

University of Miami Law School Institutional Repository

University of Miami Inter-American Law Review

10-1-1996

The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver

Julie K. Rannik

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

Recommended Citation

Julie K. Rannik, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. Miami Inter-Am. L. Rev. 123 (1996)

Available at: <http://repository.law.miami.edu/umialr/vol28/iss1/7>

This Comment is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996: A DEATH SENTENCE FOR THE 212(c) WAIVER

I. INTRODUCTION.....	123
II. THE HISTORICAL BACKGROUND OF DEPORTATION WAIVERS.....	126
III. "PHANTOM" CONSTITUTIONAL RIGHTS.....	130
IV. AVAILABILITY OF DISCRETIONARY WAIVERS AND EXPLORATION OF THE PA- RAMETERS OF JUDICIAL DISCRETION UNDER THE IMMIGRATION AND NA- TIONALITY ACT	133
V. ARGUMENTS AGAINST BROAD JUDICIAL DISCRETION	139
VI. THE EXAMPLE OF CRIMINAL SENTENCING GUIDELINES.....	142
VII. CONCLUSION	147

I. INTRODUCTION

On April 24, 1996, President Clinton signed the Anti-Terrorism and Effective Death Penalty Act¹ (AEDPA) into law. This new law was part of an omnibus crime package "intended to make it easier to prosecute anyone charged with committing or planning to commit a terrorist attack;"² however, it also made "a number of major, ill-advised changes to our immigration laws having nothing to do with fighting terrorism."³ Included in these changes was the effective elimination of a criminal alien's eligibility to apply for a waiver of deportation.⁴

1. Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat.) 1214.

2. Lena Williams, *A Law Aimed at Terrorists Hits Legal Aliens*, N.Y. TIMES, July 17, 1996, at A1.

3. *President Signs Terrorism Bill Into Law, Congress Passes Corrections Measures*, 73 INTERPRETER RELEASES 568 (Apr. 29, 1996).

4. The Anti-Terrorism and Effective Death Penalty Act eliminated the possibility of deportation waivers for all criminal aliens, except for those who had committed crimes punishable by less than one year. The new law also directed immigration officials to detain

Before the passage of AEDPA, the Section 212(c) waiver⁵ was the most common form of discretionary relief⁶ available to criminal aliens, especially for those convicted of narcotics offenses or crimes involving moral turpitude.⁷ Although Congress intended the Section 212(c) waiver to be an extraordinary measure, over the last eight years, immigration judges granted this relief to more than half of those who applied.⁸ A surge of protests emerged in response to this judicial laxity.

Amidst a tremendous anti-immigrant sentiment, Congress tightened the laws pertaining to relief from deportation. While this Comment argues that although some legislative action was needed to reduce the number of waivers granted, AEDPA was not the solution. Congress passage of AEDPA included two harmful sections: first, it expanded grounds of deportability to cover all drug offenses, including marijuana possession,⁹ and all crimes of moral turpitude;¹⁰ second, immigration judges could no longer exercise their discretion to grant criminal aliens relief from deportation. Following AEDPA, virtually all criminal aliens were subject to immediate deportation orders and were unable to apply for relief from deportation.

Following the enactment of AEDPA, members of Congress recognized that "there might be certain rare circumstances we

any noncitizen convicted of a crime in the United States, including most felonies and certain misdemeanors. These residents were detained without appeal and were not eligible for release on bond. *A Law Aimed at Terrorists Hits Legal Aliens*, *supra* note 2, at A17.

5. Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1988). The provisions of the Section 212(c) waiver were found at the former Immigration and Nationality Act § 212(c).

6. The Immigration and Nationality Act vests the Attorney General with a significant amount of discretion which is exercised at all levels of the immigration process. In particular, the Attorney General and her delegates were empowered to grant discretionary waivers to criminal aliens who were found to be deportable or excludable and who established that they deserved relief from deportation. Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1988).

7. For a description of eligibility requirements of the former Section 212(c) waiver, see discussion *infra* Part IV.

8. 142 CONG. REC. S12,294-01, S12,295 (daily ed. Oct. 3, 1996) (statement of Sen. Abraham).

9. Previously, possession of thirty grams or less was not grounds for deportation. See Immigration and Nationality Act § 241(a)(2)(B)(I), 8 U.S.C. § 1251 (a)(2)(B)(I) (1994).

10. Immigration and Nationality Act § 241(a)(2)(A)(i), 8 U.S.C. § 1251(a)(2)(A)(i) amended by Anti-Terrorism and Effective Death Penalty Act § 435 (1996) (expanding the definition of "crimes involving moral turpitude"). For the purposes of deportability, any crime with a sentence of one year or more would be considered a crime of moral turpitude. *Id.*

had not contemplated, when the removal of a particular alien might not be appropriate."¹¹ Thus, Congress recently restored Section 212(c)-type waivers under Section 240A(a) of the Immigration and Nationality Act (INA).¹² Congress failed, however, to restore appeals of these determinations.

While Congress has partially restored discretionary relief for certain aliens, various problems still exist with the reform package. First, will Section 240A(a) relief be limited as Congress has intended? Neither Congress nor the Attorney General has promulgated any firm guidelines for immigration judges to apply when determining whether an alien deserves a cancellation of deportation. As with the original Section 212(c) waiver, one may inquire whether immigration judges will grant this modified form of relief too freely. Second, will Section 240A(a) relief be an effective replacement for the original Section 212(c) waiver? Under the reform law, all aliens convicted of aggravated felonies, regardless of length of sentence, are barred from applying for relief from deportation. While there must be some limit to eligibility, Congress has expanded the definition of "aggravated felony" to include most of the deportable crimes under the INA.¹³ Thus, this waiver will exist only for a small percentage of aliens, thereby removing the "safety valve" function of the discretionary waiver.¹⁴ Finally, will the inability to appeal a discretionary denial of Section 240A(a) be detrimental to the immigration system? While aliens will no longer be allowed to postpone their removal¹⁵ by appealing discretionary decisions of immigration judges, the Government will also be precluded from appealing a faulty grant of discretion.¹⁶

11. 142 CONG. REC. S12,294-01, S12,294 (daily ed. Oct. 3, 1996) (statement of Sen. Hatch). Senator Hatch continued, "[f]or example, an alien with one minor criminal conviction several decades ago, who has clearly reformed and led an exemplary life and made great contributions to this country . . . ought to retain eligibility for a waiver of deportation or exclusion." *Id.*

12. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Division C, 110 Stat. 3009 (Sept. 30, 1996).

13. Immigration and Nationality Act § 241, 8 U.S.C. § 1251(a)(2)(iii) (1994).

14. See *infra* note 144.

15. The term "removal" replaces the former terms "deportation" and "exclusion" in most instances under the new single-proceeding scheme of the Immigration and Nationality Act. See Anti-Terrorist and Effective Death Penalty Act § 301 (1996).

16. The full ramifications of the inability to appeal discretionary decisions are outside the focus of this Comment.

This Comment analyzes the Attorney General's discretion within the context of criminal aliens seeking relief from deportation, particularly in the form of the former Section 212(c)-type waiver. Part II briefly outlines the legislative history and intent behind the restriction of waivers available to criminal aliens. Part III discusses the genesis of certain due process entitlements afforded to aliens and discusses the importance of allowing discretionary waivers. Part IV outlines the eligibility and statutory requirements of the old waiver and sets out the requirements for the new Section 240A(a) cancellation of deportation. Part V presents traditional arguments against broad judicial discretion and explains why such discretion has been curtailed. Part VI focuses on criminal sentencing guidelines as an example of how such guidelines may work in an immigration context. Part VII sets forth the benefits of judicial discretion and concludes that the recent action of Congress is insufficient to guarantee certain due process rights of aliens in removal proceedings or to preserve the integrity of the immigration law.

