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COLLATERAL DAMAGE: DRUG ENFORCEMENT & ITS IMPACT ON THE DEPORTATION OF LEGAL PERMANENT RESIDENTS

WILBER A. BARILLAS*

Abstract: The United States' legislation and jurisprudence regulating the deportation of legal permanent residents is harsh by many standards. The harshness of the legal regime is particularly acute as it relates to minor drug crimes. Under current U.S. law, possession of a single pill of Xanax leads to mandatory detention and can even lead to deportation. This Note explores the impact that the United States' drug policy has had on deportation law, the current legislative regime surrounding drug-based deportations, the changing landscape of drug enforcement, and the lack of meaningful protection that current legislation and jurisprudence affords permanent residents facing deportation due to minor drug crimes. Finally, this Note argues that the harshest aspects of the United States' drug-based deportation laws can be mitigated, either via the legislature or the judiciary, so that only truly dangerous criminal non-citizens face the prospect of mandatory detention and deportation.

INTRODUCTION

Jerry Lemaine legally immigrated to New York from Haiti when he was three years old.¹ He took advantage of the educational opportunities available to him in the United States and enrolled at the Hunter Business School to earn a degree in nursing.² He helped financially support his divorced mother and his sister who suffered from a brain disorder.³ Nevertheless, Mr. Lemaine is subject to a different standard of justice within the U.S. legal system because of his status as a legal

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¹ Nina Bernstein, *How One Marijuana Cigarette May Lead to Deportation*, N.Y. TIMES, Mar. 31, 2010, at A17.

² *Id.* Jerry Lemaine was majoring in nursing studies. *Id.*

³ *Id.*

permanent resident.⁴ Acts that would have only minor consequences for citizens can have dire consequences for someone like Mr. Lemaine.⁵

In January 2007, police officers found a marijuana cigarette in Mr. Lemaine's pocket.⁶ Following the counsel of a lawyer, Mr. Lemaine pled guilty and paid the \$100 New York penalty for possession of marijuana.⁷ Soon after his guilty plea, immigration authorities arrested Mr. Lemaine and placed him in a detention center in Texas.⁸

Mr. Lemaine spent three years in various Texas detention centers as his case worked its way up the court systems.⁹ While in the detention centers, Mr. Lemaine was subject to physical and verbal racial abuse, lost forty-five pounds, and suffered from depression.¹⁰ When he was at his lowest point, Mr. Lemaine had to be placed on a ten day suicide watch.¹¹

The government targeted Mr. Lemaine because he had a prior charge for possession of marijuana—a charge from when Mr. Lemaine was fifteen, which the court had dismissed.¹² Mr. Lemaine was sent to a Texas detention center so that the case could be tried in the Fifth Circuit, which is known as a deportation friendly circuit.¹³ Under Fifth Cir-

⁴ *Id.*

⁵ *See id.*; *see also* 8 U.S.C. § 1227(a)(2)(B) (2006) (making almost all narcotic offenses a basis for deportation).

⁶ Bernstein, *supra* note 1.

⁷ *Id.* Interestingly, whether lawyers should consider immigration issues when counseling legal residents on criminal matters was taken up in the landmark Supreme Court case of *Padilla v. Kentucky*, where the Court held that lawyers have a constitutional duty to inform immigrant criminal defendants of possible immigration consequences. 559 U.S. 356, 374 (2010).

⁸ Bernstein, *supra* note 1.

⁹ *Id.*

¹⁰ *Id.* Mr. Lemaine was placed in isolation for his own protection following the beatings. *Id.*

¹¹ *Id.* He did not see a psychiatrist for a week after being placed on the suicide watch. *Id.*

¹² *Id.* Generally, Immigration and Customs Enforcement (“ICE”) prefers to target individuals charged with multiple crimes. *See* MEMORANDUM FROM JOHN MORTON, DIRECTOR, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, CIVIL IMMIGRATION ENFORCEMENT: GUIDANCE TO THE USE OF DETAINER (Dec. 21, 2012), *available at* <http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf> (explaining that ICE’s policy is to focus on recidivist criminals for removal purposes) [hereinafter MORTON MEMO].

¹³ *See* Bernstein, *supra* note 1. The Fifth Circuit has adhered to a strict reading of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which allows for the automatic deportations of immigrants, even legal immigrants, for a wide array of crimes. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 and 18 U.S.C.); *see also* *United States v. Sanchez-Villalobos*, 412 F.3d 572, 576–77 (5th Cir. 2005) (holding that a non-citizen’s misdemeanor conviction for possession of codeine made him automatically

cuit precedent, Mr. Lemaine's second charge for possession of marijuana made him a recidivist felon and thus automatically ineligible for bond or relief from deportation.¹⁴ The Fifth Circuit ultimately decided to suspend Mr. Lemaine's case while awaiting the Supreme Court's decision in *Carachuri-Rosendo v. Holder*.¹⁵

Jose Angel Carachuri-Rosendo came to the United States when he was five years old as a Legal Permanent Resident ("LPR").¹⁶ His mother is a naturalized citizen, his two sisters are citizens, his four children are citizens, and his wife is a citizen.¹⁷ In 2004, Mr. Carachuri-Rosendo pled guilty to possession of marijuana and was sentenced to confinement for twenty days in a Texas jail.¹⁸ In 2005, he pled nolo contendere to possessing one tablet of Xanax without a prescription.¹⁹ In 2006, on the basis of his second conviction, the federal government initiated removal proceedings against Mr. Carachuri-Rosendo.²⁰

Mr. Carachuri-Rosendo appeared without an attorney at his immigration hearing, but nevertheless managed to apply for discretionary relief, known as a waiver, under 8 U.S.C. § 1229b(a).²¹ The Department of Homeland Security ("DHS") tried to block Mr. Carachuri-Rosendo's application for a waiver on the basis that he had been convicted of an aggravated felony and thus was ineligible for waiver.²² DHS argued that because Mr. Carachuri-Rosendo could have been charged as a recidivist felon based on his two misdemeanor possession charges, he had committed an aggravated felony for immigration purposes.²³ Three differ-

deportable because he could have been charged as a felon under federal law); Bryan Lonagan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 60–61 (2007) (explaining the effects of the 1996 Act).

¹⁴ Bernstein, *supra* note 1; see 8 U.S.C. § 1226(c) (2006) (stating that non-citizens charged with a drug crime can be released from detention only if they are helping the government as a witness in a criminal investigation).

¹⁵ See 130 S. Ct. 2577, 2580 (2010); Bernstein, *supra* note 1. Jerry Lemaine was released from detention after a new deportation officer decided that Jerry was a good candidate for release. Bernstein, *supra* note 1.

¹⁶ *Carachuri-Rosendo*, 130 S. Ct. at 2580.

¹⁷ *Id.* at 2583.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See 8 U.S.C. § 1229b(a) (2006) (stating that the Attorney General can cancel removal for an alien that has been in the United States for seven continuous years, at least five of those years as a permanent resident, so long as the alien "has not been convicted of any aggravated felony"); *Carachuri-Rosendo*, 130 S. Ct. at 2583.

²² *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 390 (BIA 2007).

²³ *Id.*

ent courts ruled against Mr. Carachuri-Rosendo and agreed with DHS that he was ineligible for waiver.²⁴

Ultimately, the Supreme Court overruled the lower courts and held that for immigration purposes, a non-citizen cannot be labeled a recidivist felon unless the state actually convicted him as one.²⁵ Despite Mr. Carachuri-Rosendo's victory, Justice Stevens ended the opinion on an ominous note: "Carachuri-Rosendo, and others in his position, may now seek cancellation of removal and thereby avoid the harsh consequence of mandatory removal. But he will not avoid the fact that his conviction makes him, in the first instance, removable."²⁶

In the United States, immigration discussions tend to center around illegal immigration.²⁷ Often absent from the dialogue is whether or not the justice system in place for legal immigrants is itself fair.²⁸ Jose Angel Carachuri-Rosendo and Jerry Lemaine's cases show the extremes to which our deportation system will go to ensure that it meets its self-imposed yearly deportation quotas, and how, in the eyes of deportation law, an immigrant's legal status and time in this nation hold little weight.²⁹ In particular, their cases demonstrate the harsher aspects of drug-based deportation laws.³⁰

U.S. law recognizes a distinction between different types of drug crimes for citizens, but such a distinction is almost non-existent for legal permanent residents facing deportation.³¹ Possession of a single pill of Xanax without a prescription is a Class A misdemeanor in Texas, which carries one of the lowest criminal penalties possible.³² Possession

²⁴ *Carachuri-Rosendo*, 130 S. Ct. at 2583–84.

²⁵ *Id.* at 2589 ("The mere possibility that the defendant's conduct . . . could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command that a noncitizen be 'convicted of a[n] aggravated felony' before he loses the opportunity to seek cancellation of removal." (quoting 8 U.S.C. § 1229b(a)(3))).

²⁶ *Id.*

²⁷ Lonigan, *supra* note 13, at 56 (noting the lack of discussion on the impact of U.S. immigration law on legal permanent residents).

²⁸ *See id.*

²⁹ *See* Bernstein, *supra* note 1; LEAKED ICE INTERNAL MEMO, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (May 04, 2012), available at <http://www.documentcloud.org/documents/603861-ice-documents.html> (last visited Jan. 16, 2014) (making reference to a quota).

³⁰ *See Carachuri-Rosendo*, 130 S. Ct. at 2589; Bernstein, *supra* note 1 (detailing how two possession of marijuana misdemeanors led to an LPR's three-year detention).

³¹ *See* 8 U.S.C. § 1227(a)(2)(B) (2006) (stating that any drug crime other than a single conviction for possession of less than thirty grams of marijuana makes an LPR deportable).

³² *See* TEX. PENAL CODE ANN. § 12.03 (West 2011); TEX. HEALTH & SAFETY CODE ANN. § 481.104 (West 2010) (placing Xanax—alprazolam—in Penalty Group 3); TEX. HEALTH & SAFETY CODE ANN. § 481.117 (West 2010) (stating that possession of a controlled sub-

of methamphetamine is a state jail felony in Texas, which is the highest default criminal penalty possible.³³ For a legal permanent resident, however, both crimes trigger the exact same deportation process—a process that has the potential of depriving an individual “of all that makes life worth living.”³⁴

Recently, drug-based offenses have been a powerful tool in the deportation of non-citizens.³⁵ Over the past three years they have accounted for the majority of legal immigrant deportations.³⁶ Additionally, the total number of legal immigrants deported for drug-based offenses has increased every year over the past three years.³⁷

This Note addresses an LPR’s legal struggles in deportation proceedings due to the government’s overly broad stance on narcotics. Part I of this Note explores the legal implications of having LPR status, and the role that the War on Drugs has played on deportation policies. Part II delves into the legislative regime of drug-based deportations. Part III explores the limited role that judges play in drug-based deportation proceedings. Part IV discusses recent legal developments in domestic drug laws and how they interplay with the drug-based deportation regime. Finally, Part V proposes three potential solutions to mitigate the harsh effects of the current drug-based deportation laws.

I. THE LEGAL PERMANENT RESIDENT, DRUGS, & DEPORTATION

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) and the Antiterrorism

stance categorized under Penalty Group 3 is a Class A misdemeanor). This explains why Mr. Carachuri-Rosendo received only ten days in prison for his possession of Xanax conviction. See *Carachuri-Rosendo*, 130 S. Ct. at 2582.

³³ See TEX. PENAL CODE ANN. § 12.04 (West 2011) (stating that a state jail felony, the most severe category of felony, is reserved for the most serious offenses); TEX. HEALTH & SAFETY CODE ANN. § 481.102 (West 2010) (stating that methamphetamine is a controlled substance under Penalty Group 1); HEALTH & SAFETY § 481.115 (stating that possession of a controlled substance categorized under Penalty Group 1 is a state felony).

³⁴ See 8 U.S.C. § 1227(a)(2)(B); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

³⁵ See Jeff Yates et al., *A War on Drugs or a War on Immigrants? Expanding the Definition of “Drug Trafficking” in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 880 (2005) (detailing the spike in drug-based deportations, and deportations in general, following the expansion of the War on Drugs).

³⁶ JOHN SIMANSKI & LESLEY M. SAPP, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2011, at 6 (2011), available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

³⁷ *Id.*

and Effective Death Penalty Act of 1996 (“AEDPA”).³⁸ These laws ushered in the new deportation era, crippling judicial oversight by allowing for mandatory detention and mandatory deportation.³⁹ Part of the reasoning behind these laws was the association of immigration with narcotic abuse and trafficking.⁴⁰ To appreciate the impact of these laws, an understanding of what a legal permanent resident’s status entails is necessary.⁴¹

A. What Is a Legal Permanent Resident?

A legal permanent resident is defined by 8 U.S.C. § 1101 as a person who has “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.”⁴² Becoming a legal permanent resident can take years and requires the immigrant to show his general admissibility into the United States.⁴³ For example, LPR status is unavailable to immigrants that show a likelihood of engaging in criminal activity, adhering to political activity contrary to U.S. interests, or displaying a likelihood of requiring public assistance.⁴⁴

³⁸ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 and 18 U.S.C.); Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936, 1938 (2000) (citing to both Acts).

³⁹ Morawetz, *supra* note 38, at 1936, 1938. In the decade leading up to 1996, Congress had passed increasingly harsh immigration laws, but the 1996 laws were the most expansive and far-reaching. *See* Yates et al., *supra* note 35, at 876–77 (detailing some of the laws passed in 1988 and 1990 that made narcotics offenses automatic triggers for deportation).

