

TESTIMONY OF PAUL W. VIRTUE

**Before the
House Judiciary**

**SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER
SECURITY, AND INTERNATIONAL LAW**

CONCERNING

**HEARING ON SHORTFALLS OF
1996 IMMIGRATION REFORM LEGISLATION**

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INTRODUCTION -

SCOPE OF THE PROBLEM

On September 30, 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). IIRIRA represented the culmination of immigration-reform efforts that began with the Republican Party assuming majority control of the House and the Senate in 1994. Congress was faced with the task of trying to strengthen our national security in the wake of the 1992 terrorist attacks on the World Trade Center, while at the same time trying to find a way to discourage illegal migration. What had started as separate bills, one designed to reduce the annual number of family and employment-based immigrants to the United States (legal immigration) and the other designed to address border security and deportation issues (illegal immigration), were combined in each house and then split again due to a concerted grass-roots lobbying effort. Separated from the more popular illegal-immigration bills, the legal-immigration measures were defeated in both houses. As in 1996, Congress today continues to seek ways to make our country more secure in the wake of the 9/11 terrorist attacks, at the same time it is faced with unprecedented levels of undocumented immigration and a need for reform of our system for access to essential workers.

Touted as legislation that would control illegal immigration, IIRIRA actually includes many provisions that significantly affect legal immigrants and others seeking to enter the United States legally. IIRIRA took a "one size fits all" approach to immigrants and treats otherwise law-abiding legal permanent residents (LPRs) the same as dangerous criminals. Legal immigrants who have lived here for many years are being deported for minor crimes committed long ago; family members and workers who are otherwise eligible to apply for permanent resident status instead remain in the U.S. in unlawful

status as a result of new bars to admissibility; lawful permanent residents face mandatory detention and are subject to deportation without ever seeing an immigration judge as a result of retroactive changes to the definition of “aggravated felony”; long-time immigrants with substantial ties to their communities and their families are being deported because the law no longer allows for consideration of the hardship they would suffer if deported.

Individual equities—such as longevity in the U.S., the age of the individual, the severity of an offense, how long ago the offense occurred, rehabilitation, employment, payment of taxes, contributions to one’s community and to the church, financial support of U.S. and LPR children, spouses and parents, and the break-up of families—have been put aside in favor of an inflexible, intolerant, punitive approach. The failure to look at the totality of circumstances, to exercise discretion and compassion where warranted, and to evaluate each case on the merits, reflects a failure in our system.

The events of September 2001 have made reform even more urgent. It is clear now that the U.S. must focus on individuals who pose a serious threat to Americans. We cannot afford to have our immigration-enforcement resources diverted to the prosecution and deportation of legal immigrants who committed minor crimes many years ago. Rather, IIRIRA must be changed to restore some balance in our law, to make the punishment fit the crime, and to stop the irrational diversion of immigration-enforcement resources that current law requires.

The Supreme Court has repeatedly emphasized that freedom from government detention lies at the core of the liberty that the Due Process Clause protects. Less than two years ago, the Supreme Court reaffirmed that “[F]reedom from imprisonment, from government custody, detention or other forms of physical restraint – lies at the heart of the liberty that the [Due Process] [Clause of the Fifth Amendment] protects. *Zadvydas v. Davis*, 533 U.S., 678, 690, (2001).

We cannot throw aside due-process protections in the name of national security. Indeed, as Supreme Court Justice O’Connor stated in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004):

“It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. It would indeed be ironic if in the name of national defense, we would sanction the subversion of one of those liberties which make the defense of the nation worthwhile.”

This principle applies with full force to immigrants as it does to citizens. The Due Process clause requires, at a minimum, individualized determinations, discretion, and judicial review.

Any new system Congress develops to address the need for enhanced security and to stem illegal immigration must be sufficiently flexible such that decision makers can

exercise appropriate discretion consistent with the basic rules and overarching goals of a tough but fair immigration system. It must also preserve the checks and balances mandated by our Constitution, checks and balances that not only set appropriate limits on the power of one branch of government versus another, but also ensure that each individual in this country will be treated fairly.

SPECIFIC SHORTCOMINGS OF IIRIRA

The fact that Congress continues to wrestle with many of the same immigration challenges a decade after IIRIRA suggests that the statute has not achieved the hoped for results. Despite good-faith efforts to discourage illegal immigration and remove dangerous criminals and terrorists, unfortunately, the law has encouraged undocumented immigrants to remain unlawfully in the United States and has made enforcement of measures against criminals and terrorists less efficient. Prior to IIRIRA, immigrants would come here to work for a season and then return to their home country; or family members would visit their husbands or wives, their children or their parents here, and then return home while they waited for their visa numbers to become available.

