Discretion/Cancellation

DUE PROCESS: RECENT IMMIGRATION LAWS GO TOO FAR

In 1996, the 104th Congress passed and the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Touted as legislation that would control illegal immigration, IIRAIRA and AEDPA actually include many provisions that significantly affect American families, legal immigrants and others seeking to enter the United States legally. Many, including Members of Congress and the general public, have recognized the need to revisit and change certain provisions of IIRAIRA and AEDPA. Some of the harshest provisions of IIRAIRA and AEDPA that need to be changed include:

JUDICIAL REVIEW: IIRAIRA contains many provisions that strip the courts of any authority to review the decisions of the INS. Under IIRAIRA, virtually all discretionary decisions affording relief to eligible individuals may no longer be reviewed by a court. This "court-stripping" is unprecedented and unconstitutional.

Judicial review of individual decisions by INS officers and of INS procedures and applications should be restored to ensure justice and protect against mistake and abuse.

BARS TO ADMISSIBILITY: IIRAIRA creates new bars to entering the U.S. for people who have been unlawfully present in the U.S. for six months or longer. Under these new provisions, anyone who tries to enter the U.S. who has previously been in the country unlawfully for more than 180 days but less than one year will be barred from reentering the U.S. for three years. Anyone who is in the U.S. unlawfully for one year or more will be barred from reentering for ten years. The 1996 law provides only very limited waivers and exceptions to these bars.

The three and ten year bars should be repealed. Alternatively, the waivers and exceptions to the bars should be expanded to, at a minimum: include parents of U.S. citizens and lawful permanent residents; and provide that the period of time during which a person is in removal proceedings (including any appeal period) will not count toward the period of unlawful presence (since the person is required by law to remain in the U.S. during that period).

"212(c)" RELIEF: Prior to the passage of IIRAIRA, Section 212(c) of the Immigration and Nationality Act provided relief from deportation for long-term lawful permanent residents who had committed a crime but merited a "second chance." In order to be eligible to apply for "212(c)" relief, an applicant had to show that he or she had been a lawful permanent resident for at least seven years, had served less than five years of a sentence if the underlying crime was classified as an "aggravated felony," had been rehabilitated, and had no other criminal record. If the applicant was able to establish these factors, the immigration judge had the discretion not to deport the applicant. *However, IIRAIRA completely bars anyone who has been convicted of an aggravated felony from even applying for this type of relief.* This provision essentially denies any opportunity for rehabilitation for long-term permanent residents who have family here and ties to the community. Given the broadly expanded definition of aggravated felony under IIRAIRA and its retroactive application, reform is necessary.

The ability to apply for "212(c)" relief should be restored for lawful permanent residents who have served a sentence no more than five years and meet all other requirements.

AGGRAVATED FELONIES: IIRAIRA greatly expands the definition of "aggravated felony" for immigration purposes. This definition is unrelated to any criminal definitions and, under IIRAIRA, includes non-violent crimes such as shoplifting and check kiting. Under immigration law, "aggravated felons" are deportable without the possibility of relief from deportation (see "212(c) Relief" above). Furthermore, the new expanded definitions are retroactive. Thus, legal immigrants may be placed into deportation proceedings today for minor offenses they committed decades ago. This is true *even if the offense was not defined at the time as an aggravated felony (and therefore may not have been a deportable offense), and the immigrant has served his/her punishment in the criminal law system.*

The law should be amended to narrow the definition of aggravated felony to include only serious offenses. Moreover, the new definition should not apply retroactively; it should apply only to crimes committed after April 1, 1997, the date of enactment of IIRAIRA. Immigrants should not have the rules changed on them in the middle of the game.

SUSPENSION OF DEPORTATION: IIRAIRA significantly changed a discretionary form of relief that was known as "suspension of deportation" (now called "cancellation of removal"). This relief allowed a judge to suspend the deportation of a person who was not legally residing in the U.S. but who had lived here for a long time and had other extenuating circumstances. To be eligible to apply for suspension of deportation, an applicant had to prove that he or she had been in the U.S. for at least seven years and that the applicant or his/her U.S. citizen or lawful permanent resident family member would suffer extreme hardship if the applicant was deported. If the applicant could establish these factors, the immigration judge, in his or her discretion, could decide to prevent the applicant's deportation. IIRAIRA made this form of relief much more difficult for an applicant to obtain. Under IIRAIRA, an applicant must show that he/she has been in the U.S. for at least *ten* years and that deportation would result in *"exceptional and extremely unusual hardship"* to a U.S. citizen or lawful permanent resident family member – *hardship to the applicant is not sufficient.* If the applicant cannot meet these extremely high eligibility requirements, the judge has no authority to suspend the applicant's deportation.

Congress should restore traditional Suspension of Deportation. At a minimum, the law should be amended to restore hardship to the applicant as a ground of eligibility for this relief. ✓

EXPEDITED REMOVAL: IIRAIRA creates a new expedited removal process in effect at all U.S. ports of entry. Under this expedited process, persons attempting to enter the U.S. with fraudulent documents or no documents can be summarily removed from the U.S. by an Immigration and Naturalization Service (INS) inspector at the port of entry without a hearing. Additionally, persons who attempt to enter by "misrepresentation" also may be removed. Persons summarily removed can be barred from reentering the U.S. for a minimum of five years, and possibly permanently. IIRAIRA explicitly strips the federal courts of any authority to review the INS's decision to remove the entry applicant, thus providing low-level INS employees with broad, unchecked authority to issue final and binding deportation orders. Furthermore, the new expedited removal provisions were intended to apply to persons with facially fraudulent documents or no documents. However, these provisions are overly broad in scope and are being applied to persons who have valid documents, but whom an inspector believes intend to violate the terms of his or her status. Without

Bar for 5yrs +

too broad

subjective

any meaningful review, unsuspecting travelers can find themselves facing summary deportation based only on the subjective opinion of the inspector.

The expedited removal law should be repealed.

DEPORTATION BASED ON SECRET EVIDENCE: IIRAIRA, together with AEDPA, establishes a new court charged only with hearing cases in which the government seeks to deport aliens based on secret evidence submitted in the form of classified information. The INS already has tried in other courts to use secret evidence against immigrants. In commenting on one such attempt, a court said, "One would be hard pressed to design a procedure more likely to result in erroneous deprivations. ... Secrecy is not congenial to truth seeking. ... No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it." This simple statement is a fundamental requisite of any fair legal system. Our adversarial legal system demands no less. Proceedings conducted out of sight of the accused and their attorneys are a feature of totalitarian governments, not of our own.

The law should be amended so that no person should be deprived of liberty on the basis of evidence kept secret from them.

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34GR8068

MANDATORY DETENTION: Immigrants Detained and American Families Pay the Price

THE ISSUE: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the Immigration and Nationality Act by mandating that the Immigration and Naturalization Service (INS) detain nearly all immigrants who have committed a crime. The list of crimes which subject an immigrant to mandatory detention is extensive, and includes nonviolent crimes, crimes which occurred in the distant past, and crimes for which no sentence was served. Mandatory detention went into effect on October 9, 1998. Since that time, many lawful permanent residents who have been in the United States for many years and who have U.S. citizen family members have been locked away indefinitely in INS facilities and local jails with no possibility for release.

BACKGROUND: Prior to the mandatory detention provisions enacted in the '96 law, INS could exercise its discretion and decide to release a particular detainee if it was determined that the detainee posed no risk to society and was likely to appear for proceedings. An Immigration Judge could hear evidence about a detainee's U.S family members, length of residency in the U.S., and rehabilitation and decide whether or not he or she deserved to be released. Both INS and an Immigration Judge had the authority to release an individual who posed no danger to the safety of others and was likely to appear for future hearings. By mandating detention without the possibility of release, IIRIRA took away this discretion.

The mandatory detention provisions also operate retroactively, according to the Administration's interpretation, and require the detention of individuals who committed non-violent offenses, including some misdemeanors, even years before IIRIRA became law. Many long-time lawful permanent residents have been detained without the possibility for release for offenses committed years ago.

Any change in the mandatory detention rules requires legislative action. Mandatory detention of lawful permanent residents, however, has been found unconstitutional by a majority of federal courts which have considered the issue.