⁴⁰ Morawetz, *supra* note 38, at 1944; Yates et al., *supra* note 35, at 876 (stating that provisions to combat drug trafficking were particularly prevalent in the reforms of the late 1980s).

⁴¹ *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1913–14 (2000) [hereinafter Kanstroom I] (discussing how the “permanence” of permanent resident has been deteriorated over time).

⁴² 8 U.S.C. § 1101(a) (20) (2006).

⁴³ *See, e.g.*, Elise Brozovich, Note, *Prospects for Democratic Change: Non-Citizen Suffrage in America*, 23 HAMLINE J. PUB. L. & POL’Y 403, 430 (2002) (detailing the specific hurdles that immigrants have to overcome in order to become permanent legal residents); Dinesh Shenoy & Salima Oines Khakoo, *One Strike and You’re Out! The Crumbling Distinction Between the Criminal and the Civil for Immigrants in the Twenty-First Century*, 35 WM. MITCHELL L. REV. 135, 138–40 (2008) (explaining that “[a]chieving LPR status is usually the end result of a tortuous (and torturous) process, often through more than one federal agency”).

⁴⁴ 8 U.S.C. § 1182(a) (2012) (detailing the extensive grounds of inadmissibility that an LPR must pass); Brozovich, *supra* note 43, at 430.

Once an immigrant has become an LPR, his rights are very similar to those of a citizen.⁴⁵ For example, LPRs have the same access to American schools that citizens do, including financial aid.⁴⁶ LPRs have the same due process and equal protection rights that citizens enjoy in criminal and civil proceedings.⁴⁷ LPRs can even hold certain public offices if allowed by the state's legislature.⁴⁸

Of course, permanent residence is not solely about benefits; LPRs, like citizens, must pay taxes.⁴⁹ In fact, according to a 1997 study by the National Academy of Science, immigrants contribute roughly \$1800 more per person in taxes than they receive in benefits.⁵⁰ Additionally, in New York alone in 1995, LPRs paid \$18.2 billion in taxes—equivalent to 15.5 percent of the state's total tax intake.⁵¹ Perhaps the biggest difference between LPRs and citizens is the fact that LPRs cannot vote and are subject to deportation following certain criminal convictions—drug-related convictions featured prominently among them.⁵²

⁴⁵ *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 (1952) (reasoning that “[u]nder our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen”). There are a variety of methods under which a non-citizen can become a legal permanent resident, with the most common being sponsorship through family or employment. 2 MICHAEL D. GREENBERG, ET AL., *IMMIGRATION PRACTICE MANUAL* § 22.1.1 (2d ed. 2012) (highlighting the different procedures under which a non-citizen can attain LPR status). Under every path for attaining LPR status, the non-citizen must pass the grounds of inadmissibility, which are statutory barriers that prevent certain non-citizens from gaining admission to the United States due to health, criminal, immigration, or policy concerns. 8 U.S.C. § 1182(a); *see also* GREENBERG, ET AL., *supra*, § 22.2. Attaining LPR status is always discretionary, and the federal government can deny LPR status even if a non-citizen meets all of the legal requirements. 8 U.S.C. § 1255(a). Furthermore, the grounds of inadmissibility can serve as a basis for deportation while a non-citizen is an LPR—in other words, an LPR is always subject to both the grounds of inadmissibility and deportability. *See* 8 U.S.C. § 1227(a) (2006); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1682 (2011).

⁴⁶ *See Many Non-U.S. Citizens Qualify for Federal Student Aid*, U.S. DEP'T OF EDUC.: FED. STUDENT AID, <http://studentaid.ed.gov/eligibility/non-us-citizens> (last visited Jan. 17, 2014).

⁴⁷ *See* Lonigan, *supra* note 13, at 57; Shenoy & Khakoo, *supra* note 43, at 140.

⁴⁸ Shenoy & Khakoo, *supra* note 43, at 140.

⁴⁹ Lonigan, *supra* note 13, at 57.

⁵⁰ Brozovich, *supra* note 43, at 438.

⁵¹ *See* Jeffrey S. Passel & Rebecca L. Clark, *Immigrants in New York: Their Legal Status, Incomes, & Taxes*, URBAN INST., <http://www.urban.org/publications/407432.html> (last visited Jan. 17, 2014).

⁵² Lonigan, *supra* note 13, at 57; *see also* Simanski & Sapp, *supra* note 36, at 6 (detailing the effects of drug-based deportations).

B. *The Rise of Drug-Based Deportations*

Deportations of LPRs for drug-related crimes began in 1922.⁵³ Initially, LPRs could receive judicial relief in drug-based deportation proceedings.⁵⁴ Nevertheless, this type of judicial oversight was short lived and was eliminated in 1952.⁵⁵ Although drug-based offenses have historically led to deportation, the number of LPRs deported for such offenses began to increase congruently with the increased federal efforts against drug crimes during the 1980s.⁵⁶

The War on Drugs as we know it originated during former President Ronald Reagan's administration after he ran on a strong anti-crime platform.⁵⁷ Upon Reagan's declaration of the War on Drugs, the FBI anti-drug funding increased from \$8 million to \$95 million.⁵⁸ During the Reagan and Bush I administrations, the Drug Enforcement Agency's ("DEA") and the Department of Defense's anti-drug allocations also increased.⁵⁹ The "crack-cocaine epidemic" of the mid-1980s

⁵³ See Narcotic Drug Act of 1922, ch. 202, 42 Stat. 596, 597 (making narcotics offenses a deportable crime); see also *Chung Que Fong v. Nagle*, 15 F.2d 789, 790 (9th Cir. 1926) (stating that Congress "meant to declare that violators of the Narcotic Act were considered a class not to be entitled to any sort of prescriptive right to remain in this country").

⁵⁴ See Immigration and Nationality Act of 1917, ch. 29, 39 Stat. 874, 890 (codified as amended at 8 U.S.C. § 1181 (1988)) (establishing the Judicial Recommendation Against Deportation ("JRAD"), which allowed immigrants to appeal to the judicial branch to suspend deportation proceedings); *Dang Nam v. Bryan*, 74 F.2d 379, 381 (9th Cir. 1934), *reh'g granted*, 78 F.2d 720 (9th Cir. 1935) (dismissing the first case due to lack of jurisdiction). In *Dang Nam v. Bryan*, a non-citizen was convicted of possession of opium. 74 F.2d at 379. The trial judge recommended that the non-citizen not be deported, but the immigration agency ignored the trial judge's recommendation and entered deportation proceedings against the non-citizen. *Id.* The circuit court held that the JRAD applied to narcotics charges and the recommendation of the trial judge was controlling. *Id.* at 381.

⁵⁵ See The Immigration and Nationality Act of 1952 (McCarran Act), ch. 477, 66 Stat. 163, 215 (codified as amended in scattered sections of 8 U.S.C.) (eliminating JRAD review of narcotics-based deportation proceedings).

⁵⁶ U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2011 YEARBOOK OF IMMIGRATION STATISTICS 102 (2012); Yates et al., *supra* note 35, at 880–82 (stating that in 1981 there were only 310 drug-related deportations—and 8,183 in 1990); see, e.g., *How the War on Drugs Influences the Health and Well-being of Minority Communities*, DRUG POLICY RESEARCH CTR. (RAND Drug Policy Research Ctr., Santa Monica, Cal.), June 2001, at 1, available at http://www.rand.org/content/dam/rand/pubs/corporate_pubs/2010/CP201-2001-06.pdf (noting how drug-based incarcerations went up sixteen-fold between 1983 and 1998) [hereinafter *War on Drugs*].

⁵⁷ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 48–49 (2012). It should be noted that while President Reagan implemented the War on Drugs, the idea itself actually originated in the Nixon administration. *Id.* at 46–47.

⁵⁸ *Id.* at 49.

⁵⁹ *Id.* The Department of Defense's allocations increased from \$33 million in 1981 to \$1.042 billion in 1991, and the Drug Enforcement Agency's allocations increased from \$86

led to even stronger anti-drug laws, further strengthening the Reagan Administration's "get tough on crime" platform.⁶⁰

Not wanting to appear as being soft on crime, Democrats under the Clinton Administration expanded state and local police forces and distributed more than sixteen billion dollars in state prison grants.⁶¹ The result of these funding increases was immediate: the prison population increased from around 300,000 at the onset of the War on Drugs to more than two million people by 2006.⁶² Drug convictions accounted for the majority of that increase.⁶³

LPRs were severely affected politically and practically by the War on Drugs.⁶⁴ The number of non-citizens deported annually more than quadrupled from 17,379 in 1981 to 69,680 in 1996.⁶⁵ After IIRIRA, which further increased the mandatory deportable drug-based offenses, the number of LPRs deported for drug offenses increased to 114,432 removals in 1997.⁶⁶ That number has increased every year to 391,953 deported immigrants in 2012.⁶⁷ IIRIRA was passed because of the perceived increase in drug crimes among immigrants, not taking

million to \$1.026 billion. *Id.* Interestingly, even though the Reagan Administration decided to focus on drug-related crimes, "less than 2% of the American public viewed drugs as the most important issue facing the nation" in 1982. *Id.* Another interesting note, according to Alexander, is that the budget of the National Institute on Drug Abuse was actually reduced for the time period between 1981 and 1984 from \$274 million to \$57 million. *Id.* at 50.

⁶⁰ *See id.* at 52–54. In 1985, crack cocaine, a cheaper and more intense form of powder cocaine, spread across poor inner-city neighborhoods. *Id.* at 51. The drug's cheap and highly addictive nature caused a spike in inner-city violence that caught the attention of the national media. *Id.* at 51–52. The national media intensely focused on the effects of crack cocaine on inner-city neighborhoods to the point of hyperbole, famously coining the phrase, "crack cocaine epidemic." *Id.* at 51–53.

⁶¹ *Id.* at 56.

⁶² MARC MAUER, RACE TO INCARCERATE 33 (2d ed. 2006).

⁶³ *Id.* Drug-based crimes alone accounted for two-thirds of the rise in the federal prison population between 1985 and 2000. *Id.* Half of the rise of the state prison population in that same time period was due to drug crimes. *Id.*

⁶⁴ *See, e.g.,* Ryan D. King et al., *Employment and Exile: U.S. Criminal Deportations, 1908–2005*, 117 AM. J. SOC. 1786, 1786–87 (2012) (demonstrating via statistics the rise in criminal deportations); Morawetz, *supra* note 38, at 1945 (stating that "[t]he likelihood of deportation is greater in communities that are subject to elevated levels of police activity and in which people are more likely to be arrested and prosecuted").

⁶⁵ U.S. DEP'T OF HOMELAND SEC., *supra* note 56, at 102.

⁶⁶ *Id.* The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 expanded the definition of aggravated felony so that any crime with a sentence of one year or more would lead to mandatory removal, which included many drug crimes. *See* Morawetz, *supra* note 38, at 1939 (explaining the impact of the newly expanded aggravated felony category).

⁶⁷ U.S. DEP'T OF HOMELAND SEC., *supra* note 56, at 102.

into account that the increase was due to stronger drug enforcement.⁶⁸ Stated differently, lawmakers used the overall increase in the prison population due to the drug war, which would naturally mean an increase in the immigrant prison population, as a pretext for passing the harsher deportation laws of 1996.⁶⁹

The following section explores the legislative deportation regime that was established in 1996. It also details the effects of these laws on LPRs.

II. THE LEGISLATION BEHIND DRUG-BASED DEPORTATIONS

8 U.S.C. § 1227(a)(2)(B) defines the types of drug-based offenses that make a non-citizen deportable.⁷⁰ The statute does not distinguish between LPRs and other types of non-citizens—it applies generally to all non-citizens regardless of their immigration status.⁷¹ This section explores the nuances of the deportation statutes. In particular, this section focuses on the definition of a conviction for deportation purposes, controlled substances, and the myriad of deportation consequences that accompany a drug conviction.

A. What Is a “Conviction” for Deportation Purposes?

The legal definition of a criminal “conviction” under 8 U.S.C. § 1101(a)(48) is broad and does not distinguish between a criminal and civil offense.⁷² In addition to a formal finding of guilt by a judge or

⁶⁸ See *Demore v. Kim*, 538 U.S. 510, 518 (2003) (stating that IIRIRA was passed because “[c]riminal aliens were the fastest growing segment of the federal prison population, already constituting roughly 25% of all federal prisoners, and they formed a rapidly rising share of all federal prisoners”). In the words of Senator William V. Roth Jr.:

We do know that the Federal Bureau of Prisons confines about 22,000 criminal aliens—25 percent of the total Federal prison population—and that both the number and percent have been growing steadily since 1980. The Justice Department estimates that there are about 53,000 criminal aliens in federal and state prisons Confinement of criminal aliens in state and federal prisons cost taxpayers approximately \$724,000,000 in 1990.

S. REP. NO. 104-48, at 1 (1995) (Conf. Rep.).

⁶⁹ See Morawetz, *supra* note 38, at 1944 (noting that the 1996 laws were passed due to the perceived “criminal alien” problem that was attributable to the overall prison increase).

⁷⁰ 8 U.S.C. § 1227(a)(2)(B) (2006) (listing “classes of deportable aliens” deportable for criminal offenses related to “controlled substances”).