However as the penalties for leaving the United States and the risks of returning increased, more immigrants began to establish permanent homes in the U.S., bringing their families, buying homes and integrating into the fabric of our society.

In particular, the following provisions of IIRIRA have posed problems:

1. Three and Ten-Year Bars to Admission;
2. "Aggravated felons," Retroactivity and Mandatory Detention;
3. Cancellation of Removal;
4. Lack of Judicial Review;

Three and Ten-Year Bars to Admissibility

IIRIRA created new bars to admissibility to the U.S. for people who have been unlawfully present in the U.S. for six months or longer. Section 212(a)(9)(B)(i)(I) and (II) of the Immigration & Nationality Act ("INA") were amended by § 308(c) of IIRIRA.

INA § 212(a)(9)(B)(i)(I) as amended bars anyone who has accumulated more than 180 days but less than one year of unlawful presence in the US, and who departs the U.S., from seeking readmission within three years of the date of such alien's departure. This section is known as the three-year bar.

INA § 212(a)(9)(B)(i)(II) as amended bars anyone who has accumulated more than one year of unlawful presence in the U.S., and who voluntarily departs the U.S., from seeking readmission within ten years of the date of such alien's departure or removal. This is the ten-year bar.

There is a waiver of the three and ten-year bars in INA § 212(a)(9)(B)(v) in the case of an immigrant who is the spouse or son or daughter of a United States citizen if the refusal of

admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. Hardship to the individual alien or the U.S.-citizen or LPR child is not a factor to be considered. "Extreme hardship" involves more than economics or the usual level of hardship associated with being separated from one's family. There are no bright lines and, in practice, this standard has proven very difficult to meet. Family separation and economic impact alone are insufficient to show extreme hardship. Hardship to an employer, to a child or to the applicant may not be considered. The applicant must show an aggregate of hardships that places the case beyond economic and social hardships "ordinarily" associated with deportation.

Unreviewable waiver determinations made in connection with an application for an immigrant visa offer no predictability of success for the otherwise qualified immigrant. Moreover, an applicant may have to wait anywhere from 6–12 months outside the U.S. while a waiver application is being considered. Leaving the U.S. to apply for a visa for an indefinite period alone is a disincentive. Knowing that if the waiver is denied an applicant will be barred from reentry for three or ten years makes it even more unlikely that people will assume that risk notwithstanding the fact that they qualify for family or employment-based immigrant visas.

As a result, far from curtailing illegal immigration and deterring people from overstaying their visa as intended, IIRIRA's new bars to admissibility are actually contributing to the unprecedented rise in the number of undocumented immigrants. Thus, faced with the choice of voluntarily leaving their families in the United States for a period of three or ten years, or being forced underground but remaining united with their families, many naturally chose the latter, joining the legions of undocumented individuals in this country and virtually eliminating the circular migration patterns that had characterized immigration to and from Latin America for many decades.

Examples

Perhaps the best way to see how IIRIRA really impacts immigrants and their families is to look at real-life example of how it tears apart families and discourages legal immigration. All names used are aliases.

The Case of Jose Gonzalez: Jose originally entered the U.S. without inspection in 2000 and has lived and worked in the U.S. since that time. His wife is a U.S. citizen and they have 2 children born in the U.S. His employer is willing to file a labor certification on Jose's behalf.

Jose has never been outside the U.S. since entering in 2000. He has no criminal convictions or prior deportations and has built a good life for his family in the U.S. The only possible way for Jose to become a permanent resident is if his wife files a family petition on his behalf. Because he entered without inspection, Jose would have to leave the U.S. to apply for a visa and will need to get a waiver of the ten-year bar to admissibility.

Jose can apply for a waiver of the ten-year bar, but he is not sure whether it will be granted. Furthermore, it could take up to one year before his application for a waiver is processed. The waiver will be denied if he fails to prove that his wife would suffer extreme hardship. (Hardship to his U.S.-citizen children is not considered under the current waiver.) Even if his waiver is approved, he has to wait for the consulate to interview him again for his immigrant visa. It could take another year for this interview to be scheduled. As a result, he could be separated from his family for at least two years. As an alternative, his family could accompany him to his home country. In this case, the consequences of the bar go well beyond the inadmissibility of those who have violated immigration laws because U.S. citizens also would suffer greatly. The risks of being barred from the U.S. for ten years are a substantial deterrent even to those immigrants for whom a legal channel of immigration exists.

