

PRINCIPLES FOR IMMIGRATION REFORM THAT PROMOTE FAIRNESS FOR ALL IMMIGRANTS

Many of us have fought for years for fundamental fairness for all immigrants. We have sought to roll back harsh mass deportation programs that tear apart families and to ensure that our immigration laws align with our values of justice. As we build towards an overhaul of our federal immigration system, we must take this opportunity to address some of its most egregious aspects and simultaneously resist new harmful provisions that we would have to fight for decades to come.

✓ Ending Disproportionate Double Punishment for Past Convictions

Since 1996, certain criminal convictions, including some minor misdemeanors from many years ago, automatically trigger deportation for life regardless of individual circumstances. Immigrants suffer a disproportionately harsh double punishment because they have already served their criminal sentence prior to deportation proceedings. Some immigrants even face deportation for conduct that was not deportable at the time it was committed or is not considered a “conviction” under state law.

✓ Restoring a Fair Day In Court

Immigrants should not be treated only as the sum of their mistakes in a nation that values second chances. Immigration Judges must be given back the power to grant a second chance and cancel someone’s deportation after looking at other aspects of a person’s life—such as family ties, length of time in the U.S., rehabilitation, and acceptance of personal accountability. Criminal court judges should also be given back the power they once had to recommend against deportation.

✓ Terminating Mass Deportation Programs, like the Criminal Alien Program, Secure Communities, and 287(g)

The entanglement of these deportation programs with the criminal justice system threatens the rights of U.S. citizens and immigrants alike, encouraging racial profiling and resulting in long periods of detention. This undermines community safety by eroding trust between immigrant communities and local law enforcement. Immigrants hoping to reunite with their families by coming or returning to the U.S. without authorization now also face excessive criminal punishments, compounding the racial and economic injustices of the criminal justice system. Immigration legislation must rein in the constant funneling of immigrants into the deportation system and the unequal treatment of immigrants in the criminal justice system.

✓ Ending Fast-Track Deportations

Current immigration laws allow the government to deport many without letting them see an Immigration Judge. Most also do not have lawyers to help them. For these people, low-level government agents simply decide to order their removal. No one should be banished from the U.S. and torn from their family and community without their day in court.

✓ Ending Mandatory Detention

Laws that require jailing thousands of immigrants while they fight their deportation cases are inhumane. Even in the criminal justice system, people facing charges can at least request bail. Many immigrants are transferred to for-profit detention centers thousands of miles from their homes, do not have access to lawyers, and are pressured to accept deportation to escape the deplorable conditions.

WATCH OUT!

Immigration reform legislation is a minefield, full of potential deportation traps for those currently in lawful status and those trying to obtain it.

Fight Back Against:

- Automatic unwaivable bars to getting lawful status
- New deportation grounds
- Increased immigrant detention
- Expansion of mass deportation programs
- Heightened militarization of the border
- Greater immigration and criminal penalties for border-crossers and other immigration-related violations



**IMMIGRANT
DEFENSE
PROJECT**

**national
IMMIGRATION
project**
of the National Lawyers Guild

For more information, please contact:

Angie Junck, ILRC, ajunck@ilrc.org, (415) 321-8558

Lena Graber, National Immigration Project of the National Lawyers Guild, lengraber@nationalimmigrationproject.org, (617) 227-9727 x6

Benita Jain, IDP, bjain@immigrantdefenseproject.org, (530) 723-6482

Ann Benson, WDA, abenson@defensenet.org, (360) 385-2538

END EXTREME PUNISHMENT FOR MINOR OFFENSES

Congress must change current reactionary immigration laws that go too far, undermine our system of justice, and do nothing to solve the problem of a broken immigration system and undocumented immigration. Under these laws, the most minor crime can now trigger the most terrible immigration consequences, including deporting longtime lawful permanent residents, regardless of individual circumstances. We must stop imposing disproportionately harsh double punishments after people have already served their time, denying people their day in court, and tying judges' hands.