CURRENT STATUS: INS issued policy guidance on October 7, 1998 indicating its detention priorities. The INS memo began by stating that compliance with the mandatory detention provisions is "virtually impossible," and indicated that individuals released prior to the new detention rules will not be targeted for re-detention. However, when the INS comes into contact with an immigrant subject to mandatory detention, for example during a citizenship interview or upon return to the United States from a trip abroad, the immigrant is likely to be taken into custody without possibility for release.

AILA's POSITION: The mandatory detention provisions of the 1996 immigration law go too far and should be reformed. INS should not detain non-violent immigrants, including refugees, asylum seekers and permanent residents, who pose no risk to society. To do so wastes taxpayer money and diverts much needed resources from the legitimate and necessary task of detaining those violent aliens with criminal histories. INS, itself, has taken this position. INS must have the discretion to release immigrants who pose no risk to society and are likely to show up for their hearings. The vast majority of immigrants pose no risk to American society and should not be treated like criminals. AILA strongly supports reform of the mandatory provisions. Mandatory detention goes too far and hurts American families.

<u>OTHER RELATED ISSUES</u>:

Indefinite detention - The INS is unable to return some detainees with final orders of deportation or removal to their countries of nationality. These detainees are from Vietnam, Cuba, and other countries with which the United States has no diplomatic relations or which refuse to accept the return of their nationals. Consequently, immigrants from these countries languish in INS detention for years. These individuals are commonly known as "lifers," since there is no end in sight to their detention. Many of the approximately 3,500 "lifers" are lawful permanent residents who entered the United States as refugees when they were children.

On April 30, 1999, INS Commissioner Doris Meissner announced a new mandatory review policy for long-term detainees. This policy calls for the regular review of individuals who have final deportation orders but whose immediate repatriation is not possible. Under previous INS policy, District Directors had this authority. This policy announcement merely requires that these reviews take place and that they are conducted in a regularly scheduled manner. While INS makes a commitment to fairness and consistency in this policy, it is too early to tell whether the April 30th memo will have any meaningful impact on those indefinitely detained.

Indefinite detention has been found unconstitutional by several courts. In *<u>U.S. vs. Zadvydas</u>*, where an immigrant was detained for four years beyond the completion of his criminal sentence, the court stated that "the probability of permanent confinement is an excessive means of accomplishing the purposes sought to be served... This result 'shocks the conscience'."

Hubbing - AILA strongly opposes the INS Central Region Hub Site Detention and Removal Plan. Under this INS plan, processing of detained immigrants would be centralized based not upon the place of apprehension, family or community ties–but rather based on the national origin of the detainee. Ostensibly, this plan was supposed to maximize limited agency resources and increase efficiency. While AILA is skeptical about any "resource maximization" outcomes, we are convinced that this plan violates civil rights, raises due process concerns, and will split families apart.

Of particular concern is the probability that foreign nationals who have been "hubbed" would be deprived of adequate legal counsel and representation, and largely denied access to attorneys familiar with their cases and circumstances. Removal proceedings will be hampered because of the inability to access witnesses, documents, and evidence, and also made far more complicated by the loss of family assistance. In addition, those detainees whose convictions have the potential to be reversed or pardoned will be unable to access the courts or counsel familiar with the relevant state process. In all too many cases, the proposed "streamlining" of court proceedings (through videoconferencing or telephone witness examination) will lead to confusion and further delay rather than efficiency.

Civil rights and due process must not fall victim to the agency's needs to balance an increased workload with limited resources. Given the negative consequences of the Hub Site Detention and Removal Plan, we have urged INS to develop alternative plans. 34CR8049

"Prosecutorial Discretion:" Inadequate and Not the Point!

Dogged opponents of any change in the harsh 1996 immigration laws defend their posture by alleging that because the Immigration and Naturalization Service (INS) has "prosecutorial discretion," no changes are necessary. The '96 law retroactively subjects long-term, law-abiding immigrants to deportation, simultaneously mandating detention and denying immigrants their day in court. While we welcome this tacit acknowledgement from opponents that the 1996 laws are harsh and inflexible, so-called "prosecutorial discretion" is NOT the answer. Changing the law to assure that long-term lawful permanent residents and their families are treated fairly is what needs to be done. Congress needs to act, not the INS in the guise of "prosecutorial discretion." Congress needs to take responsibility for ameliorating the draconian impact of the 1996 immigration laws on American families.

INS prosecutorial discretion is not the answer for the following reasons:

- <u>Judges, Should Have Discretion</u>: Some allege that the law does not need to be changed because INS has discretion about whether to begin or terminate a removal proceeding. However, INS prosecutorial discretion is insufficient (see below). Only immigration judges are neutral decision makers trained to evaluate each case based on evidence presented by both the INS and the immigrant. INS prosecutorial discretion should not be the sole and final answer.

- <u>There is No Statute of Limitations in Immigration Law</u>: Even if INS front line officers, trial attorneys, or district directors decide not to proceed, because these decisions are reversible, an immigrant can never be sure that he or she will not be deported in the future. A different low-level INS officer could turn this decision on its head and commence deportation proceedings. An exercise of prosecutorial discretion means that there is no finality for the immigrant. Unlike criminal law, in which the government has a limited amount of time to prosecute a case, the INS has no such time limitation and thus can reverse any decision reached through prosecutorial discretion.

- <u>Inconsistent Application of the Laws Would Increase</u>: The use of prosecutorial discretion, rather than a necessary change in the law, would lead to the law being applied inconsistently throughout the country. INS enforcement officials would have the power to make individual decisions that increasingly would be based on a number of variables including where someone lives, whether they speak English, and who represents them.

- Prosecutorial Discretion Does not Translate into the Immigration Context: Before criminal charges are filed, prosecutors weigh the strength of case and the severity of the offense to decide whether to prosecute. Moreover, in the criminal system, judges, juries and grand juries review the case in pre-trial proceedings. The criminal system does not depend solely on prosecutorial discretion. In immigration law, low level bureaucrats, pressed for deportation numbers, begin proceedings without the review of a neutral decision-maker such as a judge or jury.

- The Immigration System Moves Slowly: Even if a trial attorney or district director, after evaluating a case, decides that an immigrant should not be removed from this country, the decision most likely will not be made until the immigrant has spent months in mandatory detention. Unlike the criminal justice system, where once the police refer a case to a prosecutor, the prosecutor has a very limited amount of time to decide whether to pursue the case in criminal court, an INS immigration attorney is subject to almost no time constraints. It may be months before a person is released from detention pursuant to a favorable exercise of discretion.

- Prosecutorial Discretion Sidesteps the Real Issue that the Law Needs to be Changed: Prosecutorial discretion does not address the real issue: the 1996 immigration laws need to be changed because they are harsh laws, destroy American families, change the rules in the middle of the game and violate basic American values of fairness and due process. The INS itself recognizes, even with prosecutorial discretion, that the mandates of IIRAIRA "undeniably set forth a strong congressional policy for the detention and removal of criminal aliens." It is this mandate that is harsh, overboard and needs to be changed to allow flexibility in this merciless system.

28ad9015.1

LAWS WITHOUT MERCY AND THE NEED FOR IMMIGRATION REFORM

MYTHS AND REALITIES

Myth: INS deports only hardened, unreformed "criminal aliens."

REALITY: The 1996 immigration law made drastic changes to traditional immigration laws and procedures, subjecting to deportation tens of thousands of long-term, law-abiding legal residents.

Touted as legislation that would control illegal immigration, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA) actually include many provisions that significantly affect American families, legal immigrants and others seeking to enter the United States legally. Many, including Members of Congress and the general public, have recognized the need to revisit and change certain provisions of IIRAIRA and AEDPA.

One of the harshest provisions of IIRAIRA and AEDPA is the greatly and irrationally expanded definition of "aggravated felony." This expanded definition, which is unrelated to any criminal law definition, includes minor, non-violent misdemeanors such as shoplifting, perjury and check kiting. By casting this overly broad net, Congress has subjected tens of thousands of long-term legal residents to deportation without the possibility of relief from deportation-- regardless of how long the immigrant has been in the United States, regardless of whether the immigrant has U.S citizen family here in America, regardless of whether the immigrant has straightened out his or her life and demonstrated rehabilitation and regardless of whether the immigrant has made significant contributions to American society. For instance, **military service makes no difference**. Several Vietnam era veterans are subject to deportation under this draconian provision.