The Case of Mario Ortega: A landscape supervisor named Mario Ortega worked for his U.S. employer for ten years. Mario entered the U.S. with a border-crossing card in 1996 and overstayed. He has a Mexican wife and two children born in the U.S. He is a highly valued employee because he supervises the landscaping crew, he knows the business extremely well and he is highly reliable. His U.S. employer is aware of his status and would like to sponsor Mr. Ortega for a green card. However, even if the employer pursued the appropriate channels to obtain permanent residence for Mr. Ortega, Mr. Ortega is ineligible to obtain any benefit. Mr. Ortega cannot apply to adjust his status in the U.S. because he overstayed his original visa. If he returns to Mexico to apply for an immigrant visa, he will trigger the ten-year bar. Mr. Ortega is ineligible for a waiver of the ten year bar because he does not have a U.S. citizen or permanent resident spouse or parent. Thus, his employer cannot help him to regularize his status.

Aggravated Felons, Retroactivity and Mandatory Detention

Although our lawmakers hoped that IIRIRA would control illegal immigration and combat terrorism, these laws did very little to address those issues. Instead, as interpreted by the Department of Homeland Security (DHS), these laws expanded our nation's deportation laws to such an extent that thousands of lawful permanent residents have been removed from this country for relatively minor offenses, many of which occurred years ago.

The penalties associated with the 1996 aggravated-felony definition are severe and include mandatory detention and deportation, disqualification from most forms of relief from removal, and retroactive application of the new definition. As originally intended, the term was rightly applied to crimes which were both felonious and aggravated, such as murder, drug trafficking crimes, select crimes of violence, and child pornography.

As a result of IIRIRA, the definition of aggravated felony for immigration purposes now includes such offenses as misdemeanor theft of a video game, valued at approximately \$10; the sale of \$10 worth of marijuana; breaking into an Alcoholics Anonymous in 1968 and drinking a bottle of wine with friends; one woman pulling the hair of another during a fight over a boyfriend; or shoplifting \$15 worth of baby clothes.

In addition, the new definition was made retroactive, which means that many long-term residents can be deported for relatively minor offenses that occurred years ago, that were not classified as “aggravated felonies” for immigration purposes when they were committed. The end result has been the forced removal of many immigrants from their adoptive country, notwithstanding the length of time they lived in the U.S. IIRIRA has effectively taken away any agency discretion, adopts a “one size fits all” approach, and disregards equities such as whether or not these immigrants paid taxes, had good jobs, owned property, were employers, or had children and spouses who were either U.S. citizens or LPRs.

These harsh outcomes demonstrate an expanding conflict between immigration law and federal and state criminal-justice law and policy. For example, IIRIRA’s definition of “conviction” for immigration purposes requires the DHS to deport immigrants whose offenses are not even considered “crimes” under criminal law or whose charges have been dropped after successful participation in a rehabilitative program.

As another example, the DHS has applied the definition of “term of imprisonment” to disregard whether a criminal court has decided to suspend an immigrant’s sentence in light of the minor nature of his or her offense. This conflicts with federal and state criminal law and sentencing-reform policies that encourage treatment, rehabilitation, alternatives to incarceration and other fair and proportional responses to minor and non-criminal offenses.

In addition, DHS’ interpretations of the aggravated-felony definition have led to overreaching enforcement and to two near-unanimous Supreme Court decisions rejecting the DHS interpretations that led to the unlawful deportation of thousands of immigrants. [See 8-1 decision in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006) (rejecting broad application of the drug trafficking aggravated felony category to simple possession offenses); 9-0 decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (rejecting the broad application of the crime of violence aggravated felony category to DWI offenses)]. Moreover, IIRIRA and its interpretation have greatly expanded the reach of other deportation-law provisions to apply to offenses which are even more minor or to cases where criminal charges have actually been dropped or expunged.

By imposing mandatory detention on a person classified as an aggravated felon, DHS once again took away the agency’s discretion to consider the individual factors in each case. Any person classified as an “aggravated felon” is subject to mandatory detention without the right to release on bond pending completion of removal proceedings even if the individual can demonstrate that he or she does not pose a flight risk or a threat to the community.

Furthermore, an individual who has never spent a night in jail is treated the same as a person who spent years in jail. Although our immigration laws must be enforced, sound enforcement of immigration laws requires processes that take individual circumstances into account regarding an alien’s admissibility into or deportation from the U.S.

Finally, prior to the 1996 laws, an immigrant had to be sentenced to at least one year for a “crime involving moral turpitude” in order to be deportable for a one-time minor offense. As a result of IIRIRA, 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. In addition, the immigration law fails to extend inadmissibility exceptions for one-time minor offenders to individuals with a single low-level drug violation.