II. THE HISTORICAL BACKGROUND OF DEPORTATION WAIVERS

Since the Immigration and Nationality Act of 1952,¹⁷ Congress has enacted significant immigration reform.¹⁸ Beginning in the 1960s and 1970s, Congress passed amendments to deal with both legal and illegal immigration, but it was not until the late 1980s that Congress focused directly on the criminal alien problem.¹⁹

17. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (current version at 8 U.S.C. §§ 1101-1525 (1994)). This Act was enacted as a comprehensive codification and revision of our nation's previous immigration, naturalization, and nationality laws.

18. The Immigration and Nationality Act of 1952 contained few provisions regulating criminal aliens. Section 212(a)(9) provided for the exclusion of aliens who were convicted of a crime involving moral turpitude or aliens who admitted having committed such a crime, or aliens who admitted committing acts which constitute the essential elements of such a crime. Immigration and Nationality Act of 1952 § 212(a)(9). An alien could fall into the criminal category of excludables by supplying information to the immigration officer, notwithstanding the fact that there was no record of conviction or admission of the commission of a specific offense. *Id.* Also under the 1952 Act, an alien was deportable if convicted of a crime involving moral turpitude and sentenced to confinement for a year or more; or who at any time after entry into the United States, was convicted of two such crimes, whether or not confined. *Id.*

19. Prior to the Immigration and Nationality Act of 1990 and the Immigration Reform and Control Act of 1986, public welfare and national security prevailed as the pri-

"In an effort to deal more effectively with the involvement of aliens in serious criminal activities, particularly narcotics trafficking,"²⁰ Congress amended the INA by enacting the Anti-Drug Abuse Act of 1986.²¹ This legislation classified all controlled substances as drugs for purposes of establishing grounds of exclusion and deportation under immigration regulations.²² Congress subsequently established the Criminal Alien Program by enacting Section 701 of the Immigration Reform and Control Act of 1986.²³ The main thrust of the Criminal Alien Program provisions was to subject criminal aliens to expedited deportation hearings conducted while aliens were still in correctional custody.²⁴

mary objectives of U.S. immigration laws. See also Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. 21-23 (1988)); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943); Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246 (codified at 28 U.S.C. § 3731 (1988)); Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917) (repealed 1974); Immigration Act of 1921, ch. 8, 42 Stat. 5 (1921) (repealed 1952); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

20. 55 Fed. Reg. 24,858 (1990).

21. Pub. L. No. 99-570, 100 Stat. 3207 (codified in general sections of 8 U.S.C.).

22. *Id.*

23. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1254(i)). Section 701 provides: "In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction." *Id.* § 701.

24. William R. Robie & Ira Sandron, *Criminal Aliens in the Immigration System*, 38 FED. B. NEWS & J. 449 (1991). Section 242(a)(2) of the Immigration and Nationality Act mandated that any alien convicted of an aggravated felony be held without bond upon completion of his or her sentence pending deportation proceedings and removal from the United States. 55 Fed. Reg. 43,326 (1990) (codified at 8 C.F.R. §§ 242, 287). The Attorney General was directed not to deport incarcerated aliens until they had completed their sentences in accordance with Section 242(h) of the Immigration and Nationality Act. *Id.* The Attorney General was required, however, to begin proceedings against aliens deportable because of criminal convictions "as expeditiously as possible" as required by Section 242(i). *Id.* These provisions mandated that criminals be taken into Immigration Service custody to face exclusion or deportation from the United States rather than be allowed back into the community after release from a correctional institution. *Id.* Section 242(a)(2) further required that aggravated felons, as defined by Immigration and Nationality Act Section 101(a)(43), would be taken in to custody and held without bond. *Id.*

Criminal Alien Program cases were usually separated from the rest of the immigration cases and heard by immigration judges who were part of the Criminal Alien Program. These immigration judges either had permanent courtroom facilities at detention centers, such as the Krome Detention Center in Miami, Florida, or made routine trips to these facilities to hear criminal cases. Other criminal aliens who had already finished their sentence or had been convicted without a prison sentence had their cases heard by immigration judges outside of the Criminal Alien Program in the normal course of business.

Congress then passed the Anti-Drug Abuse Act of 1988,²⁵ which contained provisions enhancing the penalties for the "aggravated felon."²⁶ The aggravated felon provision lent support to the previously enacted Criminal Alien Program and required that deportation proceedings be completed before the felon was released from custody for the criminal sentence.²⁷ The interest of the government to expedite criminal alien deportation was furthered as this provision placed the Immigration and Naturalization Service (INS) in the position to deport the alien immediately upon the conclusion of his sentence. This system intended not only to accelerate the deportation process, but also to prevent the criminal alien from returning to the streets upon release from prison.²⁸

Because Congress was still concerned with the need to eliminate the criminal alien population within the United States,²⁹ the 1990 amendment to the INA broadened the immigration consequences for criminal conduct to include particularly harsh treatment for those aliens committing aggravated felonies.³⁰ Similar to previous legislation, the purpose of the 1990 amendment was to expedite the removal of criminal aliens and to allow fewer legal remedies by making grounds of deportability more extensive and by making waivers more difficult to obtain.³¹

25. Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified at various sections of 8 U.S.C.).

26. Anti-Drug Abuse Act of 1988, § 7342 (codified at 8 U.S.C. § 1101(a)). The Act defined aggravated felony as murder, drug trafficking crimes, any illicit trafficking in firearms or destructive devices or any attempt or conspiracy to commit such acts, committed within the United States.

27. *Id.* § 7347 (codified at 8 U.S.C. § 1252(a)).

28. Section 242(a) of the Immigration and Nationality Act was amended by requiring the Attorney General to take custody of aliens convicted of aggravated felonies upon completion of the alien's sentence and to retain such custody pending deportation. 55 Fed. Reg. 24,858 (1990). The amended procedures established by this Act were created to serve the public interest by facilitating the detection and removal of the alien aggravated felon. *Id.*

29. 136 CONG. REC. S17, 117 (daily ed. Oct. 6 1990).

30. The provisions of this amendment were severe and appeared to illustrate a position that authorized taking away the "many rights" given to criminal aliens. Jeffrey N. Brauerman & Stephen E. Mander, *IMMACT '90 Revisions Regarding Immigration Consequences of Criminal Activity*, 66 FLA. B.J. 28 (May, 1992).

31. *Id.* Criminal aliens who were convicted of aggravated felonies and who served more than five years in prison were barred from applying for a waiver of deportation. *Id.* at 34. Other aggravated felons serving less than five years would not merit relief absent a showing of unusual and outstanding equities sufficient to outweigh the severity and recidivism, or both, of their criminal activity. *Id.*

Despite all these amendments, most criminal aliens who were deemed deportable were eligible to petition the immigration judge for a waiver of deportation.³² Immigration judges were required to conduct hearings for discretionary relief in a fundamentally fair manner³³ and were not permitted to refuse to consider discretionary relief where the alien was *prima facie* eligible for such relief.³⁴ Thus, in addition to due process protections, criminal aliens in deportation proceedings were also afforded an extra level of protection. Former Section 212(c) of the INA provided a second chance to aliens with significant ties to the United States. After being convicted of the crime and found deportable as charged, the alien was given the opportunity to petition the judge for relief based on relevant mitigating factors favorable to the alien.³⁵

AEDPA, however, effectively eliminated this discretionary relief for almost all classes of aliens.³⁶ AEDPA enhanced the ability of immigration officers to deport criminal aliens by eliminating judicial review for aliens deemed deportable for committing aggravated felonies.³⁷ AEDPA also went a step further and recategorized most crimes involving moral turpitude as aggravated felonies, thereby eliminating Section 212(c) relief for all but the most minor criminal offenses.³⁸ Finally, AEDPA required

32. The aggravated felon serving more than five years in prison was the only class of alien categorically barred from applying for relief from deportation. See Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994). This portion of Section 212(c) sparked much controversy. The question posed was whether the provision should be interpreted to bar only those who actually served five years or whether it should also apply to those sentenced to five years. This question ultimately became moot as the new Section 212(c)-type relief bars relief to all aggravated felons, regardless of the sentence.