Myth: People do not get deported for minor incidents from years in the past.

REALITY: The new expanded definitions are **retroactive**. Thus, legal immigrants are placed into deportation proceedings today for minor offenses they committed decades ago. Furthermore, there is absolutely no statute of limitations on this law. This law operates retroactively even if the offense at the time was not considered a serious crime, even if the defendant received a suspended sentence and served no time and even if the crime has been expunged or the immigrant was pardoned.

In many cases, Judges have written letters or spoken on behalf of long-time legal residents who received no jail time for offenses committed in the '70's and '80's. These judges often gave suspended sentences, meaning that under criminal law the immigrant actually never was convicted, never served time in jail, and has no record.

Myth: An immigrant with money, a good lawyer, and family in the United States can always get off or string out his/her case indefinitely with appeals.

REALITY: The 1996 immigration law is merciless, providing for no second chances for many legal residents, even if they have U.S. citizen parents and children and even if they have other equities such as military or community service or proven rehabilitation.

In fact, IIRAIRA and AEDPA contain many so-called "court-stripping" provisions which prevent an immigrant from ever having his/her day in court and prevent many from even applying for case-by-case relief traditionally available. This "court-stripping" is unprecedented and has been found unconstitutional by some courts. **Insulating from judicial review an agency with a history of abuses and mistakes raises basic concerns of fairness.**

Myth: The law does not need to be reformed because INS can exercise its "prosecutorial discretion" and choose not to deport certain immigrants.

REALITY: "Prosecutorial discretion" means that the deportation of a long-time legal resident depends on the whim of often low-level INS officers. "Prosecutorial discretion" provides no finality. The benevolent whim of one low-level INS officer can be turned on its head by another seeking increased deportation numbers. Moreover, it is no cure for ill-conceived laws that go too far. The '96 law needs reform so that all immigrants are subject to fair, uniform and consistently applied laws.

Myth: Reform of these immigration laws will lead to an open door policy and criminals being allowed in and allowed to remain in the U.S.

REALITY: Reform of the harshest provisions of the '96 law will leave INS with the authority necessary to detain and deport serious offenders, just as INS has for years prior to the '96 law and one that is fair. **No one contests the legitimate INS enforcement function**. But at the same time, U.S. immigration policy must provide for family unity and a second chance for deserving immigrants. Reform will produce a system that is fair and one that reflects America's core values of fairness and due process.

Myth: Immigration, and specifically the '96 law, does not affect my constituents or my district.

REALITY: WRONG. Nationwide, from New York to California from Pennsylvania to Texas families and communities are being torn apart. **But equally importantly, our willingness to change these harsh laws tests our national commitment to basic fairness and civil rights**. How we treat people who come to this country, pay taxes, serve in the military and raise families, and how we treat those fleeing persecution or those simply coming to America seeking better opportunity speaks to who we are as a nation. The '96 immigration laws go too far, mercilessly separating families and violating core American values of due process and fairness. **Congress needs to reform this ill-conceived legislation by restoring basic fairness to immigration law.**

34GR9063

- RETROACTIVITY
- NO MAND. DET.
- JUDICAL REVIEW
- CRIM + NON CRIM CANCELLATION

"Glassman, Bradford" <Bradford.Glassman@usdoj.gov>
03/09/2000 08:17:53 PM

Record Type: Record

To: Irene Bueno/OPD/EOP, Wendy L. Patten/NSC/EOP

cc:
Subject: RE: Immigration Legislative Strategy Conference Call

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Irene/Wendy: sorry it's right before we meet, but here is a table analyzing & responding to Kennedy's bill, and setting forth ballpark-likely DOJ/INS proposed negotiating positions. I think you'll find it's pretty generous, even if it departs significantly in places from Kennedy (which even its drafters admit is a wish list). The concepts in the document have the approval of key leadership people here and at INS, but it does not yet represent a fully cleared DOJ or INS document. It should not be shared with the groups; we have a proposal for how to do that & will explain that tomorrow. Also, this is the specialist document, not the plain English one. So don't worry if it's a little opaque; we'll walk you through it.

-----Original Message-----
From: Irene_Bueno@opd.eop.gov@inetgw2
Sent: Thursday, March 09, 2000 5:43 PM
To: Mark_D._Magana@who.eop.gov@inetgw2;
Joel_K._Wiginton@who.eop.gov@inetgw2;
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patricia.a.first@usdoj.gov@inetgw2
Subject: Re: Immigration Legislative Strategy Conference Call

We are confirmed for conference call on Monday, 3/13 at 11:30 am. The conference call number is 456-2561 code 3297.

Irene Bueno
03/09/2000 11:20:45 AM

Record Type: Record

To: See the distribution list at the bottom of this message
cc:
bcc: Irene Bueno/OPD/EOP

Subject: Re: Immigration Legislative Strategy Conference Call (Document link not converted)

Since it seems that many people are not available on Friday - how about a conference call on Monday, 3/13 at 11:30 am?

Irene Bueno
03/08/2000 06:57:47 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Immigration Legislative Strategy Conference Call

In follow up to our meeting today, let's plan to have a conference call on Friday, 3/10 at 11am. I will confirm with the conference code numbers. Thanks.

Message Sent
To:____

Mark D. Magana/WHO/EOP@EOP
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Message Sent
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- kennedy.tbl.wpd

or we could
what's the preference?
no veto

Issue	Kennedy	Acceptable	Ideal
Criminal Cancellation §212(c)	· Changes bar to 5 years actually served for single agfel (no aggregation) · Eliminates criminal "stop-time" rule · Allows for breaks in presence exceeding 90 days, or 180 in aggregate, in cases of temporary trips abroad required by emergencies or "extenuating circumstances outside the control of the alien" · Provides for parole of aliens denied relief under AEDPA or IIRIRA and removed if they "would have been" eligible under the foregoing rules · Makes parole decision above subject to judicial review	· Stick with K, except: · Bar at 5 years sentenced (including suspended portions), so long as at least 1 year served; aggregates included; exception for 10+-year-old crimes · No parole of deported criminals back into U.S. Why not at least discretion for 10+ year olds **[May need to go lower on the bar, e.g., 2 years]** -Admin. shld not stipe on. -Finality - reopen - Not good idea to parole. -AG · pours · shall parole signature -Already have discretionary parole - not much of a change.	· Stick with K, except: · Bar at 5 years sentenced (including suspended portions), so long as at least 1year served; aggregates included; exception for 15+-year-old crimes · No parole of deported criminals back into U.S. **[May need to go lower on the bar, e.g., 2 years]**
Non-Criminal Cancellation	· Requires 7 rather than 10 years of CPP ok · Requires "extreme hardship" instead of higher IIRIRA standard ok · Counts alien's own hardship and that of adult LPR or citizen sons and daughters ok · Eliminates stop-time rule · Does not eliminate cap N · Makes undocumented criminals eligible for relief, under more favorable time-counting rules than 1995 law ?	· Stick with K, except: · Eliminate cap · Agfels not eligible · Restore 1995 counting rules for other criminals,? not more favorable ones **[May want to keep higher standard; grant rate under old one was over 75%]** other status like LPR · non-LPR merits	· Stick with K, except: · Eliminate cap · Criminals not eligible **[May want to keep higher standard; grant rate under old one was over 75%]**
Waivers	· Eliminates bars to 212(h) ~~except~~ aggravated for murder and torture offenses · Extends 212(i) waiver to provide relief for EWI fraud (has profound consequences), failure to attend removal proceeding, and false	· Stick with K, except: · Make 212(h) waiver for LPRs generally match criminal cancellation requirements, and for non-LPRs match 10-year suspension requirements, but make the former a little more lenient in light	· Stick with K, except: · Make 212(h) waiver for LPRs match criminal cancellation requirements, and for non-LPRs match 10-year suspension requirements · Keep 212(i) as is, but cover hardship of sons