BACKGROUND: THE AGGRAVATED FELONY DEFINITION

The government classifies certain criminal convictions under immigration law as “aggravated felonies.” This classification is one of the most powerful legal tools that the government uses against a noncitizen because it triggers the harshest immigration penalties. Common sense should mean that an aggravated felony must be a very bad crime. But because of overly-aggressive use of this classification by the government, an immigrant’s crime doesn’t have to be either aggravated or a felony to be designated an “aggravated felony.” If the government decides that someone’s crime is an “aggravated felony”:

- The person will face almost certain deportation, regardless of individual circumstances and without consideration that they have already served their time;
- The government will permanently bar the person from ever returning lawfully to the U.S.;
- Unless the person has a green card, the government will deny an “aggravated felon” a hearing in any court and deport her/him under special “expedited removal” procedures;
- Even if a person has a green card and gets a hearing before an immigration judge, the judge’s power is severely limited to simply ordering an “aggravated felon” deported. The judge cannot consider individual circumstances, regardless of how long the person has been in this country, how long ago or how minor her/his offense was, and the consequences to deportation to the person or her/his family;
- The person will be detained, sometimes for years until she/he is deported;
- The power of the federal courts to oversee and correct the actions of the government is severely limited when the person has been classified as an aggravated felon.

THE PROBLEM: MINOR MISDEMEANORS = AGGRAVATED FELONIES

Before 1996, only the most serious crimes could be defined as “aggravated felonies” under immigration law. However, in 1996, the government significantly expanded what crimes could fall under this definition to include even minor misdemeanor offenses (sometimes 20 years old) that are neither “aggravated” nor “felonies. The government uses this expanded version of the law very aggressively to classify as many immigrants as possible as “aggravated felons.” Minor offenses that have been found to be aggravated felonies under the current definition include:

- Misdemeanor theft of items of minimal value such as a \$10 video game, \$15 worth of baby clothes, or tire rims from an automobile
- Writing a bad check for \$1500 worth of construction supplies
- The sale of \$10 worth of marijuana or pointing out a suspected drug seller to a potential buyer
- Allowing friends to use a car to commit a burglary
- Pulling the hair of another during a fight over a boyfriend

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Benita Jain: Immigrant Defense Project, bjain@immigrantdefenseproject.org, (530)723-6482

Ann Benson: Washington Defender Association, abenson@defensenet.org, (360) 385-2538

The government also changed the rules so that these changes reached back in time to apply to all crimes, no matter when they were committed. Changing the rules in the middle of the game is un-American and violates basic notions of justice. Given this change, untold numbers of immigrants have been made deportable for convictions that were not a basis for deportation when they were committed. All of these aggravated felonies subject immigrants to automatic deportation regardless of their individual circumstances and without consideration that they have already served their time, resulting in a disproportionately harsh double punishment. Consequently, the government has deported thousands of immigrants without the due process that they deserve and that is the cornerstone of the American justice system.

THE SOLUTION: Congress must narrow the “aggravated felony” definition under immigration law so that it reflects common sense, proportionality, and the American system of justice and not mandate life exile for an overly broad range of offenses nor target minor violations of the law.

DID YOU KNOW?

- In the last 15 years, about 300,000 non-citizens were ordered deported from the U.S. after they had been categorized as “aggravated felons.”
- In the past ten years, more than 40% of green card holders who faced deportation as “aggravated felons” lived here legally for more than 15 years.
- In 2006, the majority of all individuals classified as aggravated felons were deported without a hearing, with low-level government clerks, not judges, making the determination.

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Ann Benson: Washington Defender Association, abenson@defense.net, (360) 385-2538



Amendment to the Aggravated Felony Definition

Section 101(a)(43) (8 U.S.C. 1101(a)(43)) is amended as follows:

The term "aggravated felony" means a felony, *for which a term of imprisonment of five years was imposed*, that is --⁴

Strike "Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph."

