

RESTORE FAIRNESS AND DUE PROCESS: 1996 LAWS GO TOO FAR

THE ISSUE: 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 and combat terrorism, these laws did very little to address those issues. Instead, IIRAIRA and AEDPA include many provisions that significantly and negatively affect American families, legal immigrants, and others seeking to enter the United States legally. Under the 1996 laws, legal immigrants routinely are detained without bond, deported without consideration for discretionary relief, restricted in their access to counsel, and barred from appealing to the courts. The laws expand the grounds of deportation, subjecting long-term immigrants to mandatory detention and automatic deportation for relatively insignificant crimes. Low-level immigration officials act as judge and jury, and the federal courts have been denied the power to review most agency decisions. Moreover, these laws are being applied retroactively. As a result, many immigrants have been expelled from their adoptive country for one-time offenses and youthful indiscretions that occurred, in some cases, many years ago. The 1996 laws are merciless: providing for no second chances, changing the rules in the middle of the game, and denying people their day in court. These laws are tearing families apart and need to be reformed.

AILA'S POSITION: AILA strongly supports legislative initiatives designed to correct the injustices resulting from IIRAIRA and to restore due process and fairness for legal permanent residents. AILA believes that our laws must embody the following principles:

Make the punishment fit the crime. Current laws punish legal immigrants out of proportion to their crimes. AILA supports restoring balance and fairness by:

- Not changing the rules in the middle of the game. The 1996 laws were written to apply retroactively. Thousands of legal immigrants thus face removal for offenses that occurred many years ago, some of which were not deportable offenses at the time they occurred. Making laws retroactive is unconstitutional in criminal law, and should be prohibited in immigration law as well.
- Amending the definition of “aggravated felony” to include only serious offenses. IIRAIRA greatly expanded the definition of “aggravated felony” for immigration purposes. This definition is unrelated to any criminal definitions and includes non-violent crimes such as shoplifting and writing bad checks. The definition should be amended to ensure that legal immigrants with relatively minor offenses are not classified as “aggravated felons” and thereby subject to automatic deportation with no discretion by an immigration judge.
- Restoring the definition of “conviction” and “term of imprisonment.” IIRAIRA fundamentally changed the meaning of these terms so that a person who never spent a night in jail is treated the same as a person who has served years in prison, and a state judge’s decision to suspend or withhold sentencing is given no consideration. Even an expunged conviction is still treated as a conviction under immigration law. These laws should be changed to ensure that immigration laws respect criminal court judge and jury decisions.
- Restoring the definition of “crimes involving moral turpitude” to require imposing a sentence. Prior to the 1996 laws, an immigrant had to be sentenced to a year for a crime involving moral turpitude in order to be deportable. As a result of IIRAIRA, this deportability ground is applied to any crime that *could* lead to a year’s sentence—even relatively minor crimes for which no jail time was imposed.
- Allowing immigrants who have been wrongly deported, or who were ordered deported because of the overly harsh 1996 immigration laws, to reopen their cases.

Authorize immigration judges to make decisions based on the facts of the case. The 1996 laws stripped immigration judges of the discretion they had to evaluate cases on an individual basis and grant relief to deserving immigrants and their families. AILA supports returning integrity to the process by:

- Returning to long-time legal residents—who have not committed a serious offense—the right to apply for relief from deportation. The 1996 laws took away an immigration judge’s discretion to consider the facts of a case, the length of time the person has lived in the U.S., or evidence of rehabilitation. Immigration judges should have the authority to consider all the facts of a case before making a decision to deport a legal resident, and they should have the discretion to grant relief in deserving cases.
- Repealing the “stop-time” rule. The 1996 laws created a legal fiction: immigrants who committed an offense in the past are not allowed to claim that they have been residing in this country since that time. As a result, immigrants face removal based on something they did many years ago, and are unable to show that since that time they have been law-abiding members of their community. Immigration judges should be able to make decisions based on all the real facts of a case, not legal fictions.
- Restoring the opportunity for long-time residents to apply for relief from deportation if they can prove extreme hardship to themselves. The 1996 laws took away the ability to consider the effect of deportation on the person seeking relief. People who have resided in this country for many years should be given back the opportunity to show the effects that removal would have on their lives.
- Ending the use of secret evidence. Under the 1996 laws, the government is given unprecedented authority to deport or detain immigrants based on evidence they have never seen and, hence, cannot possibly refute. In rejecting this principle, one court has 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. Proceedings conducted out of sight of the accused and their attorneys are a feature of totalitarian governments, not of our own.