	claim to citizenship · Eliminates requirement that hardship be extreme for 212(i) waiver · "Grandfathers" old 212(i) for pre-4/1/97 admission and adjustment applications · Extends 212(d)(12) document fraud waiver to cover frauds relating to adult sons & daughters · Provides for judicial review of 212(d)(12), 212(h), & 212(i)	of the extreme hardship to the family member that exists in the 212(h) situation · Keep 212(i) as is, but cover hardship of sons and daughters · Judicial review covered below	and daughters · Judicial review covered below
Aggravated Felony Definition	· Law in effect at time of commission controls NO · Similar for other criminal grounds · Requires more than 5 years sentenced for theft crimes, violent crimes, & certain others · Requires that alien ? smuggling be for "commercial advantage" (similar amendment for smuggling removal grounds in 212 & 237) · Makes technical change to false passport provision (PP for adult kid covered) ? · Requires failure to ? appear in court offense to have possible sentence of 5 years or more	· Stick with K, except: · Present definition applies, not law in effect at time of commission · 4 years sentenced for theft crimes, violent crimes, etc., with requirement of some time served why 4 not 5? - flexibility or 2 old system - was crazy quilt. Nightmare lot of litigation one def. but indicated in bel. gen	· Stick with K, except: · Present definition applies, not law in effect at time of commission · 2 years sentenced for theft crimes, violent crimes, etc.
Detention	· Eliminates mandatory OK detention of criminals during both proceedings & removal period · Limits post-order detention to 9 months not needed after removal period "to allow for ongoing negotiations to effect such removal," requires release of non-danger non-flight unremovables, and requires custody reviews every 90 days · Provides for IJ, BIA,	eliminate mand. detent. · Stick with K, except: · No post-order detention provision needed; regulations being drafted · Statute should not ? specify which AG delegates do custody decisions; eliminates important flexibility (e.g., Cuban Review Plan) · No need for extensive review of supervision orders · No review of discretionary custody	· Stick with K, except: · No post-order detention provision needed; regulations being drafted · Statute should not specify which AG delegates do custody decisions; eliminates important flexibility (e.g., Cuban Review Plan) · No need for extensive review of supervision orders · No review of discretionary custody

there's a high bond review under pending case - constitutional should. already review IJ, BIA, many reviews	and federal court review of all bond or parole decisions, including post-order NO · Subjects supervision orders to IJ, BIA, and judicial review NO	decisions; **explicitly provide review for grave constitutional error amounting to fundamental miscarriage of justice**	decisions; **explicitly provide review for grave constitutional error amounting to fundamental miscarriage of justice**
Conviction Definition currently too strong Ct decisions - If you get expungements, ok not to [illegible] INS process. OK	· Excludes any "action to" expunge (etc.) a bona fide conviction (i.e., mere filing by alien can thwart removal) · Excludes suspended portions of sentences (would have major impact elsewhere, as in agfel def.)	· Keep 101(a)(48) as is, but exclude cases where a subsequent judicial order (1) nullifies the conviction *in toto*, (2) on the basis of an error in the original conviction going to the underlying culpability for the crime · Do not exclude suspended portions of sentences why?	· Keep 101(a)(48) as is, but exclude cases where a subsequent judicial order (1) nullifies the conviction *in toto*, (2) on the basis of an error in the original conviction going to the underlying culpability for the crime · Do not exclude suspended portions of sentences
Judicial Review Explain - Sticking Point - Take a principle - Take out provisions "no judicial review" - ex. 3 steps: Deportable IIRIRA bond - eligibility of susp. - exercise of discretion (permission to parole) IJ > review BIA Constitutional Deportability Legal ruling 524(g) Protect AG discretion - restrict laws K+ Groups - criticize	· Eliminates all bars to judicial review, including those for criminals, discretionary decisions, class actions, selective enforcement claims, deferred action decisions, expedited removal, criminal detention decisions, *in absentia* orders, determinations relating to the asylum bars, and voluntary departure decisions · Eliminates codified standards and limitations of judicial review · Allows alien to "shop" between circuit of decision, circuit where any part of hearing was held, and circuit of residence · Provides for automatic stay of removal upon filing of petition for review · Provides jurisdiction to review legalization cases involving aliens not "front desked" · Repeals transitional jurisdictional provisions	· Begin with present INA. Restore judicial review for constitutional and legal questions; bar review of the discretionary aspects of relief decisions, as in *Kalaw v. INS*. Hence, the legal aspects of a cancellation denial would be reviewable (and also the underlying removability); the actual exercise of discretion would not. Discretionary relief for an alien already found removable has been analogized by the Supreme Court to a pardon, and there are already two layers of administrative review (IJ and BIA). Other discretionary decisions, such as the ones at issue in *Reno v. AADC*, belong with the Executive. Class action bar should remain as is. **Explicitly state no district court review except as specifically provided.** The other K provisions would	· Begin with present INA. Restore judicial review for constitutional and legal questions; bar review of the discretionary aspects of relief decisions, as in *Kalaw v. INS*. Hence, the legal aspects of a cancellation denial would be reviewable (and also the underlying removability); the actual exercise of discretion would not. Discretionary relief for an alien already found removable has been analogized by the Supreme Court to a pardon, and there are already two layers of administrative review (IJ and BIA). Other discretionary decisions, such as the ones at issue in *Reno v. AADC*, belong with the Executive. Class action bar should remain as is. **Explicitly state no district court review except as specifically provided.** The other K provisions would

	of IIRIRA · Provides general jurisdictional basis to bring any challenge to the administration of the immigration laws via habeas "or otherwise"	encourage litigation.	encourage litigation.
Withholding	· Eliminates rule that agfel with 5-year sentence is a "particularly serious crime," and requires separate finding · Eliminates rule that "particularly serious crime" makes alien a danger to U.S., and requires separate finding · Eliminates all bars when there are "urgent humanitarian reasons"	· Keep withholding as is (AG can already defer removal in "urgent humanitarian" circumstances) **[Consider separate danger to U.S. determination]** ?	· Keep withholding as is (AG can already defer removal in "urgent humanitarian" circumstances) **[Consider separate danger to U.S. determination]**
Adjustment of Status	· Restores 245(i) without restriction and without "~~super~~fee" · Allows for adjustment (non-EWI) despite lapse in status or unlawful employment · Eliminates "unlawful presence" bar	· Stick with K, except: · Restore 245(i) with $1000 "~~super~~fee" Why? what's our proposal? ?	· Stick with K, except: · Restore 245(i) with "~~super~~fee"
Applicant for Admission	· Deems returning LPRs not to be applicants for admission notwithstanding crimes, having left while under removal or extradition, or departures < 1yr or departures > 1yr for emergency or "extenuating circumstances outside the control of the alien" · Eliminates IIRIRA concept that alien present w/o inspection is an applicant for admission (again putting border crossers in stronger status than aliens who present themselves at a legal port of entry)	· Keep 101(a)(13) as is, but carve out an exception for people with old crimes & no recent illegal activity flexibility	· Keep 101(a)(13) as is

so this is what ~~the~~ K is trying to do?