33. *Landon v. Plasencia*, 459 U.S. 21 (1982); *Woodby v. INS*, 385 U.S. 276 (1966); *Cunanan v. INS*, 856 F.2d 1373 (9th Cir. 1988).

34. On the other hand, an alien who was statutorily barred from relief would not be eligible to apply for discretionary relief or to demand a hearing on relief from deportation. Former Section 212(c) relief was unavailable to persons convicted of one or more aggravated felonies if they had actually served a term of imprisonment of five years or more or if they had served various terms of imprisonment which equal a total of five years or more. *Matter of Ramirez-Somera*, BIA Int. Dec. 3185 (Aug. 11, 1992).

35. For a discussion of the discretion vested in the Attorney General, see discussion *infra* Part IV. This bifurcated process resembles the criminal trial with respect to an initial trial to determine guilt and a second trial to determine sentencing.

36. Anti-Terrorism and Effective Death Penalty Act, §440(d) (to be codified at 8 U.S.C. § 1182(c)).

37. *Id.* § 440(a) (to be codified at 8 U.S.C. § 1105a(a)(10)). Under previous law, an aggravated felon was barred only if he had served five years or more in prison.

38. *Id.* § 435 (to be codified at 8 U.S.C. § 1251(a)(2)(A)(i)(II)).

custody of any alien convicted of any criminal offense.³⁹

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996,⁴⁰ passed on October 1, 1996, restored waivers of deportation available to criminal aliens under new the INA's Section 240A(a). Congress, however, left many concerns unaddressed. Most important is the fact that, regardless of any mitigating factors, most criminal aliens found excludable or deportable under the INA are no longer statutorily eligible to apply for relief from deportation.

III. "PHANTOM" CONSTITUTIONAL RIGHTS

It has long been established that aliens inside the United States have the protection of certain constitutional safeguards.⁴¹ These rights are more extensive for lawful permanent residents and others who have lived in the United States for a lengthy period of time and who have acquired greater equities.⁴² These individuals stand to lose the same life, liberty, and property as would U.S. citizens.⁴³

As early as 1886, the Supreme Court in *Yick Wo v. Hopkins*⁴⁴ established that regardless of citizenship or alienage there is a "notion of fundamental human rights that protects individuals."⁴⁵ Hiroshi Motomura expanded on this notion in the immigration context and addressed the meaning of "phantom norms" in our society.⁴⁶ Motomura characterized phantom norms as those which have aided in the interpretation of immigration statutes, yet have remained independent of the norms which courts use directly when they decide constitutional issues in immigration cases.⁴⁷ Phantom norms have been important in the evolution of immigration law as they often have yielded more favorable decisions for aliens through the interpretation of statutes, regula-

39. *Id.* § 440(c) (to be codified at 8 U.S.C. § 1252).

40. Pub. L. No. 104-208, Division C, 110 Stat. 3009 (Sept. 30, 1996).

41. Hiroshi Motomura, *Immigration Law After A Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

42. *Landon v. Plasencia*, 459 U.S. 21 (1982).

43. *Id.* at 34.

44. 118 U.S. 356 (1886).

45. Motomura, *supra* note 41, at 566.

46. *Id.* at 549. Motomura expressed his appreciation to Alexander Aleinikoff for first suggesting the term "phantom norms." *Id.*

47. *Id.* at 549.

tions, and other forms of unconstitutional law.⁴⁸ The outcome of this process has been to "produce results that are much more sympathetic to aliens than the results that would follow from the interpretation of statutes in light of the expressly applicable constitutional immigration law based on plenary power."⁴⁹

Motomura suggests that phantom norms have been instrumental in making up for the shortcomings of the plenary power doctrine.⁵⁰ Indeed, the Court has allowed phantom constitutional

48. *Id.*

49. *Id.* These phantom norms actually originated in the mainstream public law. *Id.* at 549. Motomura suggests that this expansion of judicial review has its roots in Justice Brandeis' concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), in which he stated that "judges should interpret statutes to avoid constitutional doubt." Motomura, *supra* note 41, at 561. While many commentators believe the use of such judicial interpretation of statutes to be controversial and unpredictable, many decisions have relied on such interpretation. See generally RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985). Posner suggests that such interpretation allows courts to alter the meaning of statutes, thereby inserting a judicially-created "penumbra" around the Constitution. *Id.* See Motomura, *supra* note 41, at 561.

The effects of constitutional norms on statutory interpretation can clearly be seen in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). The Court held that a nonprofit private school engaging in racially discriminatory admissions practices did not qualify for a federal income tax exemption granted to institutions operated for religious, charitable, and educational purposes. *Id.* Although Congress probably never contemplated such problems involving racial segregation when creating the Internal Revenue Code, the Court interpreted the Congressional statute so that it would conform to the standard of nondiscrimination adopted by our legal culture. Motomura, *supra* note 41, at 562. Accordingly, the Court refused to extend such exemptions to institutions whose activities were "contrary to fundamental public policy." *Bob Jones Univ.*, at 592. Many decisions such as this one have accepted and applied background constitutional norms of racial equality as part of the mainstream public law. See also *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (accepting the background constitutional norm of racial equality as a part of mainstream public law in holding that children restricted to all-black schools were prevented from receiving equal educational opportunities and were thereby deprived of equal protection of laws guaranteed by Fourteenth Amendment).

50. Motomura, *supra* note 41, at 549. The plenary power doctrine begins with the premise that every sovereign nation has the inherent power to forbid the entrance of foreigners within its borders, or to admit them only upon such conditions as it may see fit. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). Thus, in order to promote national security, sovereignty, and self-preservation, our federal government has virtually absolute power to regulate immigration. The doctrine further provides that the power and authority of the United States to prohibit or regulate immigration of aliens is plenary. Accordingly, Congress may choose any agency to carry out its prescribed rules or policies. *Kaorn Yamataya v. Fisher*, 189 U.S. 86 (1903). Evidently, the political branches of our government may employ this power without the threat of judicial review, as long as they do not transcend limits of authority or abuse their discretion. See *Fiallo v. Bell*, 430 U.S. 787 (1977); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). The exercise of this power has oftentimes resulted in the harsh treatment of aliens by systematically wiping out the effects of the individual rights possessed by an alien.

norms to play a large role in decision making and statutory interpretation by reading statutes in the light most favorable to aliens.⁵¹ The implementation of phantom constitutional norms has been vital to the immigrant communities in the United States and has safeguarded employment and property rights which aliens now possess. Many Supreme Court cases have also helped to build up the rights of aliens to where they now possess entitlements under the Due Process Clause,⁵² even in matters involving immigration itself.

The absence of these norms would devastate the alien community by depriving them of the rights they have come to possess. It would further subject noncitizens to practices which are fundamentally unfair. In fact, many of the so-called phantom norms have become so incorporated into case law that they are now regarded as true constitutional norms.⁵³ Part of this ideology forms the basis of the concept of relief from deportation. Just as it would deprive an alien of due process to deport him without a deportation hearing, it would be fundamentally unfair to deport a certain type of alien before having the opportunity to present a case to a judge for discretionary relief.⁵⁴

51. See Motomura, *supra* note 41, at 560.

52. In *Woodby v. INS*, 385 U.S. 276 (1966), the Court held that the government must go beyond its minimal "preponderance of the evidence" standard and establish the deportability of an alien by "clear, unequivocal and convincing evidence." In *Mathews v. Diaz*, 426 U.S. 67 (1976), the Court upheld the proposition that the Constitution protects aliens from deprivations of life, liberty, or property without due process, even if their presence in the country was unlawful, involuntary, or intransitory. The Court further established that aliens' rights had constitutional significance. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court established a three prong test in determining the constitutional sufficiency of INS procedures to deportable aliens. The three prongs look to: 1) the interest at stake for the individual; 2) the risk of an erroneous deprivation of the interest through the procedures used and the probable value of additional procedural safeguards; and 3) the government's interest in avoiding the potential burdens that the additional or substitute procedure would entail. *Id.* at 335. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court ruled that even undocumented aliens were entitled to full due process and equal protection rights. In that case, the court held that "the term 'person' used in the fifth and fourteenth amendments [was] broad enough to include any and every human being within the jurisdiction of the republic," even undocumented alien school children. The Court also decided *Landon v. Plasencia*, 459 U.S. 21 (1982), which finally made real some phantom constitutional rights in its determination that once an alien gains admission into the United States and begins to develop the ties that accompany permanent residence, his constitutional status changes accordingly.