Retroactive application leads to deportation of people for old conduct even if the offense was not a deportable offense at the time it was committed. This violates basic fairness principles that one’s conduct should only be subject to the laws existing at the time of the conduct.

Examples

Sal Loayza emigrated from Ecuador as a young boy as a lawful permanent resident in the 1970s. He served honorably in the U.S. Navy for more than eight years, married, and had a U.S.-citizen son, Jeremy. Sal became Jeremy’s primary caretaker after his marriage ended. Sal was later convicted of mail fraud. During his three years in prison, Sal called Jeremy three times a day—before school, after school, and at bedtime. Jeremy struggled with adjusting to his father’s absence, but looked forward to their reunification. But on the day of his release, Sal was detained by the INS and put in removal proceedings and deemed an aggravated felon. Jeremy, convinced he would never see his father again, attempted suicide. Sal was deported in 2000 and was never able to ask for relief based on his honorable service to this country or the extreme toll his removal would take on his U.S.-citizen son.

Mi-Choong O’Brien, a native of South Korea, met her U.S.-citizen husband when he was working in South Korea as a Peace Corps volunteer. She entered the United States as a legal permanent resident in 1985, and has been married to her U.S.-citizen husband for 25 years. Together they have three U.S.-citizen children, two of them current university students, as well as an adopted child from South Korea. Mi-Choong was convicted for taking money from the cash register of the restaurant where she worked, received a one-year suspended sentence, and has already paid restitution for her crime. Yet, despite clear evidence of Mi-Choong’s rehabilitation—her employer’s statement that he was satisfied with the punishment and had no desire to see her detained or removed, and her probation officer’s testimony that Mi-Choong was doing everything possible to make up for her crime—Mi-Choong was seized one day when she showed up for her regular probation meeting and ordered removed. Because her crime is classified as an aggravated felony, deportation is mandatory; neither her length of time in the United States, her extensive rehabilitative efforts, nor the extreme hardship to her family can serve as grounds for permitting Mi-Choong to remain here in the United States.

Sonia and her son, Pedja, entered the U.S. as permanent residents in 2002 when she married George, a U.S. citizen. Sonia and George had met and courted during his regular business trips to Bulgaria. After several months in the U.S., George began subjecting both Sonia and Pedja to physical violence and emotional abuse, threatening to have them

deported if they called the police. In July 2003, when a neighbor overheard the violence and called the police, George convinced them to arrest Sonia (who spoke only limited English) due to a scratch he had on his arm where Sonia had resisted his assaults. Though Sonia subsequently moved to a shelter, obtained a protection order, and sent Pedja to live with relatives elsewhere in the U.S., Sonia was still charged with assault and pled guilty to a one-year suspended sentence. She never served any prison time. Yet, this plea satisfied the aggravated-felony definition and Sonia now faces deportation. Sonia is ineligible for any domestic-violence waiver due to this aggravated-felony conviction, and she cannot request any sort of relief from removal based on her individualized circumstances because removal is mandatory and there is an absolute bar to relief.

Cancellation of Removal

Prior to IIRIRA, aliens who were otherwise deportable could apply to an immigration judge to have their deportation suspended. If the application was granted, the alien would be eligible to adjust to the status of an alien lawfully admitted for permanent residence status. This form of relief was known as “suspension of deportation” and was governed by the provisions under section 244(a) of the Act. To qualify for this relief, aliens had to show that (1) they were continuously present in the U.S. for a minimum of seven years; (2) they were persons of “good moral character”; and (3) their deportations would result in “extreme hardship” to themselves and their parents, spouses and children who were U.S. citizens or permanent residents.

Under IIRIRA, suspension of deportation was replaced by “cancellation of removal” as it applies to nonpermanent residents. And with that change came a substantive change to the hardship standard; to the physical presence requirement; to criminal convictions; and to the number of applicants who could be granted cancellation in any given year.

Now, an alien must establish that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. Hardship to the alien is no longer a consideration, regardless of how long the alien has lived here and regardless of why and how they entered. An alien can only apply for this relief if the alien has a qualifying U.S.-citizen or LPR spouse, parent or child. In addition, the alien must now show that he or she has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application. There is now a numerical limit of 4,000 on the number of aliens who can be granted cancellation of removal in any given fiscal year.

Requiring an applicant to show “exceptional and extremely unusual” hardship to a U.S.-citizen or LPR spouse, child or parent is an almost impossible burden. Factors such as family separation; economic hardship; requiring U.S.-citizen or LPR children and/or spouses to leave the U.S. for the sake of family unity or to avoid breaking up the family; and/or losing the alien breadwinner of a family are rarely sufficient to meet the “exceptional and extremely unusual hardship” standards. It is of little consequence that an alien has not lived in their native country since they were babies; that they have no

relatives in their native country; or that they do not remember the country or their native language.