final order depart + leave + come back reinstate order summary

CIMTs crime of moral turpitude	· Requires more than one year served · Exception for "purely political" offenses · Exception for attempts NO	· Stick with K, except: · No exception for attempts	· Stick with K, except: · No exception for "purely political" offenses · No exception for attempts
Reinstatement - expedited dept. order	· Repeals reinstatement	· Keep reinstatement as is	· Keep reinstatement as is
Administrative Removal of Aggravated Felons INS not doing it except IRP.	· Reverses rule that non-LPR agfels can be expeditiously removed despite otherwise being eligible for relief	· Keep 238(b) as is	· Keep 238(b) as is
Expedited Removal	· Eliminates AG's authority to extend ER to recent border crossers	· Keep as is	· Keep as is
Voluntary Departure	· Allows for successive VD grants "for humanitarian reasons" ok	· Stick with K	· Stick with K
Attorneys	· Eliminates "at no expense to the government" language · Provides for limited appearances	· Stick with K, except: · Keep "at no expense" **[Consider proviso that AG can spend, in her sole discretion]**	· Stick with K, except: · Keep "at no expense" **[Consider proviso that AG can spend, in her sole discretion]**
Date of Adjudication	· Makes benefit grant date relate back to the date of filing · Makes extension of NIV or change of status relate back to date requested by alien - agency out problem	· Stick with K unless INS sees problems ? _ look at bill. V new	· Stick with K unless INS sees problems
Criminal Prosecutions challenge after depart open dep underlying deportation order	· Provides for challenges to removal order and nationality-based challenges during related criminal proceedings, including 1326, and including challenges to ER orders	· Disagree	· Disagree
IIRIRA and AEDPA Effective Dates ?	· Makes IIRIRA as a whole inapplicable to persons who applied for admission or "became removable" after 4/1/97 · Makes AEDPA removal	· Disagree why? Consider proposal	· Disagree

	provisions inapplicable to grounds of removability "existing" before 3/24/96 · Generally makes eligibility-conferring amendments apply to cases already adjudicated, and provides for or encourages reopening		
Statutory Construction ?	· Nothing to be construed as reducing aliens' eligibility for immigration benefits or reducing AG's capacity to exercise discretion favorably (in case there was any confusion)	· Disagree	· Disagree
Legislative Findings and Bill Analysis ?	· Extensive, litigation-promoting analysis and commentary	· Eliminate	· Eliminate

Retroactivity

Bars to Admission - need to do something
3 + 10 yrs

Battered Immig. Stop ~~[illegible]~~ time
Kennedy / Abraham

~~[illegible]~~ Tellurid

FIX '96:

Restore America's Tradition as a Nation of Immigrants and A Nation of Just Laws

Backgrounder

July 28, 1999

In 1996, Congress enacted three pieces of legislation—the **Illegal Immigration Control and Immigrant Responsibility Act** (IIRAIRA), the **Anti-Terrorist and Effective Death Penalty Act** (AEDPA), and the **Personal Responsibility and Work Opportunity Reconciliation Act** (PRWORA)—that together represented the harshest crackdown on the rights and opportunities of immigrants in 70 years. Overreacting to a short-lived backlash against immigration, Congress and the Administration seriously damaged our common-sense, balanced approach to immigration—one that upholds our tradition as a nation of immigrants and a nation of just laws. By tradition, the United States has welcomed immigrants and refugees, who have enriched our society and our economy. We have balanced our welcome with a well-regulated immigration system that has reasonable limits and clear rules.

In the aftermath of the enactment of these laws, immigrants and American families across the country have been harmed out of all proportion to any real problems the laws attempted to address. Practically from the moment these laws were enacted, a bipartisan majority in Congress, along with the Administration, has worked in a piecemeal fashion to correct the most egregious excesses. Much remains to be done before immigrants are once again treated with the same sort of fairness under our laws that other Americans take for granted. Having made a good start, Congress and the Administration should take the next steps to right the wrongs.

How immigrants are treated unfairly under the 1996 laws:

Punishment out of proportion to the crime. The 1996 laws *changed the rules* about what makes an immigrant deportable, applied the new rules *retroactively*, and stripped immigrants of the right to show that they deserve a second chance because of their good behavior subsequent to the past crime. In some cases, immigrants who have been here virtually all of their lives, are being thrown in jail for crimes they committed decades ago—even if the criminal justice system did not deem their crime serious enough to deserve a jail sentence. Previously, both the INS and an immigration judge had the authority to release an individual who posed no threat to society. But under the new "mandatory removal rules," long-time residents are now being torn away from their businesses, homes, and families and put in deportation proceedings without the chance to appeal an adverse decision. In many cases, these individuals are incarcerated in local jails with hardened criminals.

A cold shoulder for those fleeing persecution. Refugees fleeing persecution are now subject to a "summary exclusion" proceeding as they attempt to enter the U.S. If they arrive in the U.S. without documents—which they may not have if they are forced to suddenly flee for their lives—or with documents that may seem improper, they are stopped at the airport and subjected to life-and-death decisions in shotgun proceedings before low-level officials. If they convince the authorities that they deserve a thorough review of their asylum claim, they are likely to spend weeks or months in prison while they wait for their claim of persecution to be heard.

Foreigners already in the U.S. and who want asylum must learn our asylum system and apply for asylum within one year of their arrival or (with limited exceptions) they are no longer eligible to apply.

Legal immigrant taxpayers denied the safety net. After enactment of the 1996 welfare law, able-bodied U.S. citizens were expected to move from welfare to work. Immigrants—though they must pay the same taxes as citizens—were denied benefits *regardless* of their fitness for work. In the last two years, Congress and the Administration have restored certain basic benefits to elderly and disabled immigrants and to children. But even today immigrants who arrive after the arbitrary date of August 22, 1996, will not have access to a safety net their taxes help maintain, no matter what misfortune befalls them.

Welfare

American families ripped apart. Families—including families in which some members are citizens—are kept apart for up to ten years at a time as punishment for a status violation. Other families are kept from uniting by arbitrary and excessive income requirements placed on American citizens and legal permanent residents who want to sponsor and bring to the U.S. their husband, wife, or child. These income requirements essentially put family unification out of reach for low-income workers.

Income req

Victims of discriminatory application of the law still seeking redress. Certain groups of immigrants have resided for many years in the U.S. with temporary permission, while they have sought redress for discriminatory treatment by our government. Central Americans fleeing civil wars in the 1980s were unfairly denied refugee status, and certain long-resident immigrants were unfairly denied legalization by illegal INS policies in the mid-1980s. In 1996, Congress passed restrictions that may spell deportation for hundreds of thousands of hardworking, long-time residents with American families. Despite relief for some Central Americans, most immigrants in these categories still live in fear of deportation.

Latin Am.

Justice denied. Since the passage of the 1996 laws, immigrants are routinely denied their day in court—that most American of constitutional guarantees. The 1996 laws have stripped immigrants of their rights to appeal decisions by the Immigration and Naturalization Service (INS) by removing certain immigration matters from the jurisdiction of the federal courts. This means that immigrants cannot seek justice in the courts when INS agents abuse their authority. The federal courts have served as an important check on the authority of agents of the INS—an agency that is infamous for its agents' refusal to follow established policy. Now, even when there is a *pattern* of abuse, an immigrant or group of immigrants may not be able to ask the courts to compel the INS to follow the law.

Lawful Permanent Residents punished a second time for their crimes—with life in prison. Many of the approximately 3,500 "lifers" now being held indefinitely by the INS are Lawful Permanent Residents who entered the U.S. as refugees when they were children. After finishing the sentences our criminal justice system imposed on them, they are taken into custody by the INS. Their countries (Cuba, Vietnam, Laos, Cambodia, and others) refuse to take them back and so, even though they have paid their debt to society and are no longer a threat, they are subject to indefinite detention—something which amounts to life sentences for crimes already paid for.

Lifers

"Secret evidence" used to jail and deport immigrants. In apparent contravention of the constitutional directive that the accused have an opportunity to confront their accuser, the 1996 laws establish a special court charged with hearing cases in which the government seeks to deport aliens based on evidence the government says is "secret." Under this scheme, immigrants can be denied their liberty on the basis of evidence that they have no opportunity to refute.

Secret Evid.

A big brother national ID scheme. The 1996 law requires the research, development, and testing of a system for checking applications for employment by name and social security number in a huge database. Intended to curtail the hiring of undocumented workers, the system is being tested in the states with the largest immigrant population (CA, FL, IL, TX, and NY) and is marching toward full implementation

"Pilots?"

within a few short years. This provision is likely to do more to curtail the privacy rights of Americans and the civil rights of legal immigrants who look or sound "foreign" than it is to prevent the hiring of undocumented workers.

A reckless disregard for basic civil and human rights. The 1996 immigration law vastly increased spending for immigration enforcement. Since then, the ranks of the Border Patrol have swelled with inexperienced agents. Nearly 50% of them have been on the job less than three years—far beyond the maximum recommended percentage for a professional police force. The result of this hasty buildup: inexperienced Border Patrol agents have been involved in numerous unnecessary or questionable shootings and other incidents of abuse. Aside from the training problems presented by so many inexperienced officers, INS agents have carried out enforcement policies with reckless disregard for the most basic civil rights of those they apprehend. Workplace raids are conducted in a manner more befitting of a police state than the world's oldest democracy; and INS agents engage in racial profiling that leads to the harassment of long-established Latino and Asian Americans—be they citizens or legal immigrants

enforcement?