53. See Motomura, *supra* note 41, at 580.

54. New immigration legislation only permits aliens convicted of very minor crimes to apply for relief from deportation. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 has defined this type of alien as a long term legal permanent resi-

IV. AVAILABILITY OF DISCRETIONARY WAIVERS AND EXPLORATION OF THE PARAMETERS OF JUDICIAL DISCRETION UNDER THE IMMIGRATION AND NATIONALITY ACT

The discretionary authority vested in the Attorney General by the INA is delegated to the Commissioner of Immigration and Naturalization and the Executive Office of Immigration Review (EOIR).⁵⁵ This Attorney General's discretionary authority provides:

Without divesting the Attorney General of any of his powers, privileges, or duties under the immigration and naturalization laws, and except as to the Executive Office, the Board, the Office of the Chief Special Inquiry Officer, and Special Inquiry Officers, there is delegated to the Commissioner of Immigration and Naturalization the authority of the Attorney General to direct the administration of the Immigration and Naturalization Service and to enforce the Act and all other laws relating to the immigration and naturalization of aliens. The Commissioner may issue regulations as deemed necessary or appropriate for the exercise of any authority delegated to him by the Attorney General, and may redelegate any such authority to any other officer or employee of the Service.⁵⁶

The EOIR is headed by a Director, who is responsible for the supervision of the Board of Immigration Appeals (BIA) and the Office of the Chief Immigration Judge.⁵⁷ The Director is authorized to redelegate the discretionary authority to the Chairman of the BIA or the Chief Immigration Judge.⁵⁸ Accordingly, the im-

dent who has committed a crime involving moral turpitude which is punishable by less than one year. While the grant of waivers must be low, it is unjust to categorically bar long term residents convicted of more serious crimes. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Division C, 110 Stat. 3009 (Sept. 30, 1996). It is this Comment's position that while not all criminals deserve relief, this type of relief must serve as a "safety valve." While murderers, rapists, child abusers, and other violent offenders (aggravated felons by definition) may not claim a right to a hearing on discretionary relief, there is a type of criminal, for example, a long term resident of the United States who is convicted of possession of marijuana for personal use, who deserves a second chance. People make mistakes, and they must not be categorically barred from applying for relief. This is not to say that they must be granted relief, but they must have the opportunity to present their case before an impartial immigration judge.

55. 8 C.F.R. § 2.1 (1996).

56. *Id.*

57. *Id.*

58. *Id.*

migration judges are also vested with the authority to grant discretionary relief.⁵⁹

Former Section 212(c) was the source of the most common form of discretionary relief for criminal aliens. This relief was employed primarily in cases of narcotics offenses or crimes of moral turpitude.⁶⁰ Former Section 212(c) provided:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful and unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of [Section 212(a) of the Act].⁶¹

To be eligible for Section 212(c) relief, the alien must have maintained a lawful unrelinquished domicile for seven consecutive years.⁶² An alien who had been convicted of one or more aggravated felonies and had served a term of imprisonment of at least five years was not eligible for Section 212(c) relief.⁶³ The burden was on the alien to establish his eligibility for this relief.⁶⁴

Beyond the statutory requirements, an alien requesting Section 212(c) relief was required to demonstrate entitlement to

59. *Id.*

60. Section 212(c) relief was available in deportation proceedings only for grounds analogous to grounds of excludability waiveable under Section 212(a) of the Immigration and Nationality Act. *Matter of Hernandez-Casillas*, BIA Int. Dec. 3147 (Jan. 11, 1990); *Matter of Wadud*, 19 I & N Dec. 182 (BIA 1984); *Matter of Granados*, 16 I & N Dec. 726 (BIA 1979).

61. Immigration and Nationality Act § 212(c), 8 U.S.C. 1182(c) (1988) (current version at 8 U.S.C. 1182(c) (1994)). Although the statute described a waiver under Section 212(c) of the Act which was available to aliens seeking to eliminate a ground of inadmissibility upon application to enter the United States, it was interpreted to include availability for relief in deportation proceedings as well where the alien had not departed from the United States subsequent to the acts that rendered him excludable. See *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Matter of Granados*, 16 I & N Dec. at 726; *Matter of Hom*, 16 I & N Dec. 112 (BIA 1977); *Matter of Wadud*, 19 I & N Dec. at 182; *Matter of Silva*, 16 I & N Dec. 26 (BIA 1976). See also *Matter of Hernandez-Casillas*, BIA Int. Dec. 3147 (Jan. 11, 1990).

62. *Jaramillo v. INS*, 1 F.3d 1149 (11th Cir. 1993). The date to commence computation of the seven year period for Section 212(c) relief was the date when the alien was admitted for lawful permanent residence. *Matter of Newton*, 17 I & N Dec. 133 (BIA 1979).

63. *Matter of Meza*, BIA Int. Dec. 3146 (May 22, 1991); *Matter of A-A*, BIA Int. Dec. 3176 (May 15, 1992); *Matter of Ramirez-Somera*, BIA Int. Dec. 3185 (Aug. 11, 1992).

64. *Matter of Edwards*, BIA Int. Dec. 3134 (May 2, 1990); *Matter of Marin*, 16 I & N Dec. 581, 583 (BIA 1978).

a favorable exercise of discretion.⁶⁵ In determining whether a grant of Section 212(c) relief appeared to be in the best interest of the United States, the immigration judge was required to balance the adverse factors indicating the alien's undesirability as a permanent resident with the social and human considerations presented on his behalf.⁶⁶

In order to provide the framework for an equitable application of discretionary relief, the BIA enumerated several factors to be considered in deciding whether Section 212(c) relief should be granted as a matter of discretion.⁶⁷ Among the factors deemed adverse to a respondent's application were "the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as permanent resident of this country."⁶⁸ Favorable considerations included such factors as:

family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).⁶⁹

The immigration judge exercised discretion in favor of the alien when the positive factors qualitatively outweighed the adverse factors.⁷⁰

65. *Matter of Marin*, 16 I & N at 586.

66. *Id.*

67. *Id.*

68. *Id.* Although in an individual case, one or more of these adverse factors could ultimately be determinative of whether Section 212(c) relief was in fact granted, their presence did not preclude a respondent from presenting evidence in support of a favorable exercise of discretion. *Gonzalez v. INS*, 996 F.2d 804 (6th Cir. 1993).

69. *Matter of Marin*, 16 I & N at 584-85.

70. *Id.* at 586.

In cases that involved serious negative factors, such as serious crimes or repeated criminal offenses, an applicant was required to make a showing of "unusual or outstanding equities."⁷¹ Applications involving convicted aliens were evaluated on a case-by-case basis,⁷² with rehabilitation a factor to be considered in the exercise of discretion.⁷³ An immigration judge was permitted to deny Section 212(c) relief as a matter of discretion, even when unusual or outstanding equities were shown.⁷⁴ Indeed, the BIA determined that Section 212(c) relief was not an indiscriminate waiver for all who demonstrated statutory eligibility for such relief.⁷⁵ Instead, the Attorney General and her delegates were required to determine as a matter of discretion whether an applicant warranted the desired relief.⁷⁶

The exercise of this discretionary power varied greatly between immigration judges nationwide and within different EOIR districts. For example, in three and a half years of serving as an immigration judge in the Criminal Alien Program, one Miami immigration judge recalled granting only four or five Section 212(c) discretionary waivers.⁷⁷ The judge stated that the reasons for this were because while in prison or INS detention, the alien really had no track record, could not prove rehabilitation, and was oftentimes unrepresented.⁷⁸ Waivers from such judges⁷⁹

71. *Matter of Edwards*, 20 I & N Dec. 191 (BIA 1994); *Matter of Buscemi*, 19 I & N Dec. 628 (BIA 1988); *Matter of Marin*, 16 I & N at 586. Upon consideration of the record as a whole, the immigration judge was required to find that the respondent had demonstrated sufficient unusual or outstanding equities necessary to overcome the very serious negative factor of his or her criminal activity.