Effective date: This amendment shall apply to convictions entered before, on, or after the enactment of this act.

For more information, please contact:

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Lena Graber: National Immigration Project of the National Lawyers Guild, lena@nationalimmigrationproject.org, (617) 227-9727 x6

Benita Jain: Immigrant Defense Project, bjain@immigrantdefenseproject.org, (530)723-6482

Ann Benson: Washington Defender Association, abenson@defense.net, (360) 385-2538



RESTORE A FAIR DAY IN COURT

Congress must change harsh, reactionary laws that tie judges' hands and force them to deport immigrants without ever being able to consider the circumstances of the person's case. These restrictions on due process are un-American because they prevent our justice system from stopping government actions that go too far. Their consequences are unnecessarily devastating families and undermining communities.

BACKGROUND: THE POWER TO HEAR A CASE AND "WAIVE" DEPORTATION

For decades, the government has had the power to deport immigrants who have been convicted of certain crimes (including those with lawful status or green cards). However, the law historically also gave them the opportunity to present their case before an immigration judge to ask for a pardon from deportation. The judge made a decision after considering individual factors, such as family and community ties, U.S. military service, and whether the person had turned their life around since the conviction.

Also, until 1990, sentencing judges in criminal court could consider whether deportation was an appropriate penalty for the offense (on top of the criminal sentence). If not, the judge had the authority to issue a "judicial recommendation against deportation" (JRAD), so that the conviction would not be a basis for deportation.

PROBLEM: RADICAL AND UNFAIR LAWS UNDERMINE OUR SYSTEM OF JUSTICE BY PREVENTING PEOPLE FROM HAVING A FAIR DAY IN COURT

In the 1990s, Congress curtailed the discretion of immigration and criminal court judges. Now, criminal court judges can no longer recommend against deportation. Immigration judges now can no longer grant waivers where the lawful permanent resident has a conviction classified as an "aggravated felony" under immigration law – and these "aggravated felonies" now include even decades-old, minor misdemeanor offenses. And they can no longer even consider granting visas to people who are otherwise eligible, if they have one of dozens of minor offenses – even if they can prove deportation would cause hardship to citizen family members.

Judges' hands are tied: they can do nothing but order the person deported. They cannot consider how long a person has been in the U.S., how long ago or how minor their crime was, the effects on their citizen parents or kids, whether their small business would close, or any other good things they have done since their trouble with the law. Mandating such disproportionate, double penalties are un-American and violate basic notions of justice.

Moreover, the blanket definition of "aggravated felony" undermines the fairness of state criminal justice systems, because it creates grave collateral consequences for minor state convictions that neither a state prosecutor nor state judge can control. This is especially problematic for the plea-bargaining system upon

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Ann Benson: Washington Defender Association, abenson@defensenet.org, (360) 385-2538



which our criminal justice system has come to rely, because the collateral consequences are often far worse than the underlying criminal charge.

SOLUTION: CONGRESS MUST RESTORE IMMIGRATION AND CRIMINAL JUDGES' POWER TO CONSIDER EACH CASE AND DECIDE WHETHER DEPORTATION IS APPROPRIATE. THAT IS AMERICAN JUSTICE.

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We propose an overall waiver section applicable to grounds of inadmissibility and deportability of non-citizens. Current waiver provisions for the various grounds of inadmissibility and deportability vary widely in standards and applicability. Most create bright lines between eligibility and ineligibility that fail to account for the widely varying facts of each case. The existence of a waiver does not mean that it will be granted, and thus waivers should be available in all cases to account for individual circumstances.

MOST EFFECTIVE SOLUTIONS

❖ Simple Waivers Based on Family and Community Equities

- **SEC. XXX. WAIVERS OF INADMISSIBILITY.** Section 212 of the Immigration and Nationality Act (8 U.S.C. 1182) is amended by inserting the following subsection (c)—

“(c)(1) Notwithstanding any other provision of law, the Secretary of Homeland Security or the Attorney General may waive the operation of any one or more grounds of inadmissibility set forth in this section (other than 3(E)) for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. [This section shall also apply to individuals otherwise eligible for relief under INA § 212(h).]