⁷¹ *Id.* Essentially this means that an LPR is treated the same as an undocumented immigrant when it comes to drug-based deportation proceedings. See *id.*

⁷² *Id.* § 1101(a)(48); Morawetz, *supra* note 38, at 1942–43.

jury, a “conviction” under the statute includes a plea of guilty or nolo contendere.⁷³ It also includes situations where an LPR has admitted sufficient facts to warrant a finding of guilt.⁷⁴ Furthermore, any kind of suspended sentence or probation is irrelevant for deportation purposes—the sentence length of the conviction is based on the amount of time there is any restraint on liberty.⁷⁵ Finally, a conviction can also include simple penalties, as long as the penalty is court-imposed.⁷⁶

Under the statute, an LPR can be deported for any conviction relating to a controlled substance or for simply being a drug abuser or addict.⁷⁷ The statute’s only exception is for an LPR who has had only *one* conviction for possession of marijuana.⁷⁸ This means that two convictions for possession of marijuana would make an LPR deportable.⁷⁹ Furthermore, the statute also applies to convictions for crimes relating to controlled substances, meaning that LPRs can be deported for inchoate drug offenses such as attempted possession or possession of paraphernalia.⁸⁰

⁷³ 8 U.S.C. § 1101(a)(48)(A).

⁷⁴ *Id.*

⁷⁵ *See id.* § 1011(a)(48)(B); Morawetz, *supra* note 38, at 1942–43 (explaining how an LPR received a one-year suspended sentence that was counted as a one-year conviction for deportation purposes, which led to her deportation).

⁷⁶ *See* 8 U.S.C. § 1101(a)(48)(A)(ii) (2006) (“[T]he term ‘conviction’ means . . . a formal judgment of guilt of the alien entered by a court . . . where . . . the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty . . .”).

⁷⁷ *Id.* § 1227(a)(2)(B)(i)–(ii). The statute has a broad scope: “Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable.” *Id.* § 1227(a)(2)(B)(i) (emphasis added).

⁷⁸ *Id.* § 1227(a)(2)(B)(i) (stating that the breaking of any law relating to a controlled substance “other than a single offense involving possession for one’s own use of 30 grams or less of marijuana” makes an LPR deportable).

⁷⁹ *Id.* In Jerry Lemaine’s case, for example, even though he would not be automatically deportable as a recidivist felon following *Cavachuri-Rosendo v. Holder*; he would still be marked as a deportable LPR under 8 U.S.C. § 1227(a)(2)(B)(i) because he had more than a single offense of possession of marijuana. *See id.*; 130 S. Ct. 2577, 2589 (2010) (holding that an LPR could not be automatically deported as a recidivist felon unless the state had actually convicted him as a recidivist felon); Bernstein, *supra* note 1 (detailing Jerry Lemaine’s three year detention for two possession of marijuana convictions).

⁸⁰ 8 U.S.C. § 1227(a)(2)(B)(i). Courts have given the “relating to a controlled substance” language broad meaning, as exemplified in *Luu-Le v. I.N.S.*, where an LPR was found automatically deportable following a state conviction for possession of drug paraphernalia. 224 F.3d 911, 916 (9th Cir. 2000). The circuit court stated that it was “important to note that we have construed the ‘relating to’ language broadly in the past.” *Id.* at 915 (quoting 8 U.S.C. § 1227(a)(2)(B)(i)).

B. What Are “Controlled Substances”?

8 U.S.C. § 1227(a)(2)(B) adopts the same definition of controlled substances as the Controlled Substances Act (“CSA”).⁸¹ In turn, the CSA defines controlled substances as any substance mentioned in 21 U.S.C. § 812.⁸² The purpose of Section 812 is to outlaw substances that have the potential for abuse, dependence, and danger to public health.⁸³ The number of substances listed in Section 812 is extensive, featuring more than 160 controlled substances.⁸⁴ Included in Section 812 are the commonly known drugs such as marijuana, cocaine, and methamphetamine.⁸⁵

Section 812 does not provide the complete list of what is considered a controlled substance by the federal government.⁸⁶ Congress gave the Attorney General the power to expand or contract this list.⁸⁷ In practice, this has granted the Drug Enforcement Administration—an agency under the Department of Justice—the power to increase the types of substances that would fall under Section 812.⁸⁸ The DEA has used this power, for instance, to include Adderall, Xanax, Ambien, and Ritalin to the list of controlled substances.⁸⁹ As a result, what constitutes a controlled substance is an ever-expanding list, and any new drug added creates a new ground for deportation.⁹⁰

⁸¹ 8 U.S.C. § 1227(a)(2)(B)(i); Controlled Substances Act, 21 U.S.C. § 802(6) (2006). The Controlled Substances Act is the federal legislative regime that governs the definition, prohibition, and penalties relating to drugs and other controlled substances. *See* 21 U.S.C. § 801.

⁸² *See* 21 U.S.C. § 802(6) (stating that “[t]he term ‘controlled substance’ means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter”).

⁸³ *See id.* § 811(c) (outlining the criteria that determines which drugs are illegal).

⁸⁴ *Id.* § 812.

⁸⁵ *Id.*

⁸⁶ *Compare id.* (displaying a limited number of controlled substances), *with* 21 C.F.R. § 1308.11–.15 (2012) (displaying the full list of controlled substances).

⁸⁷ *See* 21 U.S.C. § 811 (granting the Attorney General power to extend the list of illegal substances to any other substances that meets Section 811’s criteria).

⁸⁸ *See id.*; *id.* § 871(a) (allowing the Attorney General to delegate his duties under the CSA to any officer or employee of the Department of Justice); 21 C.F.R. § 1308.01.

⁸⁹ *Compare* 21 U.S.C. § 812 (displaying a limited number of controlled substances), *with* 21 C.F.R. § 1308.11–.15 (displaying the full list of controlled substances).

⁹⁰ *See* 21 U.S.C. § 811 (stating that the Attorney General can add to the schedule of drugs).

C. Additional Consequences of Drug-Based Crimes for LPRs

In addition to making a non-citizen deportable, drug-based crimes also make non-citizens automatically detainable, and, if the drug crime was not a misdemeanor, subject to mandatory deportation.⁹¹ This section explores how drug-based crimes subject LPRs to automatic detention, prevent LPRs from escaping detention, and can eliminate any possibility of cancellation of deportation.

1. Drug-Based Crimes Subject LPRs to Automatic Detention

8 U.S.C. § 1226(c) states that the Attorney General shall (i.e., must) take into custody any LPR that is deportable under 8 U.S.C. § 1227(a)(2)(B).⁹² While the Attorney General has the discretion to release a non-citizen from detention on bond or parole for certain deportable offenses, generally he may not release an LPR who is facing deportation for a drug-related offense, except in very limited circumstances.⁹³ Effectively, this means that any LPR who is deportable because he has a drug conviction, other than a single conviction for possession of marijuana, can be automatically placed in a detention center.⁹⁴

Detention facilities function very similarly to prisons, and in many cases, LPRs are placed in actual prisons.⁹⁵ The Immigration and Customs Enforcement agency (“ICE”) is responsible for administering the detention centers, which house over 320,000 immigrants each year.⁹⁶ ICE houses detainees in three different types of facilities: Service Processing Centers (“SPC”), Intergovernmental Service Agreement facilities (“IGSA”), and Contract Detention Facilities (“CDF”).⁹⁷ SPCs, IGSA, and CDFs house 13, 67, and 17 percent of the detainee population re-

⁹¹ See 8 U.S.C. §§ 1226(c)(1), 1229b(a) (2006).

⁹² *Id.* § 1226(c)(1). The statute states that “[t]he Attorney General shall take into custody any alien who . . . is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title.” *Id.*

⁹³ See *id.* § 1226(a) (stating that the Attorney General can release certain non-citizen offenders on parole or bond except those whose crimes fall under subsection (c), which includes the drug-based offenses); see also *id.* § 1226(c)(1)(B), (c)(2) (detailing that drug crimes lead to automatic detention and how the Attorney General can release a non-citizen charged with a drug-based offense only if the protection of certain individuals is at stake and if the non-citizen can show that he will not be a danger to the community).

⁹⁴ See *id.* §§ 1226(c), 1227(a)(2)(B) (making an alien that has a drug conviction other than a single possession of marijuana automatically deportable).

⁹⁵ KAREN TUMLIN ET AL., A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS, NAT’L IMMIGRATION LAW CENTER, at vi (2009), available at <http://www.nilc.org/document.html?id=9>.

⁹⁶ *Id.*

⁹⁷ *Id.*

spectively.⁹⁸ While SPCs and CDFs are detention facilities built specifically for immigration purposes, IGSA are typically state or county jails that contract with ICE to house immigrant detainees.⁹⁹ This means that an LPR awaiting deportation proceedings following a controlled substances conviction has a strong likelihood of being detained in the same facility that houses violent criminals.¹⁰⁰

Further complicating matters, immigration authorities use the nature of the detention itself to induce immigrant detainees into signing “stipulated removal[s].”¹⁰¹ The stipulated removal originates from 8 U.S.C. § 1229a(d) and allows the Attorney General to enter into the equivalent of an immigration plea bargain.¹⁰² In this plea bargain, the immigrant waives his or her right to a trial or appeal in exchange for an immediate deportation.¹⁰³ From 2001 to 2011, over 160,000 immigrants were deported via the stipulated removal procedure.¹⁰⁴ While presence in the United States without papers made up most of the charges on which stipulated removal orders were based, drug crimes formed the second-most charges.¹⁰⁵ Many immigrants have signed the stipulated removal in order to escape immigration detention facilities.¹⁰⁶ Effectively, many LPRs have signed away their right to remain in this nation because of the pressures caused by mandatory detention.¹⁰⁷

2. Drug-Based Crimes Prevent LPRs from Escaping Detention

The United States’ immigration laws allow for the release of detained LPRs from detention centers at the discretion of the Attorney General; however, such a remedy is generally not available for LPRs convicted of any drug crime.¹⁰⁸ 8 U.S.C. § 1231(a)(2) states that during

⁹⁸ *Id.* The remaining 3% is made up of federal prisons. *Id.*

⁹⁹ *Id.*

¹⁰⁰ See 8 U.S.C. § 1227(a)(2)(B) (2006); TUMLIN ET AL., *supra* note 95, at vi.

¹⁰¹ JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS, NAT’L IMMIGRATION LAW CENTER, at 1 (2011), available at <http://www.nilc.org/document.html?id=6>.

¹⁰² See 8 U.S.C. § 1229a(d); United States v. Ramos, 623 F.3d 672, 675–76 (9th Cir. 2010); KOH ET AL., *supra* note 101, at iii.

¹⁰³ See 8 U.S.C. § 1229a(d); Ramos, 623 F.3d at 675–76; KOH ET AL., *supra* note 101, at iii.

¹⁰⁴ KOH ET AL., *supra* note 101, at iii.

¹⁰⁵ *Id.* at 8.

¹⁰⁶ *Id.* at 2 (stating that “immigrants have reported being coerced to sign stipulated orders of removal or being pressured to accept stipulated removal as a way to get out of immigrant detention”).

¹⁰⁷ *Id.*; see Morawetz, *supra* note 38, at 1947 (noting many LPRs with solid legal claims have given up their day in court due to the mandatory detention process).

¹⁰⁸ See 8 U.S.C. § 1231(a)(2) (2006).

the removal period, the Attorney General cannot under any circumstance release from detention an LPR who was found deportable under Section 1227(a)(2).¹⁰⁹ This means that a conviction for possession of Adderall or Xanax, or any other drug, depending on the relevant state law, will lead to automatic detention that the LPR cannot escape under any circumstances when he is in the removal period.¹¹⁰

Furthermore, while the removal period is supposed to last only ninety days under U.S. law, the Attorney General is authorized to detain a non-citizen convicted of a drug crime beyond the ninety-day removal period.¹¹¹ An LPR charged with a drug-based offense can be detained for an indefinite amount of time.¹¹² Even if the LPR is released after the ninety-day period, he will still be subject to supervision under regulations prescribed by the Attorney General for the remainder of the removal period.¹¹³

3. Drug-Based Crimes Can Eliminate Any Possibility of Cancellation of Deportation

8 U.S.C. § 1229b(a) grants the Attorney General the ability to cancel the deportation of an LPR, including drug-related deportations.¹¹⁴ This provision is specific to LPRs and requires three elements to be met: (1) the non-citizen was a permanent resident for at least five years,

¹⁰⁹ *Id.* The full text is as follows: “During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.” *Id.* Notably, this section again does not distinguish between LPRs and other types of non-citizens. *See id.*

¹¹⁰ *See id.* § 1226(c) (making any LPR charged with a drug crime automatically detainable); *id.* § 1227(a)(2)(B) (making an LPR deportable for any violation involving controlled substances, except one charge of possession of thirty grams or less of marijuana); *id.* § 1231(a)(2) (stating that the Attorney General cannot release an LPR charged with a drug crime from detention under any circumstances while the LPR is in removal proceedings). The “removal period” is the time period that an LPR is in removal proceedings. *See id.* § 1231(a)(2).

¹¹¹ *See id.* § 1231(a)(6).

¹¹² *See id.*; *see also* Bernstein, *supra* note 1 (detailing how an LPR with two convictions of possession of marijuana was detained for multiple years). *But see* Casas-Castrillon v. Dep’t of Homeland Sec., 535 F.3d 942, 943–44 (9th Cir. 2008) (holding that the Department of Homeland Security’s seven-year detention of an LPR under Section 1231(a) was improper because the “removal period” terminated when the LPR was granted judicial stay of removal, but the seven-year detention was nevertheless proper under Section 1226(a)).