This standard severely restricts an immigration judge's ability to utilize his or her discretion in granting cancellation to an otherwise worthy applicant. Based on the current standard, few cases qualify for this form of relief.

Unmarried, undocumented immigrants who have no qualifying family members are disqualified from demonstrating hardship even if they have lived most of their lives here. Therefore, many hardworking individuals, who would be otherwise eligible based on good moral character and continuous physical presence are barred from this form of relief. Prior to the enactment of IIRIRA, this was a significant form of relief for many individuals who have become contributing members of our society. Since IIRIRA's enactment, many undocumented immigrants who have made such contributions have been left without this vital form of relief.

Example

Consider the true case of Francisco Monreal, who was a nonpermanent resident in the United States for over 20 years when placed in removal proceedings. He entered the U.S. in 1980 at the age of 14. He was married and has three children, all of whom are U.S. citizens. At the time of the removal proceeding, one of the children was an infant, the others were 8 and 12 years old. Mr. Monreal's parents were both lawful permanent residents of the U.S. and seven of his siblings were LPRs, as well. Mr. Monreal had been gainfully employed in the U.S. since he was 14 years old and was the sole financial supporter of his wife and three children.

The government did not dispute the fact that Mr. Monreal met the 10-year physical presence requirement and good moral character requirement. However, his application for cancellation of removal was denied for failure to meet the stringent hardship requirements. The Board of Immigration Appeals (BIA) upheld the Judge's decision and ordered Mr. Monreal to return to Mexico. Mr. Monreal, who had never committed a crime and had always been an asset to the United States, was deported to Mexico, where he had not lived in 20 years. The decision to deport Mr. Monreal also effectively deported his 12 and 8-year-old U.S.-citizen children and also separated them from their cousins, aunts, uncles and grandparents.

Judicial Review

Judicial review provisions under IIRIRA provide that administrative findings of fact (made by the Immigration Judge or the BIA) are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary. Consequently, these provisions have substantially diminished the ability of noncitizens to have their cases heard before a neutral arbiter. Among the most troubling restrictions are those restricting federal court review over life-altering decisions made by the immigration agencies. While the REAL ID Act of 2005 restored some judicial review, specifically of constitutional claims and questions of law, it left un-reviewable many other errors made

by the administrative agencies involved, as well as eliminating *habeas corpus* review, a critical safety net provision.

Judicial review provisions under IIRIRA, which became effective on April 1, 1997, apply to the following types of cases, which are not reviewable by the court of appeals in a petition for review:

- Any determinations on an individual case relating to an expedited removal order including: the procedures and policies adapted to implement expedited removal provisions; a decision to invoke the expedited removal procedures; or a decision on an individual case.
- Any judgment regarding the granting of relief under the waiver provisions of INA §§212(h) and 212(i); cancellation of removal for certain LPRs or non-permanent residents (INA § 240A); or adjustment of status (INA § 245).
- Any final orders of removal against an alien who is removable for certain criminal grounds covered in the grounds of inadmissibility and removability, including:
 - crimes of moral turpitude;
 - controlled substance violations;
 - drug trafficking;
 - prostitution;
 - firearms offenses;
 - multiple criminal convictions;
 - human trafficking;
 - money laundering; and
 - aggravated felonies;

Examples

Mr. X is in removal proceedings and has applied for adjustment of status based on his long-time marriage to a U.S. citizen who is disabled. Many years ago he filled out an immigration application and failed to put down that he had once been arrested (but not convicted). He files an application for a 212(i) waiver for having committed “fraud” but the Immigration Judge denies it because the respondent does not have children. The BIA affirms. This decision may not be appealed to the federal courts and Mr. X is removed without further recourse.

Ms. Y has one conviction and in another case was charged but the charges were ultimately dismissed. The Immigration Judge finds that Ms. Y is removable because she has two or more convictions. The BIA affirms without opinion. This decision may not be appealed to the federal courts and Ms. Y is removed without further recourse.

Conclusion

The net result of the enforcement measures enacted in IIRIRA has been a reduction in the discretion available to immigration authorities in administering immigration laws. Congress should re-visit the question of whether restoration of some discretion will lead to more efficient use of resources and the ability for DHS to focus its limited enforcement resources on identifying, detaining and removing those people who pose real threats to our national security and the safety of our communities. I would encourage the consideration of more comprehensive immigration reform that looks to balance the very real need for security with the critical need for a legal immigration system that works. Thank you for your kind consideration of my remarks.