- **SEC. XXX. WAIVERS OF DEPORTABILITY.** Section 237 of the Immigration and Nationality Act (8 U.S.C. 1227) is amended by inserting the following subsection (d)—

“(d) Notwithstanding any other provision of law, the Secretary of Homeland Security or the Attorney General may waive the operation of any one or more grounds of removal for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

❖ Restoring Judicial Recommendations Against Deportation (JRAD)

- Section XXX of the Immigration and Nationality Act (8 U.S.C. XX) is amended by inserting the following subsection (X) -

SEC. XXX. JUDICIAL RECOMMENDATIONS AGAINST DEPORTATION.

Notwithstanding any other provision of law, the grounds of inadmissibility and deportability shall not apply if the court sentencing the alien for such a crime falling under such grounds shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien shall not be removed, due notice having been given prior to making such recommendation to the representatives of the interested State, DHS, and prosecution authorities, who shall be granted an opportunity to make representation in the matter.

For more information, please contact:

Angie Junck: Immigrant Legal Resource Center, ajunck@ilrc.org, (415) 321-8558

Lena Graber: National Immigration Project of the National Lawyers Guild, lana@nationalimmigrationproject.org, (617) 227-9727 x6

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Ann Benson: Washington Defender Association, abenson@defensenet.org, (360) 385-2538



Alternative Solutions:

❖ Amendments to Lawful Permanent Resident Cancellation

➤ **OPTION 1: Removal of LPR Cancellation Aggravated Felony Bar**

Sec. XXX. Section 240A(a)(3) (8 U.S.C. 1229b(a)(3)) is amended as follows:

(3) has not been convicted of an aggravated felony for which the sentence imposed is five years or more.

Section 240A (8 U.S.C. 1229b) is amended by adding at the end the following:

(f) CANCELLATION OF REMOVAL FOR CERTAIN PERMANENT RESIDENTS FOR URGENT HUMANITARIAN REASONS OR SIGNIFICANT PUBLIC BENEFIT- In the case of an alien otherwise eligible for cancellation of removal under subsection (a), except that the alien has been convicted of an aggravated felony that renders the alien unable to satisfy the requirement in subsection (a)(3), the Attorney General may cancel removal of the alien under such conditions as the Attorney General may prescribe, but only--

 ` (1) on a case-by-case basis for urgent humanitarian reasons, significant public benefit (including assuring family unity), or any other sufficiently compelling reason; and

 ` (2) after making a written determination that the cancellation of removal poses no danger to the safety of persons or property.'

Applicability.- This provision applies to proceedings that began before, on or after the date of enactment.

➤ **OPTION 2: Removal of LPR Cancellation Aggravated Felony Bar**

Sec. XXX. INA Section 240A(a) is amended by inserting the following:

(4) Waiver.- The Attorney General may waive the application of subparagraph 240A(a)(3) only if the conviction resulted in a sentence served of less than three years and the Attorney General determines that removal is not in the public interest or removal would result in hardship to the parent, spouse or child of the alien or hardship to the alien.

Applicability. This provision applies to proceedings that began before, on or after the date of enactment.

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❖ **Amendments to 10-Year Cancellation and VAWA Cancellation**

➤ **OPTION 1:**

Sec. XXX. REPEAL OF PER SE CRIMES BARS TO CANCELLATION ELIGIBILITY

(1) Sections 240A(b)(1)(C) and 240A(2)(A)(iv) are repealed.

Applicability. This provision applies to proceedings that began before, on or after the date of enactment.

➤ **OPTION 2:**

Sec. XXX. Sec. 240A(b)(1)(C) is amended to read as follows:

(C) has not been convicted of an aggravated felony for which the sentence imposed was five years or more during such period.