Empower federal judges to review agency decisions. The decision to deport is momentous, especially for refugees fleeing persecution and for those legal immigrants who have lived most of their lives in this country. Important issues of fairness and justice are at stake, and we should ensure that there is adequate judicial review of immigration orders and decisions. Our judicial system is one of checks and balances, and immigrants deserve their day in court.

Use detention only when needed. The detention of individuals is an extraordinary power that should only be used in extraordinary circumstances. To ensure that detention is not used to separate American families needlessly, AILA supports these reforms:

- Ending the practice of mandatory detention. The 1996 laws require ICE to put immigrants in jail even when they pose no danger or flight risk. AILA supports reforms that would require the Attorney General to release an immigrant from detention if he or she does not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.
- Ending the practice of indefinite detention. Due to the 1996 laws, thousand of immigrants are being held in jail indefinitely (the government refers to them as “lifers”) because they cannot be removed from the U.S. AILA supports reforms that would require (1) the release of long-term detainees who cannot be removed to their countries of origin if the Attorney General cannot negotiate their return with that country’s government and (2) regular review of an immigrant’s continued long-term detention.

Recognize immigrants’ strong ties to their American families and communities. Family unification has always been the cornerstone of our immigration system. Our immigration laws should be reformed to unite families instead of dividing them by:

- Repealing the 3/10-year bars and the permanent bar to re-entry. These bars divide and separate families and force people underground. They do not deter people from overstaying their visas as intended.
- Modifying and/or expanding waivers for grounds of inadmissibility. The 1996 laws resulted in new grounds of inadmissibility and the severe restriction of waivers. For example, false claims of U.S. citizenship, unlawful voting, and alien smuggling (for no commercial gain, as when a son drives his mother across the border) result in a permanent bar with no opportunity for a waiver or review. The policy of creating broad grounds of inadmissibility with no opportunity for relief must be changed to allow discretion to take into account such humanitarian considerations as family ties or innocent intent.
- Ending the practice of excluding legal permanent residents returning from short trips abroad. After passage of the 1996 laws, as a result of a minor offense that may have occurred years in the past, a legal permanent resident returning from abroad is treated as though he or she were applying for admission to the United States for the first time. Immigrants who leave the United States temporarily do not necessarily abandon their homes here, and they should not be treated as if they do.

Allocate our resources wisely. We need to focus on the people who mean to do us harm, not legal permanent residents who have jobs and families here, contribute to their communities, and share the same security concerns as the rest of us.

CURRENT LEGISLATION: The national media has profiled the cases of many people who have been hurt by the 1996 immigration laws. Many members of Congress who supported these laws now recognize that the laws went too far and must be changed. A variety of bills have been introduced over the last several years in an effort to restore fairness and basic due process.

In the 107th Congress, several bipartisan bills were introduced in the House and the Senate that recognized the need to change these laws. Senators Edward Kennedy (D-MA) and Bob Graham (D-FL) introduced the Immigrant Fairness Restoration Act, S. 955, and Representative John Conyers (D-MI), with bi-partisan support, introduced the Restoration of Fairness in Immigration Act, H.R. 3894. Both of these bills offered meaningful reform on the issues of due process, judicial review, detention standards, refugee protection, and family unification.

In July 2002, the House Judiciary Committee approved H.R. 1452, the Family Reunification Act of 2001. That bipartisan legislation targeted the harshest aspects of the 1996 laws, and would have restored some discretion in cases involving long-term legal permanent residents, addressed the problem of mandatory detention, and made other important changes. AILA strongly supported this compromise measure as an important first step in addressing the overly harsh laws passed in 1996.

In the 108th Congress, Rep. Conyers, along with 22 co-sponsors, introduced H.R. 47, which mirrored his 107th Congress due process bill, H.R. 3894. Representative Bob Filner (D-CA) introduced the Keeping Families Together Act of 2003 (H.R. 3309), which would have amended the INA to restore certain pre-IIRAIRA provisions. Representative Ed Pastor (D-AZ) introduced a bill, the Restoration of Pre-IIRAIRA Avenues of Relief Act (H.R. 836), that would have amended the INA to restore the avenues for relief from removal that existed for aliens lawfully admitted for permanent residence prior to the IIRAIRA's enactment.

In the 109th Congress, Representative Sheila Jackson-Lee (D-TX) introduced the Save America Comprehensive Immigration Act (H.R. 2092). In addition to broad reforms addressing undocumented immigration and other problems, this bill contains a number of important provisions designed to restore fairness and basic safeguards to our system, including: restoring waivers for certain grounds of inadmissibility and removal, making the immigration consequences of crimes commensurate with the offense, eliminating mandatory detention during expedited removal proceedings, and restoring fairness to the asylum and refugee systems. AILA supports this effort to restore a modicum of justice and fairness in our broken system.