72. The Board of Immigration Appeals determined that an immigration judge may not reassess an alien's ultimate guilt or innocence of a criminal conviction. *Matter of Roberts*, BIA Int. Dec. 3148 (May 1, 1991). Therefore, an immigration judge is bound by the record of conviction and must consider the respondent to be guilty of the offense for which he or she was convicted. *Id.*

73. *Id.* See *Matter of Edwards*, BIA Int. Dec. 3134 (May 2, 1994).

74. *Matter of Marin*, 16 I & N at 586.

75. *Gonzalez v. INS*, 996 F.2d at 804.

76. *Id.* See also *Ashby v. INS*, 961 F.2d 555, 557 (5th Cir. 1992). The *Ashby* court recognized that the Attorney General had unusually broad discretion in granting and denying Section 212(c) waivers, and the alien bore the difficult burden of demonstrating to the Attorney General that the application merited favorable consideration.

77. Telephone Interview with United States Immigration Judge (Mar. 15, 1996).

78. *Id.* Further, the fact that the alien was incarcerated generally meant that he had been convicted of one serious crime or a string of crimes. Aliens with long criminal records or a conviction for a particularly serious crime necessarily had a slimmer chance of obtaining relief.

79. *Id.* This judge believed that the Immigration and Nationality Act provision allowing Section 212(c) waivers was an excellent measure. Such discretionary relief served as a

were few in number, however, statistics from the Executive Office for Immigration Review clearly show that this immigration judge's restrained exercise of power was the exception.⁸⁰ The decisions of immigration judges were far from uniform.

The BIA was given authority to review discretionary decisions of immigration judges de novo in order to ensure uniformity of decision-making regarding Section 212(c) waivers.⁸¹ On appeal from a Section 212(c) decision, the alien was permitted to present testimony and evidence so that the BIA could re-apply the *Matter of Marin* standards⁸² to the facts of the case and make its own determination. If unsatisfied with the appellate result, the alien could then appeal to the circuit court.⁸³ Decisions of the BIA were reviewable under an abuse of discretion standard⁸⁴ and

safety valve for people who had spent a long time in the United States and allowed them the opportunity to show that they merited relief from deportation, as immediate deportation is often viewed as a harsh punishment reserved for serious criminal activity.

80. CHART: EXECUTIVE OFFICE OF IMMIGRATION REVIEW STATISTICS FOR ALL IMMIGRATION JUDGES:

	<u>GRANTS</u>	<u>DENIALS</u>	<u>OTHERS</u>	<u>TOTAL</u>
FY89	970	802	276	2,048
FY90	1,049	985	421	2,455
FY91	1,374	1,242	645	3,261
FY92	1,591	1,705	728	4,024
FY93	1,686	1,696	732	4,114
FY94	1,778	1,678	678	4,134
FY95	2,303	2,012	1,015	5,330

NOTE: The "others" category reflects aliens who either withdrew their applications; were found to be ineligible after filing; or had their cases terminated upon a finding that they were citizens.

81. *Matter of Burbano*, BIA Int. Dec. 3229 (Sept. 13, 1994).

82. See *supra* notes 65-71 and accompanying text.

83. Subsequent to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Division C, 110 Stat. 3009 (Sept. 30, 1996), this review is no longer available.

84. *Balani v. INS*, 669 F.2d 1157 (6th Cir. 1982). This court stated that "[e]ven where an appellate court has power to review the exercise of such discretion, the inquiry is confined to whether such situation and circumstances clearly show an abuse of discretion, that is, arbitrary action not justifiable in view of such situation and circumstances." *Id.* at 1161 (quoting *NLRB v. Guernsey-Muskingum Electric Co-op, Inc.*, 285 F.2d 8, 11 (6th Cir. 1960) (quoting *Hartford-Empire Co. v. Obear-Nester Glass Co.*, 95 F.2d 414, 417 (9th Cir. 1948)). The Sixth Circuit described the appropriate standard of review as follows: in determining whether the Board of Immigration Appeals abused its discretion, the court is required to decide whether the denial of discretionary relief was made "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group." *Balani*, at 1161. See also *Casalena v. INS*, 984 F.2d 105 (4th Cir. 1993). Most circuits have adopted similar language. In the absence of a demonstration that the Board of Immigration Appeals acted in

were upheld unless found arbitrary or capricious.⁸⁵ The mere fact that the BIA may have reached a different result was inconsequential.⁸⁶

It is apparent that the former Section 212(c) scheme allowed for abuse on the part of an alien who wanted to postpone his deportation. Moreover, it is evident that the EOIR, BIA, and INS did not always cooperate in order to carry out the express intent of Congress, because waivers were granted too frequently.⁸⁷ It is unclear whether INS ever had an affirmative policy of appealing the grants of Section 212(c) waivers or whether the BIA merely affirmed the appealed grants, but it is indisputed that the large number of grants resulted in the release of these criminal aliens into the streets. Where the BIA was bound to ensure uniformity of decision-making regarding Section 212(c) waivers, it should have used its *de novo* review to ensure that the *Matter of Marin* standards were applied uniformly.

The new Section 240A(a) relief purports to restrict the number of criminal aliens who are granted permission to remain in the United States and provides:

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien (1) has been an alien lawfully admitted for permanent residence for not less than five years, (2) has resided in the United States continuously for seven years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.⁸⁸

This "new section 240A establishes revised rules for the type of relief that [was] . . . available to excludable and deportable aliens under section 212(c)."⁸⁹ This provision is "intended to replace and modify the form of relief [previously] granted under section 212(c) of the INA."⁹⁰

an irrational or impermissible manner, the court was not permitted to rebalance the equities.

85. *Balani*, 669 F.2d at 1161.

86. *Id.*

87. See statement of Sen. Abraham *supra* note 8.

88. Immigration and Nationality Act § 240A(a).

89. 142 CONG. REC. H10841-02, H10896 (daily ed. Sept. 24, 1996) (Joint Explanatory Statement of the Committee of Conference).

90. *Id.*

Congress explicitly stated that this relief is intended only for "highly unusual cases involving outstanding aliens."⁹¹ But apart from defining extraordinary circumstances necessary for a grant of this relief to include the "insignificance of the crime" and the "substantial contributions to society made by the alien,"⁹² Congress did not enumerate any guidelines or standards by which to evaluate the applications for cancellation of deportation.

V. ARGUMENTS AGAINST BROAD JUDICIAL DISCRETION

It has been argued that although the deportation process possesses many of the protections available in any legal system, relief from deportation has been restricted dramatically by the broad discretion vested in the Attorney General.⁹³ In some instances, critics have urged that "discretion has been used as a catchword that justifies potentially arbitrary immigration decision making . . . and [which] has often become a mantle insulating immigration decisions from meaningful review."⁹⁴ These critics strongly disapprove of the plenary power doctrine.⁹⁵ They also fear the immunization of immigration legislation against constitutional review⁹⁶ and the exercise of discretion without meaningful and manageable standards.⁹⁷

91. *Id.*

92. *Id.*

93. Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861 (1994) (arguing that aliens are outsiders in our country, not only separate from our national community, but outsiders to our legal system).

94. *Id.* at 862.