An Attack on Commerce. Beginning in March 2001, the law requires the federal government to track the entry and exit of every individual crossing our borders. No system has been developed to enable the government to carry out such an ambitious task without causing long delays at border crossing points, crippling cross-border commerce, hurting trade relations, costing Americans jobs, and distracting from effective border control activities.

§110

Battered spouses and children again at the mercy of their abusers. In 1994, the Violence Against Women Act (VAWA) allowed immigrant spouses and children who were being abused by their U.S. citizen or permanent resident spouse or parent sponsor to become permanent residents independent of their sponsor's petitions for them. Provisions of the 1996 immigration law put these battered immigrants back at the mercy of their abusers by closing off avenues for their adjustment to permanent residence. They again have the choice of staying with the person who is abusing them, or being deported from the U.S.

?

Irene Bueno
03/20/2000 06:09:07 PM

Record Type: Record

To: Mark D. Magana/WHO/EOP@EOP

cc:
Subject: RE: Fix 96 - Conyers' bill

We discussed this on the conference call and I would like to tell Perry the following so let me know if you think it's okay :

(1) the WH does not have a formal position since we don't have input from all the agencies but I did send it out back in November.

(2) DOJ is planning to meet with him next week on the discretion/cancellations issues - on the general provisions that are acceptable to them. They will definitely have some concerns with some provisions in the Conyers' bill.

(3) WH supports proposals that go as far as DOJ can accept and if good reason to push DOJ further - WH will try.

(4) we are supportive of the sections of his bill that deals with:
- parity proposal
- reinstate 245(i)
- reduce naturalization backlog
- battered immigrants

(5) the bottomline is that the Administration will not oppose his bill. We will be supportive of the goals of this proposal. If we find out through further clearance that we have concerns with a section, we will work with them on it.

---------------------- Forwarded by Irene Bueno/OPD/EOP on 03/20/2000 05:51 PM ---------------------------

"First, Patricia A" <Patricia.A.First@usdoj.gov>
03/16/2000 09:19:19 AM

Record Type: Record

To: Irene Bueno/OPD/EOP

cc:
Subject: RE: Fix 96 - Conyers' bill

We're happy to meet with Perry, but I think he wanted the WH's thoughts, specifically.

-----Original Message-----

From: Irene_Bueno@opd.eop.gov@inetgw2
Sent: Wednesday, March 15, 2000 8:21 PM
To: Patricia.A.First@usdoj.gov@inetgw2; Gerri.Ratliff@usdoj.gov@inetgw2; Bradford.Glassman@usdoj.gov@inetgw2; James.E.Castello@usdoj.gov@inetgw2
Cc: Cathy.St.Denis@usdoj.gov@inetgw2; Mark_D._Magana@who.eop.gov@inetgw2; Reynaldo_Valencia@who.eop.gov@inetgw2
Subject: Fix 96 - Conyers' bill

Perry Applebaum called Maria to say that they are almost ready the Conyers' Fix 96 proposal and want to know where we are on it. I realize we have been focusing on Kennedy's proposal and that you plan to meet with Kennedy's staff (Esther) the week of March 27 but I think you also need to meet with Perry that week as well on the main Fix 96 parts of the Conyers' bill since his bill deals with a variety of issues. Please confirm that you plan to meet with Perry that same week as well so I can let Maria know.
Thanks.

CENSUS – AMERICANS ABROAD
Q&A
March 21, 2000

Q: What is your view about legislation to count Americans overseas as part of the Census?

A: While the Administration does not have a formal position on this legislation, the Administration realizes the importance of accurate data regarding the population of American residents overseas and is committed to exploring methods to enumerate Americans overseas.

For Census 2000, the Census Bureau intends to use the same procedures used in 1990. Census will count U.S. citizens who are working in military and civilian positions overseas, along with their dependents. They were included in the Congressional apportionment totals for the 1990 census through the use of administrative military and/or federal employment records.

However, private citizens living overseas who are not affiliated with the U.S. government will not be included in the 2000 Decennial. There are significant obstacles that make it very difficult to ensure that the data gathered are accurate and complete. We understand that Census Bureau Director Kenneth Prewitt and key Census staff had an extensive meeting with representatives of American citizens living abroad to examine these issues. The Census Bureau is committed to continuing to explore procedures to address these and other problems inherent in the enumeration of Americans living overseas. Assuming that the appropriate funding is available, the Census Bureau will begin preparations in 2002 to conduct a test of procedures to enumerate Americans living overseas in 2003.

Background: Expanding the scope of the overseas enumeration to include non-military and non-government personnel raises a number of concerns such as: the quality of enumeration; the Bureau's ability to reach the worldwide population and report the information in a timely manner, the confidentiality of responses, and the accuracy in reporting home states. Of particular concern would be the timeliness and accuracy of reporting home states, since it is crucial for the purposes of Congressional reapportionment. In 1960 and 1970, there were attempts to count private citizens overseas but the results could not be verified and did not meet the Bureau's stringent standards for accuracy.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

FAX COVER SHEET

DATE: 2/6

TO: Irene Allen

PHONE NO. / FAX NO. 456-5581/5-1171

FROM: PATTY FIRST

PHONE NO.: 202/514-4810

FAX NO. 202/514-9149

NO. OF PAGES: 12 (EXCLUDING COVER)

COMMENTS: Hyde response

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 19, 2000

The Honorable Henry J. Hyde
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Hyde:

Thank you for your November 4, 1999, letter to the Attorney General and the Commissioner of the Immigration and Naturalization Service (INS) regarding the INS' use of prosecutorial discretion to ameliorate certain harsh consequences associated with the 1996 immigration reforms. Separate, identical letters of reply have been sent to your 27 cosigners.

The INS has long exercised prosecutorial discretion in its enforcement activities. Before the 1996 amendments to the Immigration and Nationality Act (INA), however, the law also provided immigration judges with broad discretionary authority to grant relief from deportation to many aliens placed in deportation proceedings as a result of their criminal convictions or other grounds of deportation. This discretionary authority to grant substantive relief and confer permanent legal status — an authority entirely separate and distinct from INS prosecutorial discretion — was sharply curtailed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009. The IIRIRA eliminated both the possibility of relief from deportation and the possibility of bond for many criminal and other aliens placed in deportation and/or removal proceedings who previously would have been eligible for relief.

Consequently, the IIRIRA rendered the exercise of prosecutorial discretion by the INS the only means for averting the extreme hardship associated with certain deportation and/or removal cases. Currently INS officers are equipped with substantial rules and guidance regarding the exercise of discretionary functions. Still, the Department of Justice (DOJ) and the INS believe that INS officers would benefit from additional guidance in the area of prosecutorial discretion. The INS is now working to develop this guidance, which will promote consistency and address the initiation or termination of removal proceedings in cases with the potential for extreme hardship. Unfortunately, prosecutorial discretion guidelines — without carefully drafted substantive amendments to the INA —

remain an inadequate tool to alleviate the excessively harsh consequences of the 1996 amendments in truly exceptional cases.

Before the 1996 amendments, the INA afforded immigration judges ample authority to review and grant relief in compelling deportation cases involving what your letter refers to as "unjustifiable hardship." Most significantly, many long-time lawful permanent residents (LPRs) without serious felony histories could apply for a waiver of virtually all deportation grounds. Also, in seeking relief from deportation, a respondent could attempt to prove that his or her positive equities (e.g., family ties in the United States, evidence of hardship if deportation occurs) outweighed relevant negative factors (e.g., seriousness and recentness of crimes). This allowed an immigration judge to assess all of the circumstances of a case before rendering a decision.

Congress in 1996 enacted far-reaching immigration amendments that eliminated relief from deportation for a large number of criminal aliens. The IIRIRA significantly expanded the definition of "aggravated felony" for deportation purposes and barred LPRs from obtaining any relief from deportation if they had been convicted of an aggravated felony, regardless of the date of conviction. While these amendments have substantially assisted the INS in removing dangerous criminal aliens from the United States, we share your concern that the execution of the revised immigration laws has at times severely impacted certain long-time LPRs who committed relatively less serious crimes some time ago and who do not appear to pose a current risk to public safety. Not surprisingly, these limitations on the availability of relief for aliens subject to removal proceedings have focused increased attention on the INS' use of prosecutorial discretion.