¹¹³ *See* 8 U.S.C. § 1231(a)(3), (6).

¹¹⁴ 8 U.S.C. § 1229b(a) (2006). Notably, this section distinguishes between an LPR and other types of non-citizens. *Id.*

(2) the non-citizen has resided in the United States continuously for at least seven years, and (3) the non-citizen is not facing deportation due to an aggravated felony.¹¹⁵ This allows the DHS to automatically deport someone who was an LPR for five years and resided continuously in the United States for seven years, so long as the LPR was convicted of any drug-related crime within that seven-year time period.¹¹⁶

The third element of Section 1229b(a) is the most problematic because an “aggravated felony” is broadly defined.¹¹⁷ Under 8 U.S.C. § 1101(a)(43)(B), the definition of an aggravated felony for immigration purposes includes illicit trafficking of a controlled substance.¹¹⁸ In turn, a drug trafficking crime is defined as any felony under the CSA.¹¹⁹ Under the CSA, a crime is a felony if the maximum term of imprisonment is more than one year.¹²⁰ In sum, an aggravated felony for drug-based deportation purposes is any drug crime that could potentially impose a prison sentence of a year or more.¹²¹

¹¹⁵ *Id.*; see also GREENBERG, ET AL., *supra* note 45, § 20.5.3 (explaining the cancellation of a removal procedure).

¹¹⁶ See 8 U.S.C. § 1229b(a).

¹¹⁷ See *id.* § 1101(a)(43)(B); GREENBERG, ET AL., *supra* note 45, § 19.11 (detailing various crimes that constitute aggravated felonies for deportation purposes).

¹¹⁸ 8 U.S.C. § 1101(a)(43)(B).

¹¹⁹ See *id.* (stating that the definition of “drug trafficking” crime can be found in 18 U.S.C. § 924(c)(2)); 18 U.S.C. § 924(c)(2) (2006) (stating that a “drug trafficking” crime is anything that would be a felony under the CSA).

¹²⁰ See Controlled Substances Act, 21 U.S.C. § 802(13) (2006) (stating that a “felony” for CSA purposes means “any Federal or State offense classified by applicable Federal or State law as a felony”); 18 U.S.C. § 3559(a) (defining any crime that imposes a prison sentence of more than one year as a felony); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1683 (2013) (stating that “a noncitizen’s conviction of an offense that the Controlled Substances Act makes punishable by more than one year’s imprisonment will be counted as an ‘aggravated felony’ for immigration purposes”). When a court is analyzing whether a state drug crime is an aggravated felony for immigration law purposes, it applies the “categorical approach” to determine if the state offense is equivalent to the proscribed offense under immigration law—which in this case would be the “illicit trafficking” aggravated felony. *Moncrieffe*, 133 S. Ct. at 1684–85. Thus, in order for a state drug conviction to be an illicit trafficking aggravated felony under immigration law, it must proscribe conduct that is an offense under the CSA, and the CSA must punish that offense as a felony (a possible punishment of more than one year). *Id.* at 1685. Interestingly, in *Moncrieffe v. Holder* the Supreme Court held that possession of marijuana with intent to distribute was not an aggravated felony. *Id.* at 1686–87. Because the CSA makes distribution of marijuana a felony only if there is remuneration, and the Georgia statute under which the defendant was charged did not specify if the defendant needed to receive remuneration, it was unclear if the defendant had engaged in illicit drug trafficking as defined under the CSA, and thus he had not committed an aggravated felony because the government had failed to carry its burden of proof. *Id.*; see 21 U.S.C. § 802(13); 18 U.S.C. § 924(c)(2).

¹²¹ See 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. §§ 924(c)(2), 3559(a); 21 U.S.C. § 802(13). It should be noted that whether or not the non-citizen has to be charged as a felon in addi-

In practice, this means that almost any drug-related crime other than simple possession of marijuana can lead to mandatory deportation because the prison terms for many of the offenses in the CSA are longer than one year.¹²² For example, possession of Adderall with intent to distribute is an aggravated felony and would make an LPR subject to mandatory deportation.¹²³ Similarly, offering drug paraphernalia for sale is an aggravated felony for deportation purposes because the CSA imposes a prison sentence of up to three years for the sale of drug paraphernalia.¹²⁴

D. *The Section 1229b(a) Cancellation of Removal Procedure*

While Section 1229b(a) places the discretion to cancel a person's deportation order in the hands of the Attorney General, in practice the authority is delegated to the Executive Office for Immigration Review within the Department of Justice.¹²⁵ If an LPR meets all of the requirements under Section 1229b(a), then he can apply for cancellation of removal by filing Form EOIR-42a.¹²⁶ Much of the form is devoted to the inquiry of whether or not the LPR has resided in the United States for the statutorily mandated period, and whether he is eligible for relief in the first place.¹²⁷ For example, one of the questions in Form EOIR-42a explicitly asks LPRs whether or not they have ever trafficked controlled substances.¹²⁸

tion to receiving a prison term of a more than a year is unclear following *Carachuri-Rosendo*. See 130 S. Ct. at 2589. The Supreme Court's holding was tailored specifically to recidivist felony charges, and it is unclear if a misdemeanor charge with a prison sentence of more than a year subjects an LPR to mandatory detention. See *id.*

¹²² BRIAN T. YEH, CONG. RESEARCH SERV., DRUG OFFENSES: MAXIMUM FINES AND TERMS OF IMPRISONMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND RELATED LAWS 1–13 (2012).

¹²³ See *id.* at 3 (stating that possession with intent to distribute any Schedule II substance in any weight subject to imprisonment of up to twenty years); 21 C.F.R. § 1308.12 (2012) (stating that Adderall—an amphetamine—is a Schedule II substance).

¹²⁴ See 21 U.S.C. § 863(a)–(b) (2006).

¹²⁵ See 8 U.S.C. § 1229b; GREENBERG, ET AL., *supra* note 45, § 20.5.3(c) (explaining that Immigration Judges have discretion over Section 1229b hearings); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 371–72 (2006) (detailing the structural logistics of the deportation system).

¹²⁶ GREENBERG, ET AL., *supra* note 45, § 20.5.3(c); EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FORM EOIR-42A (2013), available at <http://www.justice.gov/eoir/eoirforms/eoir42a.pdf> [hereinafter EOIR-42a].

¹²⁷ See EOIR-42A, *supra* note 126, at 2.

¹²⁸ *Id.* at 6. More specifically, the question asks if the LPR has ever been “a trafficker of a controlled substance, or a knowing assister, abettor, conspirator, or colluder with others

In addition to filling out Form EOIR-42a, an LPR must provide evidence demonstrating that he should remain in the United States.¹²⁹ The Board of Immigration Appeals has stated that when an Immigration Judge exercises discretion in a Section 1229b(a) hearing, she “must balance the adverse factors evidencing the alien’s undesirability as a permanent resident with the social and humane considerations presented in his [or her] behalf to determine whether the granting of . . . relief appears in the best interest of this country.”¹³⁰ Relevant factors include the LPR’s legal history, evidence of good or bad moral character, the strength of the LPR’s ties to the United States, evidence of hardship to the LPR or his family, and any business ties to the United States.¹³¹ Following the submission of the evidence, the Immigration Judge will schedule a hearing where the LPR has an opportunity to testify regarding his fitness to remain in the United States.¹³² Ultimately, the final decision for whether or not the LPR is entitled to cancellation of removal will be in the hands of the Immigration Judge and the Board of Immigration Appeals, should the non-citizen choose to appeal an adverse holding.¹³³

There is a very important caveat to the cancellation of removal for LPRs—the Attorney General and his delegates may only issue four thousand cancellations of removal per year.¹³⁴ This means that if an LPR is removable due to a crime relating to controlled substances, and

in any such controlled substance offense (not including a single offense of simple possession of 30 grams or less of marijuana)?” *Id.*

¹²⁹ GREENBERG, ET AL., *supra* note 45, § 20.5.3(c).

¹³⁰ *In re C-VT*, 22 I. & N. Dec. 7, 11 (BIA 1998) (quoting *In re Marin*, 16 I. & N. Dec. 581, 584 (BIA 1978)). In *In re C-VT*, an LPR was facing removal following his conviction for possession of cocaine. *Id.* at 8. This was the only crime the LPR had ever committed in his fifteen years in the United States. *Id.* at 13. The LPR filed for cancellation of removal, and the Immigration Judge denied the cancellation, partly because she did not believe that the LPR would face much hardship from deportation. *Id.* The Board of Immigration Appeals reversed the Immigration Judge’s decision on the basis that there were enough countervailing elements in his application, such as his minimal criminal record and the fact that the state prosecutor recommended against the LPR’s deportation. *Id.* at 13–14. Between serving his ninety-day prison term for possession of cocaine, and his subsequent mandatory detention for deportation purposes, the LPR spent eight months in a prison-like setting. *See id.* at 7–8.

¹³¹ *See id.* at 11; *see also* *Ortiz-Preciado v. Mukasey*, 294 F. App’x 299, 301 (9th Cir. 2008) (holding that an Immigration Judge did not err in denying an LPR’s cancellation of removal based on evidence that the LPR was living with and financially supporting an undocumented alien).

¹³² GREENBERG, ET AL., *supra* note 45, § 20.5.3(c).

¹³³ *See In re C-VT*, 22 I. & N. Dec. at 7–8 (detailing the statutory regime concerning cancellation of removal for an LPR).

¹³⁴ 8 U.S.C. § 1229b(e)(1) (2006).

would meet all the requirements of cancellation of removal, he may nevertheless be deported.¹³⁵ 8 C.F.R. § 1240.21 allows for an Immigration Judge to reserve his decision for when a number becomes available either in the current or subsequent fiscal year, but this could presumably extend the amount of time an LPR spends in detention.¹³⁶

The next item that this note explores is the role—if any—that the judicial branch plays in mitigating the harsher aspects of these laws. As part of this analysis, the note will also explore the role of the Immigration Judges and the constitutional rights of LPRs.

III. THE EROSION OF JUDICIAL DISCRETION

The strong influence that the executive branch, through the administrative immigration agencies, and the legislature exert over deportation law, begs the question of the judicial branch's role in policing the boundaries of the deportation system.¹³⁷ Indeed, the judicial branch plays a minimal role in deportation proceedings of LPRs, and in drug-based deportations particularly.¹³⁸ Furthermore, even when the judicial branch has heard cases involving LPRs, the judiciary has refused to grant any special recognition of LPR status.¹³⁹ Thus, the removal process is highly insulated from external judicial oversight, and LPRs are exposed to the harshest possible application of the deportation statutes.¹⁴⁰

¹³⁵ See *id.*

¹³⁶ See *id.* § 1226(c) (stating that the Attorney General *shall* detain an alien charged with any offense relating to a controlled substance except thirty grams of marijuana); 8 C.F.R. § 1240.21(c) (2012); see also Memorandum from Brian M. O'Leary, Chief Immigration Judge, Executive Office for Immigration Review, to all Immigration Judges (May 17, 2011), available at <http://www.justice.gov/eoir/efoia/ocij/oppm11/11-01.pdf> (detailing the Executive Office for Immigration Review's procedures for dealing with cancellation of removal after the number quota has been met).

¹³⁷ See DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 230 (2007) (noting the complicated relationship between discretion, deportation, and the role of the judiciary in the process) [hereinafter *KANSTROOM II*].

¹³⁸ See 8 U.S.C. § 1229b(a) (2006) (limiting cancellation of removal to the Attorney General's discretion).

¹³⁹ See *Kanstroom I*, *supra* note 41, at 1911–15 (detailing how non-citizens historically lost constitutional protections).

¹⁴⁰ See Legomsky, *supra* note 125, at 380–81 (detailing the boundaries of the modern judicial review scheme over immigration matters).

A. *The Judicial Branch's Absence from the Deportation Process*

Since 1952, the Attorney General and his delegates have wielded the authority to cancel removal, albeit subject to judicial oversight.¹⁴¹ The judicial branch's role in the cancellation of removals was historically limited to the typical administrative law judicial reviews, and the Judicial Recommendations Against Deportation ("JRAD"), which allowed criminal court judges to use their discretion to prevent deportation.¹⁴² The JRAD system could not be used against narcotics offenses, however, and it was abolished entirely in 1988.¹⁴³

In 1996, Congress took steps to further limit the judicial branch's administrative law oversight of agency deportation orders.¹⁴⁴ Congress enacted 8 U.S.C. § 1252(a)(2)(C), which states that no court shall have jurisdiction to review final removal orders made under 8 U.S.C. § 1227(a)(2)(B).¹⁴⁵ 8 U.S.C. § 1252(a)(2)(B) states that courts will not have jurisdiction to review any agency decision regarding the granting of relief or any decisions or action of the Attorney General and DHS.¹⁴⁶ These statutes also eliminate a federal court's habeas corpus powers.¹⁴⁷ Congress made one exception to this otherwise strict provision: Courts still have jurisdiction to review constitutional questions or questions of law.¹⁴⁸ This means that courts are able to review an Immigration Judge's interpretation of a statute or any constitutional issue.¹⁴⁹

Taken as a whole, the provisions of Section 1252 effectively bar the courts from reviewing many important deportation matters.¹⁵⁰ This includes whether or not the government properly instituted removal in

¹⁴¹ KANSTROOM II, *supra* note 137, at 234.