95. *Id.* Heyman states that although "the plenary power doctrine technically applies only to constitutional attacks on immigration legislation, its judicial adoption reflects a mood decidedly unfavorable to aliens." *Id.* at 862. This mood is intensified by the fact that "an alien seeking a favorable exercise of discretion is usually someone subject to deportation. Thus, having violated our immigration laws, she then turns to the system seeking discretionary relief. She appeals to our compassion, seeking to remain in this country. Yet such a claim seems incompatible with an entitlement." *Id.* at 863. Heyman then states that it is easy to see how discretionary decisionmaking regarding aliens "would seem an unlikely candidate for rigorous judicial review." *Id.*

96. *Id.* at 864. Indeed, many immigration decisions are developed through administrative action and the courts have recently accorded great deference to agency construction of silent or ambiguous statutes. *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984). "Although the Administrative Procedure Act permits a reviewing court to set aside agency action found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,' it also protects 'matters committed to agency discretion' from judicial review." 5 U.S.C. §§ 701, 702, 706 (1988).

97. Heyman, *supra* note 93. Heyman states that discretion seems to mean "power unconstrained by legal rules." *Id.* at 865. In that sense, it seems that "the notion of review

The first argument advanced against broad judicial discretion is the notion that the decision-maker acts without constraint and proceeds differently from case to case.⁹⁸ Supporters of this argument believe that unless discretion is guided by stringent legal standards, "the possibility of inconsistent and arbitrary decision making is always present."⁹⁹ Without guidelines placed on the decision-maker, discretion can easily be viewed as license, especially when the finality of a decision makes the unanswerable to any reviewing body.¹⁰⁰

A second argument against broad judicial discretion is that discretion never remains constant throughout all cases and among all decision-makers.¹⁰¹ Each judge is constrained by his own socialization and training.¹⁰² In this respect, it is difficult to find a body of shared social and ethical values among decision-makers.¹⁰³ Consequently, results will necessarily differ from one judge to another and results of Section 212(c) cases will lack uniformity.¹⁰⁴

A third argument suggests that within the area of discretionary decision making, a judge is less likely to be reviewed than when guided by statutes, regulation, and precedent.¹⁰⁵ Ironically, "discretionary decisions of this kind are justified not because they are correct, but because they are close enough, and making a finer determination is either not possible or not worth the time and effort."¹⁰⁶

A fourth argument claims that immigration judges are lesser officials and the quality of their decisions may not warrant deference.¹⁰⁷ This argument has been further enhanced by the influx

of discretion is doomed for the following reason: one cannot determine if discretion is abused if no determinate standards exist for its use." *Id.*

98. *Id.* at 878.

99. *Id.*

100. *Id.* at 878-83.

101. *Id.* at 882.

102. *Id.* at 886.

103. *Id.*

104. *Id.* See *Matter of Burbano*, BIA Int. Dec. 3229 (Sept. 13, 1994) (stating that the most important policy objective in applying a de novo standard of review for Section 212(c) cases is to assure uniformity of decision-making).

105. Jeffrey L. Romig, *Administrative Review of Cases Involving the Exercise of Discretion Under Section 212(c): Should the Board of Immigration Appeals Adopt an "Abuse of Discretion" Standard?*, 9 GEO. IMMIGR. L.J. 63, 72 (1995).

106. Heyman, *supra* note 93, at 884 (quoting Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 269-70 (1990)).

107. Romig, *supra* note 105, at 72 (1995).

of new, inexperienced immigration judges who are vested with great discretionary authority immediately upon their induction.¹⁰⁸

These critics, and even some courts, appear to be under the mistaken impression that Section 212(c) relief was rarely ever granted.¹⁰⁹ In *Gonzalez v. INS*,¹¹⁰ the INS was asked to provide the circuit court panel with BIA decisions which granted Section 212(c) discretionary relief to aliens convicted of drug offenses. Although more than three thousand of the BIA's decisions had been published at that time,¹¹¹ the INS could only provide the panel with a single decision granting Section 212(c) relief to an alien.¹¹² The INS was unable to provide the court with any other decisions, published or unpublished, in which the BIA exercised its discretion in favor of an alien convicted of a serious drug offense.¹¹³ The *Gonzalez* court noted that the BIA does not keep

108. *Id.*

109. In fact, these critics of broad judicial discretion did not realize how lucky criminal aliens applying for Section 212(c) relief were. The same "unfettered" judicial discretion that they criticize was instrumental in granting Section 212(c) relief to over half of those that applied. See CHART, *supra* note 80.

110. *Gonzalez*, 996 F.2d at 810. *Gonzalez* was convicted of conspiracy to possess with intent to distribute 500 grams or more of cocaine and possession with intent to distribute approximately two kilograms of cocaine. She was found deportable as charged under Section 1251(a)(2)(A)(iii) for commission of an aggravated felony and Section 1251(a)(2) (B)(I) for trafficking of controlled substances. The immigration judge denied her request for Section 212(c) relief after he "considered the testimony and evidence in a manner consistent with the Marin balancing approach and the factors enumerated by the BIA and concluded that *Gonzalez* had not demonstrated sufficiently outstanding or unusual equities to warrant Section 212(c) relief." *Id.* at 809. Specifically, while the immigration judge noted that many of her positive factors were commendable, they did not rise to the level of unusual or outstanding equities necessary to negate the nature, severity, and recency of the drug crime. He further refused to find that rehabilitation had been established where the respondent "[sought] to place the blame of her offense on her co-defendants and [did] not accept responsibility for her own actions." *Id.* On appeal, the BIA rebalanced the relevant factors and concluded that discretionary relief was not warranted. On appeal to the Sixth Circuit, the respondent asserted that the BIA had abused its discretion in failing to weigh the respondent's equities in her favor. She argued that the denial of discretionary relief based largely upon a conviction for a single crime was an abuse of discretion constituting "a de facto ruling that immigrants convicted of a single, though admittedly, serious drug crime will never warrant a favorable grant of discretionary relief even though Congress has expressed a contrary intent." *Id.*

111. UNITED STATES DEPARTMENT OF JUSTICE, LEGAL ACTIVITIES 1992-1993 at 69 (1992).

112. *Gonzalez*, 996 F.2d at 810. For the only Section 212(c) grant, see *Matter of Morobel*, A30 924 038 (BIA 1993) (granting Section 212(c) relief to an alien who had been convicted for an attempt to sell \$20 worth of cocaine).

113. *Gonzalez*, 996 F.2d at 810. The court recognized that the BIA hears only a small percentage of the total number of cases heard by immigration judges yet stated that "this

statistics of grants and denials of Section 212(c) relief with regard to drug cases or any cases other than the gross numbers of appeals.¹¹⁴ Under an abuse of discretion standard, the court reluctantly affirmed the BIA, stating that although it would have come to a different conclusion, there was no evidence to suggest that the BIA acted in an irrational or impermissible manner.¹¹⁵ As such, the BIA's decision was left undisturbed. In dictum, however, the court expressed disapproval that the Attorney General generally failed to exercise discretion favorably to certain classes of aliens.¹¹⁶

The *Gonzalez* decision sheds light on an interesting situation: the administration's unwillingness to "come clean" with the huge number of former Section 212(c) grants, and consequently, the huge numbers of criminal aliens released into society. In light of the alarming number of grants, it is not surprising that the number of former Section 212(c) grants was not publicized.

Congress recognized this problem during its latest attempt to reform discretionary relief. In an effort to ensure that discretionary relief would be more difficult to obtain, Congress effectively eliminated what was left of the Attorney General's discretion. While the loose *Matter of Marin* standards were not able to ensure the conservative grant of Section 212(c)-type relief, perhaps Congress should have considered a different solution to the problem other than eliminating administrative discretion in the immigration context.