Your letter specifically asks whether the INS believes that the 1996 amendments to the INA eliminated this discretion. The IIRIRA did not alter the INS' fundamental authority to exercise prosecutorial discretion. Indeed the new §242(g) of the INA, 8 U.S.C. §1252(g) (Supp. IV 1998), specifically recognizes the INS' prosecutorial discretion to decide whether or not to commence a removal proceeding. In fact, by expanding the classifications of criminal aliens for whom no statutory relief from removal exists, the IIRIRA rendered the exercise of prosecutorial discretion the only means for averting the extreme hardship associated with certain removal cases.

In enforcing the immigration laws, INS officers are equipped with substantial rules and guidance regarding the exercise of discretionary functions. Part 239 of the INS regulations in chapter 8 of the Code of Federal Regulations identifies the INS officers who are authorized to commence removal proceedings and states the reasons that can support cancellation of notices to appear, including that the circumstances of the case have changed to such an extent that continuation is no longer in the best interests of the Government. Immigration officers also receive guidance and training regarding specific discretionary decisions such as when to grant voluntary departure, deferred action, or stays of removal.

The INS exercises prosecutorial discretion with respect to many enforcement decisions. For example, the INS exercises prosecutorial discretion when deciding whether to initiate a removal case, to allow an alien to withdraw an application for admission, to grant voluntary departure, or to defer enforcement action. Similarly, the INS may parole an inadmissible alien into the United States for "urgent humanitarian reasons or significant public benefit." We also agree that more can be done to encourage these uses of prosecutorial discretion to avoid unnecessary hardship.

However, I would be remiss if I left the impression that prosecutorial discretion can solve the problems set forth in your letter. As an initial matter, the fact that the INS may forego commencing a removal proceeding does not cure the underlying immigration violation. Unlike the criminal laws, the immigration laws do not contain generally applicable statutes of limitation that allow past violators to move on with their lives after a sufficient time without fear of further enforcement consequences. On the contrary, a removable alien (even an LPR) against whom the INS does not initiate removal proceedings will likely confront problems long into the future. For example, an immigrant who travels outside the United States and attempts to re-enter may not be admissible. Even if the INS finds "urgent humanitarian reasons or [a] significant public benefit" for parole, the alien will remain in a legal limbo thereafter, paroled but ineligible for permanent admission to the country.

Another concern with the exercise of prosecutorial discretion is that if a law enforcement agency provides instructions or regulations on the exercise of prosecutorial discretion that are unduly formalized or rigid, such guidance may potentially be considered to establish a substantive process for conferring an immigration benefit. Stated differently, certain criminal aliens seeking to avoid removal could attempt to use such guidance to obtain judicial review of discretionary enforcement decisions appropriately within the province of the Executive Branch.

Finally, although Congress reaffirmed in the IIRIRA the INS' prosecutorial discretion to commence removal proceedings against an alien, it did the opposite with respect to the agency's discretion to release criminal aliens once the INS institutes proceedings. Under INA §236(c), Congress expressly limited the discretion the INS otherwise would have had to release lawfully admitted aliens, aliens who cannot be removed, and aliens cooperating with a criminal investigation even if these individuals have committed relatively minor crimes and pose neither a danger to the community nor a flight risk.

Additional INS prosecutorial discretion guidance cannot eliminate all controversy about immigration enforcement decisions. Immigration officers entrusted with the difficult responsibility of enforcing our immigration laws consistently, fairly and thoroughly will continue to be required to make difficult decisions, often without the optimal time and information with which to do so. Guidelines on prosecutorial decisions — no matter how comprehensive or how carefully implemented — remain an inadequate substitute for the more thorough evidentiary processes previously available under the INA, wherein an experienced immigration judge could review evidence and elicit testimony.

For these reasons, I urge you to reject the notion that prosecutorial discretion, even wisely exercised, can provide an adequate substitute for sound administrative adjudication. We will continue to develop guidelines to make the most of this limited tool. Nevertheless, we also need your support for remedial legislation. As always, I remain committed to working with Congress to ensure the highest standards of deliberation and justice in the design and implementation of our Nation's immigration laws.

I appreciate your concern and your comments, and trust that you will not hesitate to contact me if I can be of assistance.

Sincerely,

Robert Raben

Robert Raben
Assistant Attorney General

Washington, DC 20515

November 4, 1999

The Honorable Janet Reno
Attorney General
Department of Justice
10th St. & Constitution Ave. NW
Washington, DC 20530

The Honorable Doris M. Meissner
Commissioner
Immigration and Naturalization Service
425 Eye Street, NW
Washington, DC 20536

Re: Guidelines for Use of Prosecutorial Discretion in Removal Proceedings

Dear Attorney General Reno and Commissioner Meissner:

Congress and the Administration have devoted substantial attention and resources to the difficult yet essential task of removing criminal aliens from the United States. Legislative reforms enacted in 1996, accompanied by increased funding, enabled the Immigration and Naturalization Service to remove increasing numbers of criminal aliens, greatly benefitting public safety in the United States.

However, cases of apparent extreme hardship have caused concern. Some cases may involve removal proceedings against legal permanent residents who came to the United States when they were very young, and many years ago committed a single crime at the lower end of the "aggravated felony" spectrum, but have been law-abiding ever since, obtained and held jobs and remained self-sufficient, and started families in the United States. Although they did not become United States citizens, immediate family members are citizens.

There has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship. If the facts substantiate the presentations that have been made to us, we must ask why the INS pursued removal in such cases when so many other more serious cases existed.

We write to you because many people believe that you have the discretion to alleviate some of the hardships, and we wish to solicit your views as to why you have been unwilling to exercise such authority in some of the cases that have occurred. In addition, we ask whether your view is that the 1996 amendments somehow eliminated that discretion. The principle of prosecutorial discretion is well established. Indeed, INS General and Regional Counsel have taken the position, apparently well-grounded in case law, that INS has prosecutorial discretion in the initiation or termination of removal proceedings (see attached memorandum). Furthermore, a number of press reports indicate that the INS has already employed this discretion in some cases.

True hardship cases call for the exercise of such discretion, and over the past year many Members of Congress have urged the INS to develop guidelines for the use of its prosecutorial discretion. Optimally, removal proceedings should be initiated or terminated only upon specific instructions from authorized INS officials, issued in accordance with agency guidelines. However, the INS apparently has not yet promulgated such guidelines.

The undersigned Members of Congress believe that just as the Justice Department's United States Attorneys rely on detailed guidelines governing the exercise of their prosecutorial discretion, INS District Directors also require written guidelines, both to legitimate in their eyes the exercise of discretion and to ensure that their decisions to initiate or terminate removal proceedings are not made in an inconsistent manner. We look forward to working with you to resolve this matter and hope that you will develop and implement guidelines for INS prosecutorial discretion in an expeditious and fair manner.

Sincerely,

Henry J. Hyde
Rep. Henry J. Hyde

Barney Frank
Rep. Barney Frank

Lamar Smith
Rep. Lamar Smith

Sheila Jackson Lee
Rep. Sheila Jackson Lee

Bill McCollum
Rep. Bill McCollum

Martin Frost
Rep. Martin Frost

Rep. Bill Barrett

Rep. Brian P. Bilbray

Rep. Charles T. Canady

Rep. Nathan Deal

Rep. David Dreier

Rep. Eddie Bernice Johnson

Rep. Patrick J. Kennedy

Rep. James P. McGovern

Rep. Howard L. Berman

Rep. Corrine Brown

Rep. Barbara Cubin

Rep. Lincoln Diaz-Balart

Rep. Bob Filner

Rep. Sam Johnson

Rep. Matthew G. Martinez

Rep. Martin T. Meehan

Rep. F. James Sensenbrenner, Jr.