¹⁴² *Id.* at 228; DANIEL LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 8:8 (2013) (explaining the powers that the JRAD had and its effectiveness in overcoming deportability, excludability, and the bars to good moral character).

¹⁴³ See The Immigration and Nationality Act of 1952 (McCarran Act), ch. 477, 66 Stat. 163, 204–07, 214–15 (codified as amended in scattered sections of 8 U.S.C.) (eliminating JRAD review of narcotics-based deportation proceedings); KANSTROOM II, *supra* note 137, at 228.

¹⁴⁴ 8 U.S.C. § 1252(a)(2)(C) (2006); KANSTROOM II, *supra* note 137, at 230–31. Federal judges were still using their powers over administrative law manners to scrutinize immigration agency decisions. KANSTROOM II, *supra* note 137, at 230–31.

¹⁴⁵ See 8 U.S.C. §§ 1227(a)(2)(B), 1252(a)(2)(C). Effectively, this means that courts have an extremely limited role to play when an LPR is facing deportation due to a drug-based conviction. See *id.*

¹⁴⁶ *Id.* § 1252(a)(2)(B).

¹⁴⁷ *Id.* §§ 1252(a)(2)(B)–(C) (stating that judicial review is barred for removal decisions notwithstanding habeas corpus provisions).

¹⁴⁸ *Id.* § 1252(a)(2)(D).

¹⁴⁹ *Id.*; Legomsky, *supra* note 125, at 381.

¹⁵⁰ 8 U.S.C. § 1252(a)(2)(B)–(D) (2006); see also Legomsky, *supra* note 125, at 380–84.

the first place, whether the individual deserves favorable exercise of discretion, or whether the Immigration Judge gave sufficient consideration to a question of fact.¹⁵¹ These restrictions on the judiciary mean that an LPR's sole opportunity for some kind of judicial discretion is limited to a hearing before an Immigration Judge or the Board of Immigration Appeals.¹⁵²

B. *Immigration Judges & the Board of Immigration Appeals*

Immigration Judges and the Board of Immigration Appeals also face unique hurdles in exercising judicial discretion over drug-based deportation matters.¹⁵³ Immigration Judges belong to the Executive Office for Immigration Review ("EOIR"), which is an adjudicative agency under the Department of Justice.¹⁵⁴ The role of the Immigration Judge is primarily to interpret the relevant immigration statutes.¹⁵⁵ Specifically, Immigration Judges decide whether a non-citizen is deportable and if so, whether or not the non-citizen is eligible for any discretionary relief.¹⁵⁶

The Board of Immigration Appeals ("BIA") is also under the umbrella of the EOIR and the Department of Justice.¹⁵⁷ The BIA is able to hear appeals from both the government and the non-citizen on almost every relevant immigration topic, including removal and detention.¹⁵⁸ The BIA's decisions are considered final for administrative law purposes, and appealing to a federal circuit court would have to be based on constitutional issues or questions of law.¹⁵⁹

¹⁵¹ See Legomsky, *supra* note 125, at 380–84.

¹⁵² See 8 U.S.C. § 1252(a)(2)(B), (D) (limiting the scope of judicial review by the federal courts).

¹⁵³ Legomsky, *supra* note 125, at 372–80 (detailing the political hurdles of Immigration Judges).

¹⁵⁴ *Id.* at 371–72.

¹⁵⁵ See *id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 375.

¹⁵⁸ 8 C.F.R. § 1003.1(b) (2012) (stating that appeals may be filed with the Board of Immigration Appeals regarding the decision of Immigration Judges in situations including exclusion cases, deportation cases, removal proceedings, administrative fines and penalties, and adjustment of status).

¹⁵⁹ 8 U.S.C. § 1252(a)(2)(D) (2006); 8 C.F.R. § 1003.1(d)(7). Note that there is an exception to the finality of the BIA's decision, which occurs when the Attorney General at his own discretion decides to review a board decision in accordance with 8 C.F.R. § 1003.1(h). *Id.*; 8 C.F.R. § 1003.1(h). The Attorney General rarely exercises this power. Legomsky, *supra* note 125, at 375 (stating that the Attorney General exercises his review power sparingly).

Due to the strong and explicit nature of the deportation statutes, Immigration Judges and the BIA wield little effective discretion over cases.¹⁶⁰ Their limited discretion is further compounded by the fact that they operate under the executive branch, which has a natural interest in increasing deportations.¹⁶¹ This has led to an atmosphere where many Immigration Judges and the BIA feel that they imperil their employment if they rule against the government.¹⁶² In fact, in the early 2000s, the National Association of Immigration Judges (“NAIJ”) proposed the establishment of a new immigration court that would be independent of the Department of Justice.¹⁶³ The NAIJ reasoned that keeping Immigration Judges within the Department of Justice creates a “conflict of interest” that is “insidious and pervasive.”¹⁶⁴

The pressures felt by these administrative agencies means that deportation decisions are free of legislative or political constraints only when an Article III judge is deciding a question of law or an issue with constitutional implications.¹⁶⁵ This begs the follow up question: What kind of constitutional rights do LPRs have in deportation proceedings?¹⁶⁶

¹⁶⁰ See Legomsky, *supra* note 125, at 371–72 (detailing the statute-centric analytical process Immigration Judges undertake when deciding immigration issues); see also 8 U.S.C. § 1227(a)(2)(B) (demonstrating that its broad language leaves little room for judicial interpretation).

¹⁶¹ See Legomsky, *supra* note 125, at 372–75 (detailing the internal pressures that Immigration Judges and the BIA have to deal with when ruling against other government agencies); Morawetz, *supra* note 38, at 1948 (stating that “Congress audits the Immigration and Naturalization Service (INS) [now DHS] enforcement efforts and treats any failure to deport expeditiously a person who fits the criminal alien label as evidence of the INS’s failure”).

¹⁶² See Legomsky, *supra* note 125, at 373. In 2002, Attorney General John Ashcroft announced that he was reducing the size of the BIA from twenty-three members to eleven in one year. *Id.* at 376. Within that one-year period, several BIA members began to rule in favor of the government at a greater frequency than they had before the Attorney General’s announcement. *Id.* at 377.

¹⁶³ *Id.* at 373.

¹⁶⁴ *Id.* (internal quotations omitted). It should be noted that Immigration Judges can only be removed for cause, but they may be reassigned at the discretion of the Attorney General. *Id.* at 373–74.

¹⁶⁵ *Id.* at 371–72.

¹⁶⁶ See 8 U.S.C. § 1252(a)(2)(D) (2006) (limiting judicial review to questions of law and constitutional issues).

*C. Despite Their Relationship with the U.S. Government, an LPR's
Constitutional Rights Are Limited*

Even though an LPR can seek judicial review of constitutional matters, this has proven to be a fruitless avenue because the Supreme Court has consistently held that LPRs have limited constitutional rights in deportation proceedings.¹⁶⁷ The issue is perhaps best summarized by the case of *Hariasades v. Shaughnessy*, where LPRs faced deportation for being members of the communist party.¹⁶⁸ The LPRs argued that “admission for permanent residence confers a ‘vested right’ on the alien, equal to that of the citizen, to remain within the country, and that the alien is entitled to constitutional protection [to remain in the country] to the same extent as the citizen.”¹⁶⁹ The Supreme Court was not persuaded by the argument, reasoning that permanent residence status is a privilege granted to certain non-citizens, which the U.S. government is within its sovereign right to revoke.¹⁷⁰

Effectively this means that from a constitutional standpoint, deportation proceedings treat LPRs in the same manner as undocumented immigrants.¹⁷¹ *Hariasades* and subsequent holdings have left LPRs with little constitutional recourse to challenge the harsh effects that drug-based offenses have on them compared to their citizen counterparts.¹⁷²

For example, the issue of whether or not the government can constitutionally place LPRs in detention without a hearing was the primary

¹⁶⁷ See Kanstroom I, *supra* note 41, at 1911–15. Much of the legal justification for the harshness of deportation law stems from the idea that deportation is a civil procedure as opposed to a criminal procedure. See *id.* at 1894–95.

¹⁶⁸ 342 U.S. 580, 581–82 (1952).

¹⁶⁹ *Id.* at 584.

¹⁷⁰ *Id.* at 586. “Most importantly, to protract this ambiguous status [legal permanent residence] within the country is not his right but is a matter of permission and tolerance. The Government’s power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.” *Id.* at 586–87.

¹⁷¹ See, e.g., *Demore v. Kim*, 538 U.S. 510, 521 (2003) (stating that Congress may make rules for LPRs that would be unconstitutional for citizens); *Bassett v. U.S. Immigration & Naturalization Serv.*, 581 F.2d 1385, 1386 (10th Cir. 1978). In *Bassett v. U.S. Immigration & Naturalization Serv.*, an LPR was deported after a conviction for possession of marijuana. 581 F.2d at 1386–88. He tried to argue that the deportation violated “his rights to due process and equal protection of the laws.” *Id.* at 1386. The Court expressly rejected that idea, citing to *Hariasades v. Shaughnessy*, among other cases. *Id.* at 1388.

¹⁷² See *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2590 (2010) (finding for the LPR based on statutory construction rather than any constitutional ground); *Lopez v. Gonzales*, 549 U.S. 47, 56–57 (2006) (finding for an LPR in a deportation proceeding based on statutory construction rather than the constitution).

issue in *Demore v. Kim*.¹⁷³ In *Demore*, an LPR challenged the constitutionality of Section 1226(c) on the basis that the statute violated his substantive due process rights because the immigration authorities automatically detained him without determining whether or not he posed a flight risk.¹⁷⁴ The Supreme Court rejected this argument, holding that according to precedent, Congress can treat LPRs in a manner that would be unconstitutional if done to citizens.¹⁷⁵ The *Demore* decision highlights the long-standing precedent that the Constitution does not apply to legal permanent residents in the same manner as it does to citizens, and thus LPRs cannot realistically rely on the Constitution for relief in deportation proceedings.¹⁷⁶ The distinct problems that drug laws create are further compounded by the lack of judicial oversight, and the next section explores these unique problems.¹⁷⁷

IV. DRUG-BASED DEPORTATIONS CAUSE UNIQUE PROBLEMS

The fragmented nature of drug enforcement and the broad nature of the deportation regime has created a peculiar set of legal challenges for LPRs.¹⁷⁸ This section explores recent developments that further fragmented drug enforcement in this nation, how these recent changes interplay with the current legislative regime, and how the current immigration administration is incentivized to ignore these recent changes—and thus leniency—in deportation proceedings.

¹⁷³ 538 U.S. at 527–28. It should also be noted that there has been a long line of cases that have consistently held that LPRs do not have the type of constitutional rights in deportation proceedings that they would have in normal criminal proceedings. See *Kanstrom I*, *supra* note 41, at 1911–15 (summarizing some of the more prevalent cases). At this point, the weight of Supreme Court precedent against the proposition of greater constitutional rights for LPRs in deportation proceedings may be too much to overcome. See *id.*

¹⁷⁴ *Demore*, 538 U.S. at 514. 8 U.S.C. § 1226(c) places LPRs convicted of a drug crime in mandatory detention. 8 U.S.C. § 1226(c) (2006).

¹⁷⁵ *Demore*, 538 U.S. at 522.

¹⁷⁶ See *id.*; *Bassett*, 581 F.2d at 1386.

¹⁷⁷ See 8 U.S.C. § 1252(a)(2)(B)–(D).

¹⁷⁸ See *id.* § 1227(a)(2)(B) (highlighting the broad nature of drug-based deportations); Stephen B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 32–33 (2009) (detailing the increasingly divergent nature of drug enforcement in the U.S. and worldwide).

A. The Changing Drug Landscape

Since its beginning in the 1980s, the War on Drugs has garnered widespread academic criticism.¹⁷⁹ Among other things, the War on Drugs has been criticized for being too costly, ineffective, and disproportionate in its treatment of racial minorities.¹⁸⁰ As a result, many Americans have begun to adopt a more tolerant view of drugs.¹⁸¹ In fact, fewer Americans are opposed to the legalization of marijuana than at any time in recent history.¹⁸² This more accepting attitude has manifested itself in recent state laws.¹⁸³

For example, in November 2000, California voters passed Proposition 36, a response to the perceived failure of the War on Drugs.¹⁸⁴ Under the new California law, possession of a narcotic for personal use receives only probation.¹⁸⁵ In 2008, Massachusetts voters passed the Massachusetts Sensible Marijuana Policy Initiative, which decriminalized possession of one ounce of marijuana completely, making possession a mere civil penalty.¹⁸⁶ Most significantly, Washington and Colorado fully legalized recreational use of marijuana in 2012.¹⁸⁷

¹⁷⁹ See, e.g., ALEXANDER, *supra* note 57, at 97–102 (explaining how the War on Drugs has created a racial caste system by disproportionately targeting people of color); MIKE GRAY, *DRUG CRAZY: HOW WE GOT INTO THIS MESS AND HOW WE CAN GET OUT* 196–97 (1998).

¹⁸⁰ See ALEXANDER, *supra* note 57, at 97–102 (detailing the disparate treatment people of color receive from drug enforcement); *War on Drugs*, *supra* note 56, at 1.

¹⁸¹ Amie L. Nielsen, *Americans' Attitudes Toward Drug-Related Issues from 1975–2006: The Roles of Period and Cohort Effects*, 40–2 J. DRUG ISSUES 461, 486 (2010).

¹⁸² *Id.* at 474.