Sec. XXX. Sec. 240A(2)(A)(iv) is amended to read as follows:

(iv) the alien has not been convicted of an aggravated felony for which the sentence imposed was five years or more during period.

Applicability. This provision applies to proceedings that began before, on or after the date of enactment.

❖ **Amendments to Cancellation Bars based On “Clock Stop” Provision**

➤ **OPTION 1:**

Sec. XXX. REPEAL OF RULE FOR TERMINATION OF CONTINUOUS PERIOD-

(1) Section 240A(d)(1) (8 U.S.C. 1229b(d)(1)) (8 U.S.C. 1229b(a)) is repealed.

(2) Section 240A(d) (8 U.S.C. 1229b) is amended--

(A) by redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively.

Applicability. This provision applies to proceedings that began before, on or after the date of enactment.

For more information, please contact:

Angie Junck: Immigrant Legal Resource Center, ajunck@ilrc.org, (415) 321-8558

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Benita Jain: Immigrant Defense Project, bjain@immigrantdefenseproject.org, (530)723-6482

Ann Benson: Washington Defender Association, abenson@defensenet.org, (360) 385-2538

➤ **OPTION 2:**

Sec. XXX. Section 240A(d)(1) of the Immigration and Nationality Act (8 U.S.C. 1229b(d)(1)) is amended to read as follows:

(1) Termination of continuous period. - For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end, except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title.

Applicability. This provision applies to proceedings that began before, on or after the date of enactment.

For more information, please contact:

Angie Junck: Immigrant Legal Resource Center, ajunck@ilrc.org, (415) 321-8558

Lena Graber: National Immigration Project of the National Lawyers Guild, lena@nationalimmigrationproject.org, (617) 227-9727 x6

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Ann Benson: Washington Defender Association, abenson@defense.net, (360) 385-2538



CONGRESS MUST AMEND THE IMMIGRATION DEFINITIONS OF “CONVICTION” AND “TERM OF IMPRISONMENT” TO CORRESPOND WITH CRIMINAL COURTS’ DEFINITIONS

THE PROBLEM: IMMIGRANTS ARE DEPORTED FOR CONVICTIONS THAT NO LONGER EXIST UNDER STATE LAW AND FOR WHICH THEY SERVED NO JAIL TIME

The definition of “conviction” under the immigration law was substantially broadened in 1996 to include many case dispositions that the criminal justice system never intended to be a conviction. For example, many states encourage courts and prosecutors to allow a person to enter a drug or mental health treatment program – and upon successful completion, any criminal charges are dismissed. However, the federal government treats these cases as a “conviction,” triggering removal. As a result of this change in 1996, immigrants are funneled into the immigration detention and deportation system for criminal cases where the person is not found guilty legally or where the case is dismissed and no longer exists on their state criminal record. When the federal government treats these types of dispositions as “convictions,” it undermines the state’s goal and interest in cost-efficient alternatives to incarceration that also strengthen communities. This is because, after a court determination that an immigrant is eligible for a rehabilitative or other diversion program, the immigrant will be transferred to immigration custody and lack access to the court instituted program.

Additionally, there is vast confusion for immigrants that land in deportation proceedings for these dispositions that are not considered convictions for the criminal justice system. Many criminal defense attorneys and criminal judges tell defendants that certain dispositions will not result in a conviction. Since this advice will conflict with the immigration’s definition of conviction, immigrants will apply for immigration benefits, such as green card renewal or citizenship, and travel internationally. Unfortunately, immigration authorities, when screening these immigrants for benefits and after international travel, will then use the broad definition of conviction to place them in deportation proceedings. Immigrants then endure an often worse and unbargained for punishment of deportation after relying on legal advice that their dispositions would no longer be considered “convictions.”