Rep. Christopher Shays

Rep. Henry A. Waxman

Rep. Kay Granger

Rep Gene Green

Rep. Ciro D. Rodriguez

Immigration and Naturalization Service

EORCOU 90/16

Office of the Regional Counsel

70 Kimball Avenue
South Burlington, VT 05403-6813

January 19, 1999

MEMORANDUM FOR ALL DISTRICT COUNSEL
EASTERN REGION

FROM: Jack Penca
Regional Counsel, Eastern Region

SUBJECT: Discussion of Operation Last Call

The issue as to whether the District Directors have the authority to exercise "prosecutorial discretion" in initiating removal proceedings has recently arisen. The District Directors do indeed have such authority. Enclosed please find a memorandum from General Counsel Paul Virtue to Executive Associate Commissioner Michael Pearson, which includes a recitation of factors the District Directors or their designees should consider in the exercise of such discretion. I will distribute a signed and dated copy of the memorandum when it becomes available. While not so stated in the attached memorandum, it stands to reason that Chief Patrol Agents would also enjoy the same authority.

Enclosure

U.S. Department of Justice
Immigration and Naturalization Service

Office of the General Counsel

425 I Street NW
Washington, DC 20536

MEMORANDUM FOR Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

FROM: Paul Virtue
General Counsel

SUBJECT: Discussion of Operation Last Call

The United States Supreme Court has consistently held "that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). Section 237(a) of the Immigration and Nationality Act states, in part, "An alien . . . shall, upon order of the Attorney General, be removed . . . ." The language "upon order of the Attorney General" vests with the Attorney General, and thereby the Immigration and Naturalization Service, the discretion whether to commence or request termination of a removal proceeding. Cabasug v. INS, 847 F.2d 1321 (9th Cir. 1988); Johns v. DOJ, 653 F.2d 884 (5th Cir. 1981); Matter of Geronimo, 13 I&N Dec. 680, 681 (BIA 1971).

Despite the continuing availability of prosecutorial discretion, the Service recognizes the mandates of IIRAIRA undeniably set forth a strong congressional policy for the detention and removal of criminal aliens. However, the provisions of section 236 do not mandate the initiation of removal proceedings; rather they mandate detention (of most criminal aliens) pending a decision whether to remove. Nevertheless, in all cases, great care should be taken in choosing to exercise such prosecutorial discretion, since doing so will have the practical effect of relieving a possible violator of the law of his or her obligation thereunder.

The Service's exercise of prosecutorial discretion is not subject to review by the immigration judge, the Board of Immigration of Appeals, or the courts. Section 242(g); American-Arab Anti Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995).

Nevertheless, exercise of such may not be based on impermissible, [illegible] ground s as race, nationality, religion, or . The decision committed to the good common sense and sound judgment of the Service official. Factors the official may consider in exercising prosecutorial discretion include, but are not limited to, the following:

1. immigration status;
2. length of residence or presence in the United States;
3. age;
4. any physical or mental condition:
5. family in the United States;
6. severity of criminal conduct;
7. purpose of the enforcement action;
8. effect on public opinion, and
9. availability and appropriate use of Service resources;
10. likelihood of ultimate removal;
11. alien's presence in the United States is desired by law enforcement authorities;
12. sympathetic factors which could result in an unfavorable decision by administrative or judicial authorities.

No single factor is determinative, but, again, the decision is entrusted to the good judgment of the Service official.

Regarding the aliens placed in proceedings as a result of Operation Last Call, the district directors, or their designees, should review each of their respective cases and make a determination, based on prosecutorial discretion, whether the Service should proceed with a removal hearing. If a determination is made in a particular case not to proceed, the district director, or his or her designee, should request the district counsel, or designated assistant district counsel, to file a motion to dismiss, pursuant to 8 C.F.R. § 239.2(c), on the basis that the notice to appear was improvidently issued or that circumstances have changed to the extent that continuation is no longer in the best interest of the government. Once a removal proceeding is dismissed, the detention mandate expires and the alien should be released from custody.

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

COPY FOR YOUR INFORMATION

1. FOLDER NO: 860274
2. TRACKING ID No: X99-275722
3. RESERVED
4. DATE OF DOCUMENT: 11/04/1999
5. DATE RECEIVED: 11/08/1999
6. DUE DATE: 11/24/1999

7. FROM: Henry J. Hyde
U.S. House of Representatives
Washington, DC 20515

8. TO: AG

9. CATEGORY: CG-PRTY

10. SUBJECT:
Regarding guidelines for use of prosecutorial discretion in removal proceedings of criminal aliens. Advises of the widespread view that some deportations were unfair and resulted in hardship. Requests that DOJ implement written guidelines to make clear to INS officials that they can and should exercise prosecutorial discretion and to ensure that their decisions on removal proceedings are made in a consistent manner. Ltr signed by 27 other MCs. (pdm)

11. ACTION/INFORMATION:

Referred To:	Date Assigned:	Action:
INS	11/09/1999	Prepare response for AAG/OLA signature. Return to E.S. w/copy of incoming for transmittal to OLA.

Referred To:	Date Assigned:	Information:
EOUSA	11/09/1999	For information.
OAG	11/09/1999	For information. To AG, OAG (Ferrer).
ODAG	11/09/1999	For information.
OLA	11/09/1999	For information.

12. RESERVED FOR EXECUTIVE SECRETARIAT USE
prosecutorial discretion in removal proceedings.

13. EXECUTIVE SECRETARIAT CONTACT: Patricia Morgan, (202) 616-0081

Because of his personal involvement in his scholarship fund, Ernie would also become a father-figure to his students, as they would often seek his advice and guidance as to their career paths.

During the month of March each year, Ernie travels to the Philippines to attend his students graduation ceremonies. Most of his students keep in touch and still write to him long after their schooling is done.

These days, Ernie spends most of his time playing tennis and volunteering in many community and church projects in Daly City.

Retirement also allows him to spend more time with his wife Lina and their daughter Erline.

He is one of the organizers of the planned "North County Strategic Planning for the Filipino-American Community," a planning conference for the Filipino American community in the San Mateo County area for the year 2000.

Known to close friends as "mayor" and "konsehal (councilor)," obviously in reference to his earlier attempts to win a city council seat in Daly City, Ernie's passion for community service has not only benefitted the Filipino-American community in Daly City but also his hometown in the Philippines.

For sure, his good deeds serve as an inspiration to many immigrants to give back to their community here and to the community that they left behind in the Philippines.

Send comments to Amancio 'Jojo' Liangco at Ferma & Liangco Law Offices, 605 Market Street, Suite 605, San Francisco, CA 94105, or e-mail to Lawfirmfl@aol.com.

Court says legal immigrants can appeal deportation

By Bob Egelko
Associated Press

SAN FRANCISCO (AP)- Legal immigrants can go to court to challenge the government's attempt to deport them for past crimes, a federal appeals court has ruled.

A recent federal law reduced, but did not eliminate, judicial review of deportation, the 9th U.S. Circuit Court of Appeals said recently.

The court also held out hope to immigrants who pleaded guilty in the past to certain crimes, such as drug crimes, that became grounds for mandatory deportation under a 1996 federal law.

> Immigrants may still be eligible to remain in this country under a procedure called a waiver of deportation, which allows longtime legal residents to stay if they have close family ties to the United States and are rehabilitated.

Those immigrants may still be eligible to remain in this country under a procedure called a waiver of deportation, which allows longtime legal residents to stay if they have close family ties to the United States and are rehabilitated, the court said.

They must first persuade a federal judge that they would not have pleaded guilty if they had known a future law would require deportation for the crime.

Immigration officials have granted about half of the waiver applications in the past, said attorney Lucas Guttentag, national director of the American Civil Liberties Union's immigrants'-rights project.

The ruling "makes an enormous difference for all people whose cases were pending" when the 1996 law passed, Guttentag said.

He said thousands of people may be affected in the nine Western states covered by the circuit.

The new law makes non-citizens automatically deportable for a variety of crimes, including virtually all drug crimes, and says they cannot appeal those deportation orders in federal court. The law also says they are ineligible for waivers of deportation.

The appeals court ruled, however, that the law did not eliminate another route to federal court: habeas corpus, a procedure older than the United States, which allows residents to seek release from unconstitutional detention. Most other appeals courts have reached the same conclusion.