¹⁸³ See COLO. CONST. art. XVIII, § 16; CAL. PENAL CODE § 1210.1 (West 2004); MASS. GEN. LAWS ch. 94C, § 32L (2012); WASH. REV. CODE § 69.50.4013 (2012).

¹⁸⁴ See *Gardner v. Schwarzenegger*, 178 Cal. App. 4th 1366, 1370 (1st Dist. 2009). The following text was on the ballot:

The war on drugs has failed. Nonviolent drug users are overcrowding our jails. Violent criminals are being released early. Drug treatment programs are rarely available. We pay \$25,000 annually for prisoners when treatment costs only \$4,000. Expanded treatment programs will reduce crime, save lives, and save taxpayers hundreds of millions.

Id. (quoting Voter Information Guide, Gen. Elec., summary of Prop. 36, 3 (Nov. 7, 2000)).

¹⁸⁵ CAL. PENAL CODE § 1210.1.

¹⁸⁶ MASS. GEN. LAWS ch. 94C, § 32L. The statute states that possession of one ounce or less of marijuana “shall only be a civil offense, subjecting an offender who is eighteen years of age or older to a civil penalty of one hundred dollars and forfeiture of the marihuana, but not to any other form of . . . punishment or disqualification.” *Id.*

¹⁸⁷ COLO. CONST. art. XVIII, § 16; WASH. REV. CODE ANN. § 69.50.4013; see also WASH. SEC’Y OF STATE, Initiative Measure No. 502, (Jul. 08, 2011), available at http://sos.wa.gov/_assets/elections/initiatives/i502.pdf; Press Release, State of Colo., Gov. Hickenlooper Signs Amendment 64 Proclamation, Creates Task Force to Recommend Needed Legislative Ac-

In addition to outright legalization of certain drugs, a small number of states have reformed their drug laws to be more lenient.¹⁸⁸ For example, in the 2000s, New York reduced prison terms for drug crimes and made the elements of certain drug-related crimes more difficult to meet.¹⁸⁹ All of the states that have engaged in some form of decriminalization or legalization followed the same basic policy rationale: it is not fair to incarcerate addicted individuals and it is too costly to continue doing so.¹⁹⁰

There have been signs even at the federal level that the United States may rethink its drug policy.¹⁹¹ For example, in 2008, President Obama ran on a drug policy platform to abolish mandatory minimum sentences, support the creation of drug courts, and eliminate the disparity in punishments between crack cocaine and powder cocaine.¹⁹² Additionally, in 2009, Attorney General Eric Holder announced that the federal government would cease conducting raids on California's medical marijuana dispensaries.¹⁹³ Finally, it is worth noting that the United States has had two presidents in the past twenty years that have openly admitted to prior drug use.¹⁹⁴ While these new laws and policies reduce the criminal offenses for which an LPR can be convicted, they

tions, (Dec. 10, 2012), available at <http://www.colorado.gov/cs/Satellite/GovHickenlooper/CBON/1251634887823>.

¹⁸⁸ See, e.g., Edward J. Maggio, *New York's Rockefeller Drug Laws, Then and Now*, N.Y. ST. B.A. J., Sept. 2006, at 30, 34 (detailing how New York's drug laws were diluted in the 2000s); Andrea Lofgren, Note, *A Sign of Things to Come? Drug Policy Reforms in Arizona, California, and New York*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 773, 781–84 (2011) (explaining the changes that occurred in Arizona, California, and New York's drug laws, making them more lenient overall).

¹⁸⁹ See Maggio, *supra* note 188, at 32–34. The New York law doubled the weight of drugs that an offender needed to possess in order to be charged with a crime. *Id.* at 33.

¹⁹⁰ See Lofgren, *supra* note 188, at 784–91 (stating that “[t]wo themes motivated the reforms in Arizona, California, and New York: treating drug offenders as addicts in need of medical rehabilitation and saving money for state taxpayers”).

¹⁹¹ See, e.g., M. Alex Johnson, *DEA to Halt Medical Marijuana Raids*, NBCNEWS, Feb. 27, 2009, <http://www.nbcnews.com/id/29433708/#.USFbBJNeuAY> (last visited Jan. 24, 2013); 2008 Leading Presidential Candidates' Platforms on Criminal Justice Policy, (Mar. 24, 2008), <http://www.sentencingproject.org/doc/publications/publications/Presidential%20Candidates%27%20Platforms%20-%20Spreadsheet%207%2018%2008.pdf> [hereinafter *Obama Platform*].

¹⁹² See *Obama Platform*, *supra* note 191.

¹⁹³ See Johnson, *supra* note 191. *But see* Kate Linthicum & Andrew Blankstein, *U.S. Raids Pot Shops, Warns Operators*, L.A. TIMES, Sept. 26, 2012, at AA3 (stating that the Attorney General's stance on marijuana dispensaries was short lived because California's dispensaries led to illegal profiteering).

¹⁹⁴ ALEXANDER, *supra* note 57, at 251 (noting that President Bill Clinton admitted to using marijuana, and President Barack Obama admitted to using marijuana and cocaine).

have also made it so that conduct that is legal in one state can lead to deportation in another.¹⁹⁵

B. The Broad Language of Section 1227(a)(2)(B) Has Created a Strict & Inconsistent Drug-Based Deportation Regime

8 U.S.C. § 1227(a)(2)(B)(i) states that any conviction relating to controlled substances, other than a single conviction for possession of less than an ounce of marijuana, makes an LPR deportable.¹⁹⁶ Similarly, 8 U.S.C. § 1226(c) directs the Attorney General, acting through ICE, to place any non-citizen that is deportable due to Section 1227(a)(2)(B) in detention.¹⁹⁷ LPRs have access to relief from deportation for drug-related crimes only in very specific circumstances, and this relief is completely unavailable if the drug-related crime carries a potential sentence of a year or more under federal law.¹⁹⁸ The broad nature of these statutes means that despite the advancements in the decriminalization of drugs, LPRs are still subject to bizarre deportation scenarios even in the decriminalizing states.¹⁹⁹

The broad definition of a “conviction” for immigration purposes could expose LPRs to detention and deportation in states that impose lesser criminal penalties, like probation, on drug offenses.²⁰⁰ A conviction for deportation purposes includes any court-imposed penalty following a formal finding of guilt.²⁰¹ This means that states that impose probation and treatment rather than any jail time are nevertheless exposing LPRs within their borders to potential immigration consequences.²⁰² For example, California does not impose any jail time for possession of

¹⁹⁵ Compare MASS. GEN. LAWS ch. 94C, § 32L (2012) (making possession of marijuana a civil infraction), with GA. CODE ANN. §§ 16-13-2, -30 (2011) (making first time possession of marijuana a criminal misdemeanor, and a subsequent conviction for possession a felony with a one-year minimum sentence). For example, possession of marijuana can lead to incarceration and deportation in Georgia but not in Massachusetts. See 8 U.S.C. § 1227(a)(2)(B) (2006) (making two convictions of possession of marijuana a deportable offense); GA. CODE ANN. §§ 16-13-2, -30; MASS. GEN. LAWS ch. 94C, § 32L.

¹⁹⁶ 8 U.S.C. § 1227(a)(2)(B)(i).

¹⁹⁷ *Id.* § 1226(c).

¹⁹⁸ *Id.* §§ 1101(a)(43)(B), 1229b(a); Controlled Substances Act, 21 U.S.C. § 802(13) (2006); (stating that an aggravated felony is any drug trafficking crime under the CSA, and the CSA, in turn, defines a drug trafficking crime as any crime that carries more than a one-year sentence).

¹⁹⁹ See 8 U.S.C. §§ 1101(a)(43)(B), 1226(c), 1227(a)(2)(B), 1229b(a).

²⁰⁰ *Id.* § 1101(a)(48)(A) (effectively defining a “conviction” as any finding of guilt that imposes a penalty on the non-citizen).

²⁰¹ See *id.*

²⁰² See *id.*

a controlled substance; California only requires probation and treatment.²⁰³ Nevertheless, because probation is still a court-imposed penalty following a finding of guilt, it is still a conviction for immigration purposes, and an LPR could be subject to detention and deportation despite not seeing any jail time for his drug offense.²⁰⁴ Additionally, even in the states that have fully decriminalized certain drugs, drug-related acts are still illegal under federal law, and LPRs could face deportation if apprehended by federal authorities and charged under federal law.²⁰⁵

In many states with reformed drug laws, non-citizens can still be deported under the expansive “relating to” language in Section 1227(a)(2)(B)(i)²⁰⁶ The words “relating to” mean that inchoate and auxiliary drug-based offenses are treated the same as full drug crimes for deportation purposes.²⁰⁷ For example, in *Luu-Le v. I.N.S.*, a legal permanent resident was charged with a state misdemeanor for possession of drug paraphernalia.²⁰⁸ The LPR argued that the language of § 1227(a)(2)(B) did not apply to drug paraphernalia.²⁰⁹ The circuit court held otherwise, stating that the “relating to” language of § 1227(a)(2)(B)(i) encompassed crimes involving drug paraphernalia.²¹⁰ The LPR was subsequently deported—possession of drug para-

²⁰³ CAL. PENAL CODE § 1210.1 (West 2004) (making possession of a controlled substance punishable by probation).

²⁰⁴ 8 U.S.C. § 1101(a)(48)(A) (2006) (stating that a court-imposed penalty is a conviction for immigration purposes); *id.* § 1227(a)(2)(B) (making a non-citizen deportable if he is convicted of more than one possession of marijuana offense); CAL. PENAL CODE § 1210.1. This is especially harsh in California because the statute allows for a court to set aside a possession of a controlled substance conviction if the defendant successfully completes treatment, but his probation remains a conviction for immigration purposes. *See* 8 U.S.C. § 1101(a)(48)(A); CAL. PENAL CODE § 1210.1(e)(1).

²⁰⁵ *Compare* COLO. CONST. art. XVIII, § 16, and WASH. REV. CODE ANN. § 69.50.4013 (2012) (making possession of marijuana not subject to any criminal or civil penalty), with Controlled Substances Act, 21 U.S.C. § 844(a) (2006) (making individuals who possess controlled substances, including marijuana, subject to a criminal penalty).

²⁰⁶ *See* 8 U.S.C. § 1227(a)(2)(B)(i) (stating that the statute is violated for any conviction relating to controlled substances); *see also* *Luu-Le v. I.N.S.*, 224 F.3d 911, 915 (9th Cir. 2000) (holding that the “relating to” language in § 1227(a)(2)(B) is interpreted broadly).

²⁰⁷ *See* 8 U.S.C. § 1227(a)(2)(B)(i); *Luu-Le*, 224 F.3d at 915–16 (giving examples of the types of crimes that the “relating to” language covers).

²⁰⁸ *Luu-Le*, 224 F.3d at 913. Interestingly, the opinion does not provide much in the way of the petitioner’s background. *See id.* For example, the opinion does not state how many years the petitioner lived in the United States, whether he had family, and whether his single misdemeanor conviction for drug paraphernalia was his only crime. *See id.* at 913–14.

²⁰⁹ *Id.* at 913.

²¹⁰ *See id.* at 915–16 (quoting 8 U.S.C. § 1227(a)(2)(B)(i)). It should be noted that this case was decided in the transition period following the passage of IIRIRA in 1996. *See id.* at

paraphernalia serving as the sole basis for his deportation.²¹¹ Today, possession of drug paraphernalia is still illegal in many states, including Massachusetts.²¹² This means that a single conviction in Massachusetts for possession of marijuana paraphernalia could make an LPR deportable even though possession of marijuana itself will not.²¹³

While many citizens now realize that drug addiction is a disease, U.S. deportation policy does not reflect this understanding.²¹⁴ DHS can still deport a non-citizen, including an LPR, for being a drug addict.²¹⁵ This means that for LPRs suffering from drug addiction, seeking any kind of medical help can lead to detention and deportation.²¹⁶ For example, if an LPR in Colorado were to check into a rehabilitation center for an addiction to marijuana and DHS found out, he could be deported under 8 U.S.C. § 1227(a)(2)(B)(ii), simply on the basis of being a drug addict.²¹⁷

The ever-expanding definition of what constitutes a controlled substance also creates dangerous scenarios for LPRs.²¹⁸ For example, commonly used drugs for anxiety disorders or attention deficit disor-

913. INS entered deportation proceedings against the LPR in 1993, and the LPR's arguments involved the pre-IRIRA deportation laws. *See id.* It is unclear from the decision whether or not the LPR was in detention from 1993 until the circuit court's final decision in 2000. *See id.*

²¹¹ *See id.* at 916.

²¹² MASS. GEN. LAWS ch. 94C, § 32I (2012) (stating that “[n]o person shall sell, possess or purchase with intent to sell, or manufacture with intent to sell drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to . . . introduce into the human body a controlled substance in violation of this chapter”).

²¹³ *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2006); MASS. GEN. LAWS ch. 94C, §§ 32I, 32L.

²¹⁴ *See* 8 U.S.C. § 1227(a)(2)(B)(ii) (making any drug addict deportable); Lofgren, *supra* note 188, at 784–91 (detailing the United States' changing perception on drug addiction as a disease rather than a crime).

²¹⁵ *See* 8 U.S.C. § 1227(a)(2)(B)(ii). On at least one occasion, a non-citizen has been deported for simply being a drug addict. *See Pondoc Hernaez v. I.N.S.*, 244 F.3d 752, 753 (9th Cir. 2001).

