanent resident status to an individual when he otherwise would not be eligible. Since Congress has plenary power over immigration, it can make any law admitting any individual alien, even when the alien is inadmissible under the INA. The overall number of bills introduced and subsequently passed has dramatically fallen within the last few years, but success is still possible if the case is particularly sympathetic. Formal rules lay out the procedure and substantive criteria for such petitions.

A number of nonpermanent forms of relief may be available to the aggravated felon. The first of these is deferred action, though it is inapplicable if removal proceedings have already begun. The INS does not always institute removal proceedings for everyone it suspects of being deportable. In cases in which extraordinary and sympathetic factors would make removal unconscionable, the INS often does not initiate such proceedings. However, the INS Operations Instruction 24.1A(22), which gave the district director discretion to defer action if various conditions are met, such as how likely the alien is to depart on his own, the likelihood another country will take the alien, the age or health of the alien, adverse publicity, and high enforcement priority, such as for terrorists or war criminals, has since been rescinded.

Another option for relief from deportation may exist in voluntary departure under INA section 240B. Voluntary departure is used by an immigration judge in exchange for not formally ordering removal. The Attorney General has the discretion to permit the alien to depart voluntarily if he is not subject to 237(a)(2)(A)(iii), which specifically concerns aggravated felonies committed after admission. The only way for voluntary departure to be applicable is for the crime to have been committed before admission. Voluntary departure also prevents a twenty-year bar to readmission due to removal proceedings on the basis of an aggravated felony upon the alien’s return to the United States.

Congress provided two opportunities for voluntary departure. Section 240B(a) allows for departure, before or in lieu of removal proceedings, for those convicted

265. See Legomsky, supra note 256, at 504.
267. See Legomsky, supra note 256, at 504.
268. See id.
of aggravated felonies, assuming the above criteria are met.\textsuperscript{272} Section 240B(b) authorizes voluntary departure at the conclusion of the removal hearing,\textsuperscript{273} though it is slightly more restrictive.\textsuperscript{274} Congress has also barred all judicial review of orders denying voluntary departure.\textsuperscript{275} Congress additionally gave the Attorney General the authority to limit eligibility for voluntary departure under 240B(e), which effectively gives the Attorney General the power to add further restrictions and bars judicial review of any regulations.\textsuperscript{276}

Finally, the alien may request a stay of removal. This is subject to the INS's discretion under 8 C.F.R. section 243.4.\textsuperscript{277} However, removal must be stayed while a motion to reopen is pending, or the motion is deemed withdrawn.\textsuperscript{278} This has only a limited effect, postponing deportation pending a petition to reopen.

\textit{Conclusion}

Criminal conduct carries many consequences for the permanent resident alien in the United States. Aside from being a ground for inadmissibility or deportability, criminal activity may completely eliminate the alien's right to affirmative relief from removal, even for cases of extreme hardship or extraordinary circumstances. Since the 1980s, Congress has focused particular attention on criminal aliens, expanding removal grounds, decreasing and in some cases entirely removing the availability of discretionary relief, expediting the procedures involved in some criminal removal procedures, and removing judicial review of decisions of executive agencies.

The matter is further complicated by the number of actors involved in making immigration policy. Congress, the executive branch, and the courts actively participate in various aspects of immigration. Congress determines immigration law, the Departments of State and Justice carry out the bulk of congressional wishes, and the courts review the constitutionality of the actions of both branches. Very often, the particular agendas of each branch do not coincide, and often they pursue contradictory policies. The history of removal law since 1988, and specifically the definition of aggravated felony since 1988, has evidenced an increasing intolerance for criminal activity, especially activity amongst the resident alien population. Legislative activity within the last decade, in response to the rise in alien criminal population in United States prisons, has additionally disfavored the resident alien convicted of aggravated felonies. Administrative decisions have evidenced equal harshness against the resident alien. In addition, the indeterminacy of direct policy — swinging from rigid adherence to legislative intent to acceptance of extraordinary cases that necessitate against the strict application of deportation proceedings — has made for very

\textsuperscript{272} See id. § 240B(a), 8 U.S.C. § 1229(c).
\textsuperscript{273} See id.
\textsuperscript{274} Bond is mandatory and not discretionary. Id. § 240B(b)(3). The maximum period allowed to depart is 60 days and not 120. Id. § 240B(b)(2).
\textsuperscript{276} See LEGOMSICY, surpa note 256, at 509.
\textsuperscript{277} 8 C.F.R. § 243.4 (1996).
\textsuperscript{278} See id. § 3.2.
unpredictable patterns within the administration. The judiciary has hesitated to support wholeheartedly congressional desire, trying rather to balance the due process rights of resident aliens with congressional ill will. The Tenth Circuit in particular demonstrates the impact national decisions in the three branches of government have in regional areas such as Oklahoma. Congress did leave some room for relief, though effectiveness of such relief is not guaranteed and the alien must have a very compelling case. The challenge is to balance congressional wishes and the demands on the executive branch with the limited protections available.

_Brent K. Newcomb_