VI. THE EXAMPLE OF CRIMINAL SENTENCING GUIDELINES

In response to the broad disparity in criminal sentencing across the nation, Congress voted to enact and the President signed into law the Sentencing Reform Act of 1984 (SRA).¹¹⁷ Un-

does not diminish the fact that, in cases which do eventually reach the BIA, the BIA's lack of the exercise of discretion left the impression that it had a policy of not granting a Section 212(c) waiver in a case where an alien has been convicted of a serious drug offense." *Id.* The court went on to declare that "such a policy, if it does exist, appears to be an unauthorized assumption by the INS of a position properly to be made by Congress." *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE (1989). Congress' three basic objectives were: 1) "to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system," *Id.* at 2; 2) to seek "uniformity in sentencing by narrowing the wide disparity in sentences im-

der the SRA,¹¹⁸ Congress authorized the creation of the United States Sentencing Commission (Commission) to address the problem of sentencing disparity inherent in a criminal sentencing system which granted "unfettered discretion . . . [to] judges and parole authorities responsible for imposing and implementing the sentence."¹¹⁹ Federal courts began sentencing under the initial set of guidelines on November 1, 1987.¹²⁰ At the time, the guidelines were to apply to approximately ninety percent of all cases in the federal courts.¹²¹

The Commission created categories of offense behavior and offender characteristics and prescribed "guideline ranges that specifi[ed] an appropriate sentence for each class of convicted persons, to be determined by coordinating the offense behavior categories with the offender characteristic categories."¹²² The SRA then required federal judges to impose upon convicted defendants a sentence consonant with these sentencing guidelines,¹²³ unless there was a factor present for which the guidelines did not adequately account.¹²⁴

posed by different federal courts for similar criminal conduct by similar offenders," *Id.* at 3; and 3) to seek "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." *Id.*

118. Pub. L. No. 98-473, 98 Stat. 2017 (codified at 28 U.S.C. §§ 991-998 (Supp. V 1987)).

119. S. REP. NO. 225, 98th Cong., 2d Sess. 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221-29.

120. HUTCHISON & YELLEN, *supra* note 117, at 2. These guidelines were drafted by the U.S. Sentencing Commission, "an independent agency in the judicial branch composed of seven voting and two nonvoting, ex officio members." *Id.* at 1. The principal purpose of the Commission was to "establish sentencing policies and practices for the federal criminal justice system that would assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." *Id.* The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of the Sentencing Reform Act. *Id.*

121. *Id.*

122. HUTCHISON & YELLEN, *supra* note 117, at 2.

123. *Id.* "The statute contemplates the guidelines will establish a range of sentences for every coordination of categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum imprisonment cannot exceed the minimum by more than the greater of 25 percent or six months." 28 U.S.C. § 994(b)(2) (1994).

124. S. REP. NO. 225, 98th Cong., 2d Sess. 38 (1993), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221-29. There was substantial debate in Congress about what impact the Act and the guidelines would have upon judicial discretion and prosecutorial discretion. Despite warnings that prosecutorial discretion was being enhanced at the expense of judicial discretion, Congress and the President determined to go ahead, and the Sentencing Reform Act became law.

In a case which presents "an aggravating or mitigating circumstance . . . that was not adequately taken into consideration by the Sentencing Commission,"¹²⁵ the SRA allows the judge to depart from the guidelines and sentence outside the range, although the judge is required to specify the reasons for doing so.¹²⁶ "When a judge encounters an atypical case, one to which a particular guideline applies linguistically but in which conduct significantly differs from the norm, the court may consider whether a departure is warranted."¹²⁷

In creating the guidelines, the Commission sanctioned the use of departure for "unusual cases outside the range of the more typical offenses, yet expected these occurrences to be rare."¹²⁸ The Commission articulated two basic reasons for this departure policy. First was the difficulty in creating "a single set of guidelines which encompasses the vast range of human conduct potentially relevant to a sentencing decision."¹²⁹ Second was the Commission's belief "that despite the legal freedom to depart from the guidelines, the courts would not do so very often."¹³⁰ Moreover, if the judge departs from the guideline range, an appellate court may review the reasonableness of the departure.¹³¹ The Commission believed that by monitoring courts' departures from the guidelines and their stated reasons for doing so, it would be able to create more accurate guidelines.¹³²

This sentencing system provides the most practical and comprehensive manner in which to effectively punish and deter criminals for the commission of specific crimes. The argument is further bolstered by the fact that a sentencing judge may depart from the guidelines for important distinctions which are not fully considered.¹³³ This is especially important when it is impractical and impossible to create a sentencing system which predicts

125. HUTCHISON & YELLEN, *supra* note 117, at 8. "In principle, the Commission, by specifying that it has adequately considered a particular factor, can prevent a court from using it as grounds for departure." *Id.*

126. *Id.* at 2.

127. *Id.* at 8. The Commission has set out a few factors, such as race, sex, national origin, creed, religion, and socioeconomic status, that the court cannot take into account as grounds for departure. *Id.*

128. *Id.*

129. *Id.* at 9.

130. *Id.*

131. *Id.* at 2.

132. *Id.* at 9.

133. *Id.*

every conceivable feature of criminal behavior. Such a system would become tremendously burdensome and would "compromise the certainty of punishment and its deterrent effect."¹³⁴ On the other hand, a retreat to the simple, broad-category approach granting judges the "discretion to select the proper point along a broad sentencing range"¹³⁵ would result in "correspondingly broad disparity in sentencing,"¹³⁶ with different courts exercising their discretionary powers in different ways.¹³⁷

Critics argue that in the case of mandatory minimum sentences, many criminals are not receiving punishment that fits the crime.¹³⁸ They contend that while many prisoners are serving life sentences for the sale of marijuana, technically a drug trafficking crime, other criminals are serving lesser sentences.¹³⁹ Rapists, robbers, and murderers are being paroled to make room for first-time drug offenders serving lengthy, mandatory-minimum sentences as prescribed by the SRA.¹⁴⁰ Ironically, the crackdown on the drug problem appears to leave other major offenses virtually and comparatively unpunished.

Critics further contend that such a system takes away virtually all discretion from judges where a crime perfectly fits a

134. *Id.* at 3.

135. *Id.* at 34.

136. *Id.*

137. *Id.*

138. In *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), the Court upheld a mandatory life sentence without the possibility of parole for a first-time offender for possession of cocaine. The Michigan statute, like the federal guidelines, prevented the sentencing judge from considering any mitigating factors or the defendant's individualized characteristics. In affirming the sentence, the Court sent a clear signal that "criminal sentencing and punishment are the tasks of the legislature, not the courts." See Mark A. Paschke, *Harmelin v. Michigan: Punishment Need Not Fit the Crime*, 23 Loy. U. Chi. L.J. 273 (1992). Paschke states that "[c]onsequently, legislative discretion in criminal sentencing may go unchecked, resulting in no constitutional protection against punishment that does not 'fit' the crime." *Id.* at 274.

139. Paschke, *supra* note 138.

140. *Harmelin*, 111 S. Ct. at 2705-07 (Kennedy, J., concurring). Justice Kennedy determined that "society considers the possession of drugs to be more serious than second degree murder, rape, and armed robbery." *Id.* In his article, however, Paschke indicated that "[p]ublic opinion polls demonstrate that in general, murder and rape are considered more serious offenses than drug offenses." Paschke, *supra* note 138, at 305 n.224. He claimed that "[t]his is evidenced by the fact that a clear majority of the public favors capital punishment for murder and rape, but not for dealing drugs." *Id.* However, there is evidence that indicates otherwise. See President's Address to the Nation on the National Drug Control Strategy, 1989 PUB. PAPERS 1136 (Sept. 5, 1989) (stating that drugs are the gravest domestic threat facing our nation today).

particular category of the sentencing guidelines and vests the prosecutors with an extraordinary degree of power. Yet, a criminal sentencing judge may depart from the guidelines to weigh the defendant's criminal history against any circumstance that could mitigate the degree of punishment.

Criminal sentencing guidelines have been in effect for nearly a decade. The guidelines provide for uniformity and predictability. While judges may depart from these guidelines, they are aware of the fact that departure is not generally warranted. Still, an attorney with a good case will be able to make an argument for departure.