²¹⁶ *Pondoc Hernaez*, 244 F.3d at 753–55. In *Pondoc Hernaez v. I.N.S.*, the non-citizen registered at a drug rehabilitation facility and informed INS of that fact when he was seeking an alien registration receipt card. *Id.* INS subsequently placed the non-citizen in removal proceedings and successfully deported the non-citizen following the circuit court's affirmation of the Immigration Judge's decision. *Id.* at 755, 758.

²¹⁷ *See* 8 U.S.C. § 1227(a)(2)(B)(ii) (stating that “[a]ny alien who is, or at any time after admission has been, a drug abuser or addict is deportable”); COLO. CONST. art. XVIII, § 16 (legalizing possession of marijuana).

²¹⁸ *See* 8 U.S.C. § 1227(a)(2)(B) (stating that the definition of “controlled substances” stems from 21 U.S.C. § 802(6) of the CSA); *see also* Controlled Substances Act, 21 U.S.C. § 802(6) (2006) (stating that any of the substances within its numerous “schedules” are controlled substances); *id.* § 811(a) (allowing the Attorney General to expand the substances within the CSA's schedules).

ders are legally considered controlled substances.²¹⁹ This means that if an LPR is caught with any number of medically useful drugs, either because he did not have a prescription or because the prescription had expired, he faces automatic detention and possible deportation.²²⁰ Because the list of controlled substances is ever expanding, many LPRs may be caught unaware that certain medically viable drugs could lead to deportation should they ever possess those drugs without a prescription.²²¹

8 U.S.C. § 1229b(a)'s exception for cancellation of removal and Section 1229b(e)'s numeric limits on cancellation of removal further exacerbate the consequences stemming from the broad language of Section 1227(a)(2)(B).²²² The fact that an individual is not eligible for relief unless he has resided in the country for a significant amount of time potentially eliminates relief for a number of LPRs.²²³ For instance, if a non-citizen lived in the United States for six years before becoming a permanent resident, and four years later was convicted for either possession of drug paraphernalia, possession of Ritalin without a prescription, or for checking into a drug rehabilitation clinic, the he would face automatic deportation.²²⁴ There would be no inquiry into his connections to the United States, whether he is leaving family behind, whether he has a criminal record, or whether his drug addiction is his only negative personal issue.²²⁵ Even if relief was available via Section 1229b(a) and the Immigration Judge held that the LPR should not be deported,

²¹⁹ See 21 C.F.R. §§ 1308.11–.15 (2012) (labeling Xanax, Ritalin, and Adderall controlled substances); Lisa Miller, *Listening to Xanax*, N.Y. MAG., Mar. 18, 2012, <http://nymag.com/news/features/xanax-2012-3/> (detailing the popularity of Xanax).

²²⁰ See TEX. HEALTH & SAFETY CODE ANN. §§ 481.104, .117 (2010) (Texas statute labeling Xanax a controlled substance and making it a crime to possess without a prescription); *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010) (holding that an LPR was deportable following his conviction for possession of one Xanax tablet without a prescription); 21 C.F.R. §§ 1308.11–.15 (DEA regulations labeling Xanax a controlled substance).

²²¹ See 8 U.S.C. §§ 1227(a)(2)(B), 1229b(a) (2006) (making any non-citizen with a conviction relating to a controlled substances violation deportable and limiting cancellation of removal only to non-citizens that have been LPRs for five years, lived continuously in the U.S. for seven years, and have not been convicted of an aggravated felony). Compare 21 U.S.C. § 812 (listing illegal drugs that Congress has codified), with 21 C.F.R. § 1308.11–.15 (containing a broader list of illegal drugs than those Congress codified).

²²² See 8 U.S.C. § 1229b(a), (e) (placing restrictions on when an LPR can apply for cancellation of removal due to the automatic deportation presumption of § 1227(a)(2)(B)).

²²³ *Id.* § 1229b(a).

²²⁴ See *id.* §§ 1227(a)(2)(B), 1229b(a).

²²⁵ See *id.* §§ 1227(a)(2)(B), 1229b(a).

the LPR could nevertheless be deported if the yearly quota for cancellation of removal had already been filled.²²⁶

At the very least, the LPR will face mandatory detention for a drug crime, no matter how minor.²²⁷ This means that many LPRs will lose months of their lives, and presumably any employment they held at the time, in a detention center for acts that are not even considered crimes in certain states.²²⁸

C. *The General Make-Up of the Immigration Administration Places LPRs at a Disadvantage*

The issue as to whether or not immigration officials would actually deport a long-time LPR for possessing drug paraphernalia may seem harsh, but the pressure that DHS faces to increase deportations is very real.²²⁹ Congress regularly audits immigration agencies and scolds them whenever they fail to deport criminal non-citizens in an expeditious manner.²³⁰ As a result, DHS has begun setting increasingly ambitious yearly quotas for deportations.²³¹

Additionally, congressional pressure has led DHS and ICE to use their impressive administrative interpretive power to render LPRs both more deportable and ineligible for relief from deportation.²³² This tactic manifests itself in case law and some notable examples include *I.N.S. v. St. Cyr*, *Lopez v. Gonzales*, and *Carachuri-Rosendo v. Holder*.²³³

²²⁶ See *id.* § 1229b(e).

²²⁷ See *id.* § 1226(c).

²²⁸ See *id.* Compare MASS. GEN. LAWS ch. 94C, § 32L (2012) (making possession of marijuana a civil infraction), with GA. CODE ANN. §§ 16-13-2, -30 (2011) (making first time possession of marijuana a criminal misdemeanor, and a subsequent conviction for possession a felony with a one-year minimum sentence).

²²⁹ See Morawetz, *supra* note 38, at 1948. All of this takes place during the regular congressional reviews of government agencies. *Id.*

²³⁰ *Id.* (stating that “Congress audits INS [now DHS] enforcement efforts and treats any failure to deport expeditiously a person who fits the criminal alien label as evidence of the INS’s failure”).

²³¹ See LEAKED ICE INTERNAL MEMO, *supra* note 29 (making reference to a quota); Lonagan, *supra* note 13, at 77 (stating that DHS’s annual report “reads like a corporate newsletter, boasting of a greater number of criminal deportations than in previous years”).

²³² See Morawetz, *supra* note 38, at 1948; see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (stating that when Congress implicitly delegates authority to an agency, such as DHS or ICE, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency”).

²³³ *Carachuri-Rosendo*, 130 S. Ct. at 2580; *Lopez v. Gonzales*, 549 U.S. 47, 50 (2006); *I.N.S. v. St. Cyr*, 533 U.S. 289, 292 (2001).

In *St. Cyr*, the government argued that the IIRIRA had eliminated an LPR's habeas corpus right.²³⁴ Similarly, in *Lopez*, the government argued that a crime that was a felony under state law but a misdemeanor under the CSA was the equivalent of an aggravated felony for deportation purposes.²³⁵ Perhaps the most extreme example is *Carachuri-Rosendo*, where DHS argued that the Immigration Judge should consider an LPR, whose only crimes were two misdemeanors, a felon because he could have hypothetically been charged as a recidivist felon under federal law.²³⁶ With such a pro-deportation attitude and a near limitless legislative authority to engage in drug-based deportations, DHS has set a new record every year for deportations—with drug-based deportations comprising the majority of criminal deportations.²³⁷

In addition to the natural pressures that the executive branch faces in increasing the deportation of non-citizens, the fact that the executive branch has full oversight of the immigration process creates other problems.²³⁸ In the United States, the executive branch has discretion in determining the deportable crimes, how to prosecute those deemed deportable, and how to apply the existing immigration law, all while enjoying near limitless insulation from judicial interference thanks to legislative barriers.²³⁹ When Immigration Judges or the BIA hold in fa-

²³⁴ *St. Cyr*, 533 U.S. at 298. It should be noted that the Supreme Court found for the permanent resident, and in response Congress explicitly eliminated habeas relief for immigration detainees. See 8 U.S.C. § 1252(a)(2)(B) (2006) (explicitly eliminating habeas corpus relief for removable non-citizens); *St. Cyr*, 533 U.S. at 314.

²³⁵ *Lopez*, 549 U.S. at 51.

²³⁶ *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 390–91 (BIA 2007). DHS argued “that any correspondence between a ‘state possession crime’ and the Federal felony of ‘recidivist possession’ could be established by means of a purely *hypothetical* inquiry . . . whether he has a criminal history that *could have* exposed him to felony treatment had he been prosecuted federally.” *Id.* at 390. It should be noted that even DHS realized the implications of that argument and eventually retreated from it. *Id.* at 391.

²³⁷ See U.S. DEP’T OF HOMELAND SEC., *supra* note 56, at 102; Simanski & Sapp, *supra* note 36, at 6; News Release, Immigration and Customs Enforcement, FY 2012: ICE Announces Year-end Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance for Further Focus Resources (Dec. 21, 2012), *available at* <http://www.ice.gov/news/releases/1212/121221washingtondc2.htm>.

²³⁸ See Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 647 (2009) (similarly criticizing the immigration adjudicatory process); Legomsky, *supra* note 125, at 408–09 (criticizing the lack of judicial independence in immigration proceedings).

²³⁹ See 8 U.S.C. § 1252(a)(2)(C) (eliminating judicial review in deportation matters except in questions of law or the Constitution); Controlled Substances Act, 21 U.S.C. § 811 (2006) (granting the Attorney General and the DEA the power to extend the list of illegal substances to any other substances that meets Section 811’s criteria); *see also Carachuri-Rosendo*, 130 S. Ct. at 2582; *Lopez*, 549 U.S. at 51; *St. Cyr*, 533 U.S. at 298 (highlighting the

vor of an LPR, they are in essence entering a judgment against their direct employer, which some scholars believe leads to an inherent pro-deportation bias in immigration proceedings.²⁴⁰ Furthermore, there has been at least one instance where the Attorney General's interference with the BIA makeup due to political reasons led to BIA decisions that certain circuit courts derided as "literally incomprehensible" and "so inadequate as to raise questions of adjudicative competence."²⁴¹

In the past fifteen years, many citizens have come to realize the practicality of more lenient drug laws.²⁴² Nevertheless, LPRs continue to face a legislative and administrative drug-based deportation regime largely unaffected by these developments.²⁴³ Citizens have realized that not all drug crimes are equal, and it is only fair that some of the recent legal leniency trickle down to LPRs at the federal level.²⁴⁴

V. RESTORING THE PERMANENCE IN LEGAL PERMANENT RESIDENT

The detrimental effects of deportations on families are well documented.²⁴⁵ For LPRs, deportation is particularly severe because they are—by definition—non-citizens that are seeking to remain permanently in the United States.²⁴⁶ Furthermore, LPRs have an established legal relationship with the United States that mostly makes them legal equals to naturalized citizens except in one very important situation—deportation.²⁴⁷

Given the changing attitudes on drugs, the incredible likelihood of drug crimes leading to deportation, the draconian scenarios that the United States' deportation laws create, and the legal relationship permanent residents enjoy with the nation, it is only fair to change the

extremes to which the immigration authorities will interpret statutes so as to make LPRs automatically deportable).

²⁴⁰ See Legomsky, *supra* note 125, at 373.

²⁴¹ See *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1187 (9th Cir. 2005); *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004); see also Legomsky, *supra* note 125, at 375–78 (explaining how much of the criticism originated with the Attorney General's attempt to streamline the immigration appellate process, but really was driven by a desire to remove pro-immigration board members, and how it subsequently led to serious procedural deficiencies).

²⁴² See Duke, *supra* note 178, at 32–33.

²⁴³ See Legomsky, *supra* note 125, at 408–09.

²⁴⁴ See Lofgren, *supra* note 188, at 784–91 (stating that some states were frustrated with the negative impacts of harsh drug laws and amended their statutes to be more lenient).

²⁴⁵ See, e.g., Lonigan, *supra* note 13, at 79; Morawetz, *supra* note 38, at 1950–54 (devoting an entire section to the impact of deportation on families).

²⁴⁶ See 8 U.S.C. § 1101(a)(20) (2006).

²⁴⁷ Lonigan, *supra* note 13, at 57.

current deportation regime to mitigate some of its harsher outcomes.²⁴⁸ This note proposes three alternative methods by which the United States can make the deportation process more fair to LPRs and ensure that only those truly deserving are actually deported: (1) amend the existing legislation, (2) provide for full judicial oversight of the deportation process for LPRs, or (3) recognize that LPRs are entitled to some constitutional protections in deportation proceedings.

A. Amending the Current Deportation Legislation

Perhaps the most efficient way to achieve a fair deportation system for LPRs is to amend statutes like Section 1227(a)(2)(B) and Section 1226(c) to narrow their deportation and detention requirements to truly dangerous criminals.²⁴⁹ For instance, it is evident that by withholding relief from removal for non-citizens charged with a drug trafficking crime, Congress was attempting to expedite removal for non-citizens who were active participants in the drug trade.²⁵⁰ The problem is not with Congress's intent, but rather with their decision to tie the definition of a drug trafficking crime to the length of the crime's potential sentence.²⁵¹ To resolve over-exclusivity, the definition of a drug trafficking crime should be explicitly changed to the common sense understanding of the word: a trade or deal in illegal drugs within interstate commerce.²⁵²

²⁴⁸ See 8 U.S.C. § 1101(a)(20) (establishing the status of LPRs); *id.* § 1227(a)(2)(B) (making any non-citizen, regardless of legal status, deportable for *any* offense relating to controlled substances); Nielsen, *supra* note 181, at 486 (detailing how most Americans now hold a generally positive attitude towards decriminalizing marijuana); Simanski & Sapp, *supra* note 36, at 6 (indicating that the majority of criminal deportations in 2011 were drug based).