Further, the immigration law defines a “term of imprisonment” as any period of jail time ordered by a court, regardless of whether that jail sentence was suspended. Suspended sentences are court orders of jail time that are delayed by a judge to allow for the defendant to comply with an alternative to incarceration sentence. If the person successfully completes this alternative to incarceration sentence, the defendant does not have to complete the originally suspended jail sentence. In some states, criminal judges must impose this suspended jail sentence every time they want to impose a non-jail sentence (for example, for first time, low-level offenses like shoplifting). This is critical because a lawful permanent resident, refugee and asylee can be deported for certain offenses only if the immigration law’s definition of “term of imprisonment” is satisfied, and suspended sentences would meet this definition, even if the person didn’t spend a day in jail.

THE SOLUTION: Congress must amend the definition of conviction and sentence under immigration law so that it reflects common sense, proportionality, and the American system of justice.

For more information, please contact:

Angie Junck: Immigrant Legal Resource Center, ajunck@ilrc.org, (415) 321-8558

Lena Graber: National Immigration Project of the National Lawyers Guild, lena@nationalimmigrationproject.org, (617) 227-9727 x6

Benita Jain: Immigrant Defense Project, bjain@immigrantdefenseproject.org, (530)723-6482

Ann Benson: Washington Defender Association, abenson@defensenet.org, (360) 385-2538

Amendments to the Definition of Conviction and Sentence

DEFINITIONS OF `CONVICTION' AND `TERM OF IMPRISONMENT' –

(a) Section 101(a)(48) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(48)) is amended—

(1) in subparagraph (A), by striking `court' and all that follows through the period at the end and inserting `court. An adjudication or judgment of guilt that has been dismissed, expunged, deferred, annulled, invalidated, withheld, or vacated, an order of probation without entry of judgment, or any similar disposition shall not be considered a conviction for purposes of this Act.'; and

(2) in subparagraph (B)—

(A) by inserting `only' after `deemed to include'; and

(B) by striking `court of law' and all that follows through the period at the end and inserting `court of law. Any such reference shall not be deemed to include any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.'

(b) EFFECTIVE DATE.-The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act.

For more information, please contact:

Angie Junck: Immigrant Legal Resource Center, ajunck@ilrc.org, (415) 321-8558

Lena Graber: National Immigration Project of the National Lawyers Guild, lena@nationalimmigrationproject.org, (617) 227-9727 x6

Benita Jain: Immigrant Defense Project, bjain@immigrantdefenseproject.org, (530)723-6482

Ann Benson: Washington Defender Association, abenson@defensenet.org, (360) 385-2538

LIMIT REMOVAL BASED ON LONG AGO CONDUCT

Congress must limit the authority of DHS to deport immigrants for long ago conduct. DHS' practice of permanently holding immigrants under the threat of deportation for decades-old offenses violates basic notions of fairness long recognized in the law.

BACKGROUND: LACK OF A STATUTE OF LIMITATIONS IN THE IMMIGRATION LAW

Under “statutes of limitation” in both the criminal and civil contexts, the law generally limits the time during which the government may bring criminal or civil charges against an individual. For example, under federal criminal law, an individual may generally not be prosecuted or punished for a non-capital offense unless charges are brought within five years (18 U.S.C. § 3282). Similarly, under non-criminal federal law, an action or proceeding may generally not be brought against an individual for the enforcement of any civil penalty or forfeiture unless commenced also within five years (28 U.S.C. § 2462). Nevertheless, immigrants face deportation for conduct that happened many years ago because federal immigration authorities have deemed that the lack of a “statute of limitations” in the Immigration and Nationality Act itself allows them to reach back in time as far as they want to deport people.

THE PROBLEM: THE THREAT OF DEPORTATION NEVER GOES AWAY NO MATTER HOW LONG AGO THE CONDUCT AT ISSUE

DHS' bringing of deportation charges against immigrants long after the conduct in question violates basic notions of fairness and creates tremendous hardship for immigrants – many of whom are long-time lawful permanent resident immigrants, refugees or asylees – and their families, employers, employees, communities, and the United States as a whole. Where the conduct resulted in a criminal conviction, the person may have long since finished the sentence that the criminal judge felt was fair. In the intervening time, many such immigrants have established productive and law-abiding lives – gone to school, raised families, bought houses, built businesses, paid taxes and become active in their communities. And, as the years passed, many have even applied to renew replace their green cards or other immigration documents or gone through DHS inspection when returning to the United States after vacations or business trips abroad – all without DHS taking any action against them.