The immigration guidelines imposed by the BIA for the adjudication of former Section 212(c) applications¹⁴¹ were much more flexible than these sentencing guidelines. They provided more discretion to the Attorney General and her delegates, who although in the best position to evaluate the factors present in the alien's case,¹⁴² tended to grant relief too generously. Unlike the criminal sentencing guidelines, the guidelines set up in *Matter of Marin* merely provided guidance to immigration judges in exercising discretion and in no way deterred them from weighing additional factors in favor of the alien.¹⁴³ The same broad discretion which sparked Congress to initiate the criminal sentencing guidelines existed with the Attorney General under former legislation.¹⁴⁴

Although decision-making of immigration judges does not go unchecked, these immigration judges apparently contributed to the huge number of grants of former Section 212(c) waivers. Stringent guidelines similar to the criminal sentencing guidelines

141. *Matter of Marin*, 16 I & N Dec. at 581.

142. In *Matter of Burbano*, BIA Int. Dec. 3229 (Sept. 13, 1994), the BIA commented that "the immigration judge who presides over a case has certain observational advantages due to his or her presence at the exclusion or deportation hearing." *Id.*

143. In *Matter of Edwards*, 20 I & N Dec. 191 (BIA 1994), members of the Board of Immigration Appeals stated that "it is the Board's purpose to provide guidance in the exercise of discretion in these areas but . . . it is not the Board's intention to provide a formula that should be rigidly followed." *Id.* Another member of the BIA stated that "[i]t may well be that any attempt to formulate a method for exercising 'discretion' is doomed to be either too broad or too narrow, and that rough formulas may be all that one can devise." *Id.*

144. The Attorney General was given the discretion to grant such waivers by statute and it was her duty to define it. Had the Attorney General promulgated regulations for the immigration judges to follow, they would not have had free reign to grant waivers to criminal aliens.

would have benefited the immigration system. Such guidelines could easily be enacted by Congress or promulgated by the Attorney General in the Code of Federal Regulations. The immigration judges would then have the ability to hear all cases and to depart from the guidelines if justified, yet would be aware of the strong congressional presumption against departure from the guidelines.

Just as previous legislation, the immigration reform law fails to give any guidelines to the Attorney General and merely states that relief from deportation is extraordinary relief.¹⁴⁵ It sets forth vague standards, but fails to define when relief should be granted. Where the law is so ambiguous, results can never be equitable. It is the absolute duty of the Attorney General to define these guidelines to ensure that relief is correctly awarded. Relief will either be too freely granted or too often denied. It is unclear at this point whether the new system and its standards will be uniformly applied.

VII. CONCLUSION

Under previous law, when an alien was found deportable, he or she was permitted to request relief from deportation if *prima facie* eligible for any such relief. In essence, the alien asked the judge to consider any redeeming characteristics the alien still possessed despite his or her criminal activity. AEDPA, however, eliminated virtually all relief formerly available to long-term legal residents and precluded immigration judges from taking into account the seriousness of the crimes or the individual circumstances of each alien. Thus, all noncitizens were to be treated alike, even those who had not committed violent offenses, those who were not repeat offenders, and those who were longtime residents of the United States and had rehabilitated themselves. It was, and still is, a matter of fundamental fairness to allow these aliens to petition the judge for relief. To refuse such review would be in conflict with the due process rights which aliens in removal proceedings possess.

Indeed, judicial discretion benefits the alien and the deportation process in various ways. Discretionary power is given to courts in order to individualize the application of law, by making

145. See Joint Explanatory Statement of the Committee of Conference, *supra* note 89.

it flexible and adaptable to circumstances.¹⁴⁶ Without it, the law is more likely to be criticized as harsh and unjust.¹⁴⁷ Formerly, the Attorney General was vested with the authority to exercise discretion in order to minimize the harsh consequences that deportation imposes on aliens and their families by allowing, in certain circumstances, a waiver of deportation.¹⁴⁸ Now, most criminal aliens are no longer eligible for this relief, and they are subject to a more stringent law requiring immediate deportation upon a final order of deportation. These aliens are no longer allowed to present their arguments to a judge and to prove that they have accepted full responsibility for their criminal behavior, shown attempts at and proof of rehabilitation, and contributed to society in a way that would make them favorable candidates to remain in the United States. Although the cancellation of deportation is far from an entitlement, there should be a larger pool of candidates statutorily eligible to petition for discretionary relief.

While indiscriminately allowing any convicted alien to remain in the United States imposes a huge cost on society, a system which mandates the immediate deportation of all criminal aliens imposes unduly harsh consequences on someone who has spent a significant amount of time and effort settling in the United States.

Critics of broad judicial discretion suggest that such discretion has led to procedural arbitrariness and great injustice to the criminal alien population.¹⁴⁹ What they do not realize is that the discretion they criticize is the same discretion that led to the grant of over half of all Section 212(c) waivers in the last eight years. While there must be some solution to the disparity in discretionary relief, discretion is too important to eliminate. The Attorney General should take greater responsibility in promulgating appropriate regulations for immigration judges to follow. In the alternative, Congress should consider setting reasonable guidelines which the Attorney General and her delegates must follow unless, in the judge's opinion, there is good reason to de-

146. *Gonzalez*, 996 F.2d at 811 (quoting DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 363 (1980)).

147. *Id.* at 811.

148. *Id.* "Deportation is a drastic measure and at times the equivalent of banishment or exile." *Id.* "It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948)).

149. See *supra* Part V.

part. As with the criminal sentencing guidelines, departure in the immigration context should require a written justification. Stringent standards which subject immigration judges to immediate reversal at the BIA will remind them of congressional intent to make relief extraordinary. At the same time, justified departure would allow for relief for those who made a terrible mistake, but who have rehabilitated and have contributed to society. It is in this context that the preservation of discretion in the criminal alien context would yield greater equity in the long run to both aliens and the judicial system.

The Attorney General has been vested with the discretion to determine whether allowing the alien to remain in the United States is in the best interest of our society because the Attorney General, and the immigration judges as her delegates, are in the best position to do so.¹⁵⁰ Many were outraged that the majority of former Section 212(c) cases were granted, but, by categorically barring almost all classes of aliens from applying for relief, Congress has unnecessarily removed almost all of this discretion. An alien, previously eligible for former Section 212(c) relief, no longer has the opportunity to prove his case before an impartial judge. The judge will no longer evaluate the alien's demeanor and sincerity. An alien who has committed a single offense, served out a minimal sentence with time off for good behavior, assimilated back into society, compiled a good and continuous employment history since his release from prison, and has begun on a path of rehabilitation, is no longer able to obtain relief.

While we must impose a difficult burden on those attempting to establish eligibility for relief, we must not limit eligibility as drastically as it has been by recent legislation. In order to pro-

150. A Miami immigration judge stated that he would feel totally deprived if he did not have the opportunity to observe the alien in court. He stated that there is an important subjective component in the granting of a discretionary waiver which is essential in determining the alien's eligibility for relief. This immigration judge remarked that he begins to assess the alien from the moment he walks into the courtroom. Among many factors, this immigration judge assesses the way the aliens walk, the manner in which they carry themselves, whether they maintain eye contact and whether they fidget in their seats. He stated that a judge cannot decide on gut feeling alone, but that one develops a sixth sense after years of sitting on the bench. It becomes easier to distinguish between those that are lying and those who are stretching the truth. He also stated that in close cases, he enters into dialog with the alien. Sometimes he may ask, "How do I know you're not going to commit these crimes again?" or "Tell me something about yourself" Oftentimes, this answer will put the alien over the top. Telephone Interview with United States Immigration Judge (Mar. 15, 1996).

tect the due process rights which resident aliens possess in immigration proceedings, the Attorney General must retain the discretionary authority to hear all deserving cases and grant waivers of deportation when appropriate.

JULIE K. RANNIK*

* J.D. Candidate 1997, University of Miami School of Law.