²⁴⁹ See 8 U.S.C. §§ 1226(c), 1227(a)(2)(B). Section 1227(a)(2)(B) currently punishes all drug offenses equally, and Section 1226(c) subjects non-citizens convicted of a drug offense to mandatory detention. *Id.* §§ 1226(c), 1227(a)(2)(B).

²⁵⁰ See *id.* § 1101(a)(43)(B) (defining drug trafficking as an aggravated felony); *id.* § 1229b(a) (withholding cancellation of removal from non-citizens convicted of an aggravated felony); Morawetz, *supra* note 38, at 1944 (stating that when passing IIRIRA, Congress was concerned with the number of criminal aliens in the nation's prisons).

²⁵¹ See 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. §§ 924(c)(2), 3559(a) (2006); Controlled Substances Act, 21 U.S.C. § 802(13) (2006); *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580–81 (2010) (explaining how the statutes work together to render any drug-related crime that imposes a sentence of one year or more an "aggravated felony" for deportation purposes).

²⁵² See *Lopez v. Gonzales*, 549 U.S. 47, 53–54 (2006) (noting the odd definition of drug trafficking within the CSA and how it goes against the common sense definition).

Additionally, it would be equitable to reserve deportation for recidivist offenders.²⁵³ Due to the ever-expanding list of controlled substances, a one-strike possession policy can lead to overly harsh results. A three-strike policy appears to be the fairest solution because LPRs will likely be well aware of the deportation consequences, should they ever commit the third offense.²⁵⁴ Furthermore, this would allow LPRs to benefit from laws like those passed in California, which make possession of marijuana a civil penalty so long as the individual takes part in addiction treatment.²⁵⁵ This result would also be more in line with general American attitudes regarding drug addiction as a disease rather than a crime.²⁵⁶

With these new definitions in hand, 8 U.S.C. § 1227(a)(2)(B) could be changed so that it applies solely to LPRs convicted of illicit drug trafficking or LPRs who have received three drug related convictions.²⁵⁷ This would mitigate many of the harsh consequences of the current drug-based deportation regime.²⁵⁸ Minor drug crimes would no longer subject LPRs to mandatory detention and the possibility of mandatory deportation, and only professional criminal LPRs or deliberate repeat offenders would be subject to such provisions.²⁵⁹

A final concession of equity should be that every LPR subject to deportation should have the opportunity to apply for cancellation of

²⁵³ See *Carachuri-Rosendo*, 130 S. Ct. at 2589 (noting how possession for a single pill of Xanax made an LPR deportable even absent his previous conviction for possession of marijuana); *Lonegan*, *supra* note 13, at 81 (arguing that ICE should disclose rates of recidivism of deportees).

²⁵⁴ See *Padilla v. Kentucky*, 559 U.S. 356, 389 (2010) (Scalia, J., dissenting) (stating that “[s]tatutory provisions can remedy [deportation consequence] concerns in a more targeted fashion”); MORTON MEMO, *supra* note 12 (stating the ICE should only pursue immigrants with three or more misdemeanor convictions).

²⁵⁵ See 8 U.S.C. § 1226(a)(2)(B)(ii) (2006) (making drug addiction a deportable offense); CAL. PENAL CODE § 1210.1 (West 2004) (making possession of marijuana a civil offense that is accompanied by mandatory rehabilitation).

²⁵⁶ See *Nielsen*, *supra* note 181, at 486.

²⁵⁷ See 8 U.S.C. § 1227(a)(2)(B); *Lopez*, 549 U.S. at 53–54 (explaining the common sense definition of illicit trafficking); MORTON MEMO, *supra* note 12.

²⁵⁸ See 8 U.S.C. §§ 1226(c), 1227(a)(2)(B); 18 U.S.C. §§ 924(c)(2), 3559(a) (2006); Controlled Substances Act, 21 U.S.C. § 802(13) (2006); *supra* Part II (demonstrating the harsh regime created by 8 U.S.C. § 1101(a)(43)(B) (2006)); see also *Lopez*, 549 U.S. at 53–54 (noting the odd definition of drug trafficking within deportation law); MORTON MEMO, *supra* note 12 (demonstrating the Executive Branch’s recent apprehension in executing the deportation laws to their full capacity).

²⁵⁹ See *Lopez*, 549 U.S. at 53–54; MORTON MEMO, *supra* note 12. Mandatory detention of certain criminal non-citizens has merit because many criminal non-citizens have failed to appear at deportation proceedings in the past. See *Demore v. Kim*, 538 U.S. 510, 519–20, 529 (2003) (explaining Congress’s reasoning for implementing mandatory detention).

removal.²⁶⁰ The consequences of deportation can be incredibly harsh, and it only seems fair to afford LPRs the same kind of examination into their character when removing their permanent status, as when granting it.²⁶¹

B. Restoring Judicial Oversight

An alternative method for making the deportation process fairer to LPRs, though perhaps not as immediately effective, is to restore judicial oversight.²⁶² The method for achieving this is twofold: (1) Immigration Judges and the BIA should be independent of the Department of Justice, and (2) the statutory provisions eliminating judicial review of immigration decisions should be removed.²⁶³

Given that the Department of Justice operates under the office of the President, and as such is subject to political pressures, it would be equitable to insulate the immigration adjudicatory process from the negative effects of politics.²⁶⁴ Moving the Immigration Judges and the BIA away from the influence of the executive could achieve this.²⁶⁵ Additionally, eliminating the barriers on judicial review would allow Article III Judges, an entity that is fully disinterested from the immigration process, the ability to ensure that equitable immigration procedures are being followed by giving them the power to question BIA findings of fact and exercise of discretion.²⁶⁶ These changes would ensure that

²⁶⁰ See 8 U.S.C. § 1229b(a) (placing restrictions on which LPRs may seek cancellation of removal); Legomsky, *supra* note 125, at 409 (arguing for judicial review of every deportation case).

²⁶¹ See 8 U.S.C. § 1182(a) (2012) (detailing the extensive grounds of inadmissibility that would prevent a non-citizen from obtaining LPR status); see also Brozovich, *supra* note 43, at 430 (detailing the specific hurdles that immigrants have to overcome in order to become LPRs); Shenoy & Khakoo, *supra* note 43, at 138–40 (explaining that “[a]chieving LPR status is usually the end result of a tortuous (and torturous) process, often through more than one federal agency”).

²⁶² Family, *supra* note 238, at 603–04 (detailing the criticisms that Immigration Judges face); Legomsky, *supra* note 125, at 408–09.

²⁶³ Legomsky, *supra* note 125, at 404–09 (stating that “Congress should *both* restore decisional independence to the administrative process (at both the initial hearing and the administrative appeal stages) *and* repeal the 1996 and subsequent limitations that it has imposed on judicial review”).

²⁶⁴ See *id.*

²⁶⁵ See *id.* at 375–76 (detailing how the Attorney General has interfered with the immigration adjudicatory process due to political reasons). Recall that the National Association of Immigration Judges themselves had at one point advocated for this solution. *Id.* at 373.

²⁶⁶ See 8 U.S.C. § 1252(a)(2)(c) (2006) (eliminating judicial review of all immigration decisions except those involving questions of law or the constitution); Legomsky, *supra*

LPRs were given proper judicial oversight either when appearing before an Immigration Judge or when an Article III Judge is reviewing the BIA's decisions.²⁶⁷

C. Constitutional Rights in Deportation Proceedings

Substantial Supreme Court precedent states that deportation proceedings are civil in nature and thus not subject to the Constitution's criminal due process protections.²⁶⁸ If deportation proceedings were treated more like criminal proceedings, LPRs would have greater protection from the harsher aspects of the deportation law, such as mandatory detention.²⁶⁹ In the case of *Padilla v. Kentucky*, the Supreme Court showed signs that it recognized the criminal-like nature of deportations, and that perhaps deportation proceedings should be held to a higher constitutional standard.²⁷⁰

In *Padilla*, Jose Padilla—an LPR of forty years and U.S. military veteran—faced mandatory deportation after being indicted on charges of possession of marijuana, drug paraphernalia, and trafficking marijuana.²⁷¹ Mr. Padilla entered into a plea bargain with the state after being assured by his lawyer that there was no danger of deportation because he had been in the United States for so long.²⁷² Still, Mr. Padilla's plea made him subject to mandatory deportation under Section

note 125, at 375, 408–09 (detailing the potentially destructive nature of executive interference and the potential benefits of greater judicial oversight).

²⁶⁷ See GREENBERG, ET AL., *supra* note 45, § 20.5.3(c) (detailing an Immigration Judge's limited role over a Section 1229b hearing); Legomsky, *supra* note 125, at 404–09.

²⁶⁸ See, e.g., Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-A-Half Amendment*, 58 UCLA L. REV. 1461, 1472 (2011) (noting how *Padilla v. Kentucky* was the first time in nearly ninety years that the Supreme Court even attempted to address the fallacy of deportation as a civil procedure) [hereinafter Kanstroom III]; Shenoy & Khakoo, *supra* note 43, at 143–46.

²⁶⁹ See, e.g., KANSTROOM II, *supra* note 137, at 19 (explaining that it is only fair that constitutional norms applicable to criminal cases should also apply to criminal deportations); Adriane Meneses, Note, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation As Punishment*, 14 SCHOLAR 767, 829 (2012) (detailing some of the benefits that non-citizens would receive under the Constitution).

²⁷⁰ See *Padilla*, 559 U.S. at 364; Kanstroom III, *supra* note 268, at 1467–73 (summarizing the Court's holding and its significance).

²⁷¹ *Padilla v. Commonwealth*, No. 2004-CA-001981-MR, at 1–2 (Ky. Ct. App. Mar. 31, 2006).

²⁷² *Id.* at 2–3.

1227(a)(2)(B) and Section 1229b(a).²⁷³ Mr. Padilla argued that the Constitution entitled him to effective assistance of counsel regarding the immigration consequences of a criminal conviction, and the Supreme Court agreed.²⁷⁴ The Court reasoned that deportation was not merely a civil collateral consequence to a criminal conviction due to its unique nature—a notable break from prior precedent.²⁷⁵

While the Supreme Court did not expressly acknowledge that deportation is a criminal procedure in *Padilla*, the Court nevertheless took an important first step in separating deportation from strictly civil procedures.²⁷⁶ If the Supreme Court were to take *Padilla* further and formally hold that deportation is not a civil procedure, then the nature of the deportation process would fundamentally change.²⁷⁷ If deportation was deemed a criminal process, courts would have to apply greater constitutional restraints on the deportation process, which could lead to the erosion of the current legislation's harsher aspects and the implementation of a fairer deportation system.²⁷⁸

CONCLUSION

LPRs are in a unique status among the nation's immigrants—in many ways, the law regards them as the equivalent of citizens. One of the key differences between LPRs and citizens is that LPRs convicted of drug crimes are subject to deportation. The launch of the War on Drugs in the 1980s led to an explosion in the number of individuals convicted for drug crimes, and non-citizens were included in that increase. Using the increase in criminal non-citizens as a pretext, Congress enacted stronger immigrations laws in 1996. The new laws made it easy for LPRs to be placed in detention and automatically deported for drug crimes, and the new laws also reduced oversight from the judicial

²⁷³ *Id.* The record did not refute Padilla's allegation that he received mistaken advice. *Id.* at 7. Nor did the record refute Padilla's allegation that he would not have accepted the plea if he had known of the deportation consequences. *Id.*

²⁷⁴ *Padilla*, 559 U.S. at 360, 374–75.

²⁷⁵ *Id.* at 364–66; Kanstroom III, *supra* note 268, at 1462–63, 1481–82.

²⁷⁶ See *Padilla*, 559 U.S. at 364–66. (focusing on the criminal-advice aspect as the reasoning behind the holding rather than the rights of LPRs); Kanstroom I, *supra* note 41, at 1928–31 (explaining the rationale and history behind the substantive due process model for deportation law); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301 (2011) (highlighting the deportation law breakthrough in the Court's opinion).

²⁷⁷ Markowitz, *supra* note 276, at 1301 (stating that if the Supreme Court were to explicitly declare that deportation is not a civil procedure then it would “plot a course for the more robust judicial protection of the rights of immigrants facing deportation”).

²⁷⁸ See *id.* at 1350.

branch. Since then, deportations have increased every year, and drug-based deportations have accounted for the majority of the criminal deportations.

In recent history, a movement has been underway in the United States to enact more lenient drug laws. Because of the 1996 laws, however, LPRs have not benefited from the more lenient drug laws to the same extent as citizens. Today, a drug-related act that would subject a citizen to a civil fine or no penalty at all can subject an LPR to mandatory detention and possible deportation. Congress and the courts can correct this imbalance in a number of ways: by amending existing legislation, restoring judicial oversight, or granting LPRs facing deportation the same procedural rights that we grant individuals in criminal proceedings.

In *Demore v. Kim*, Chief Justice Rehnquist stated, “Congress regularly makes rules [for non-citizens] that would be unacceptable if applied to citizens.”²⁷⁹ This line neatly encompasses the draconic and often unfair situation in which many LPRs find themselves. Many United States citizens have amended their respective state laws to better reflect changing attitudes towards drugs, and to ignore the needs of legal immigrants in this process would be truly unacceptable.

²⁷⁹ *Demore v. Kim*, 538 U.S. 510, 521 (2003).