As one presidential immigration commission has stated: “That it is wrong to keep the threat of punishment indefinitely over the head of one who breaks the law is a principle deeply rooted in the ancient traditions of our legal system.”¹ Nevertheless, even though the federal civil statute of limitations provision at 28 U.S.C. 2462 has been described as the “catch-all” statute of limitations that applies where Congress has not otherwise provided for a limitations period in a statute (*Fed. Election Comm'n v. Nat. 'l Republican Senatorial Comm.*, 877 F. Supp. 15, 17 (D.D.C. 1995)), the federal government and courts have nevertheless declined to apply 28 U.S.C. 2462 to immigration removal proceedings because the Immigration and Nationality Act does not itself include any express statute of limitation provision. One court, which took this position, stated:

¹ “Whom We Shall Welcome” (President’s Commission on Immigration and Naturalization Report, 1953), p. 197.

For more information, please contact:

Angie Junck: Immigrant Legal Resource Center, ajunck@ilrc.org, (415) 321-8558

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“Despite our discomfiture with the prolonged delay in initiation of removal proceedings [in this case], . . . the task of creating a limitations period lies with the legislature, not the judiciary” (*Restrepo v. Attorney General*, 617 F.3d 787, 801 (3d Cir. 2010)).

THE SOLUTION: Congress must clarify that the general federal civil statute of limitation applies to the bringing of removal charges based on long ago conduct, or enact an immigration-specific statute of limitation.

For more information, please contact:

Angie Junck: Immigrant Legal Resource Center, ajunck@ilrc.org, (415) 321-8558

Lena Graber: National Immigration Project of the National Lawyers Guild, lena@nationalimmigrationproject.org, (617) 227-9727 x6

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Proposed Amendments

The first following amendment to INA § 239 would bring federal immigration proceedings expressly within the purview of the general federal 28 U.S.C. § 2462 five-year statute of limitation on the bringing of federal civil charges. The following alternative amendment to INA § 239 would enact a more targeted immigration-specific statute of limitation provision.

PROPOSED AMENDMENT TO INA § 239 (INITIATION OF REMOVAL PROCEEDINGS) –

Section 239(d) (Prompt Initiation of Removal) of the Immigration and Nationality Act (8 U.S.C. § 1229(d)) is amended in subparagraph (2), by striking the period at the end of the subparagraph and inserting:

“, except that initiation of any removal proceeding under this Act is subject to section 2462 of title 28, United States Code.”

ALTERNATIVE PROPOSED AMENDMENT TO INA § 239 (INITIATION OF REMOVAL PROCEEDINGS) –

Section 239(d) (Prompt Initiation of Removal) of the Immigration and Nationality Act (8 U.S.C. § 1229(d)) is amended to insert a new subparagraph (3) reading as follows:

“(3) Time for Commencing Proceedings –

Except in the case of an alien who is deportable under 237(a)(4) or inadmissible under section 212(a)(3), or except as otherwise provided by Act of Congress, any removal proceeding against an alien admitted to the United States for being within a class of deportable aliens described in section 237(a), or within a class of inadmissible aliens described in section 212 (a), shall not be entertained unless commenced within five years from the date when the alien became deportable or inadmissible.”

For more information, please contact:

Angie Junck: Immigrant Legal Resource Center, ajunck@ilrc.org, (415) 321-8558

Lena Graber: National Immigration Project of the National Lawyers Guild, lena@nationalimmigrationproject.org, (617) 227-9727 x6

Benita Jain: Immigrant Defense Project, bjain@immigrantdefenseproject.org, (530)723-6482

Ann Benson: Washington Defender Association, abenson@defensenet.org, (360) 385-2538

