2000

Current Trends in Illegal Reentry Cases

Stephen W. Yale-Loehr
Cornell Law School, SWY1@cornell.edu

Rachel J. Valente
True, Walsh & Miller

CURRENT TRENDS IN ILLEGAL REENTRY CASES

Stephen Yale-Loehr[1] *and Rachel J. Valente*[2]

As the Immigration and Naturalization Service (INS) begins removing more and more aliens, a growing number are reentering illegally after their removal.[3] Many of those reentering do not realize that by doing so they are committing a crime. The case law in this area is quite complex and fraught with constitutional considerations. This article provides an overview of the crime of illegal reentry under Immigration and Nationality Act (INA) § 276.[4]

I. ILLEGAL REENTRY

The Immigration and Nationality Act § 276 is codified at 8 U.S.C. § 1326 and states that an alien who has been "denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding"[5] and thereafter reenters the United States or is at any time found in the United States, without prior approval by the Attorney General (when such approval is required), can be fined or imprisoned up to two years or both.[6] If such reentry follows removal subsequent to a felony conviction, other than an aggravated felony,[7] or three or more misdemeanors involving drugs or crimes against persons, or both, it is punishable by a fine or imprisonment for up to

---

[1] Stephen Yale-Loehr is co-author of CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE (rev. ed. 1999) [hereinafter YALE]. He also teaches immigration law at Cornell Law School and is Of Counsel at True, Walsh & Miller in Ithaca, NY (www.twmlaw.com). He can be reached at syl@twmlaw.com.

[2] Rachel Valente graduated from Cornell University in 1998. She currently is a research assistant at True, Walsh & Miller. She will attend Harvard Law School beginning in the Fall 1999.

[3] *See* Bill Wallace, *Deported Criminals Stream Back Into the U.S. by the Thousands*, SAN FRANCISCO CHRONICLE, May 11, 1998, at A11.

[4] *See* 8 U.S.C. § 1326 (Supp. III 1997).

[5] § 1326(a)

[6] *See id. See also* 6 YALE, *supra* note 1, § 71.04[2][e], at 71-78.

[7] *See* 6 YALE, *supra* note 1, § 71.05[2], at 71-162 (discussing aggravated felonies).

10 years or both.[8] If such reentry follows a conviction for an aggravated felony, the penalty is increased to a fine or imprisonment for up to 20 years or both.[9] In addition, recent legislation created specific penalties for those aliens who: (1) illegally reenter after being excluded pursuant to INA § 235(c) because the alien was suspected of terrorist activity under INA § 212(a)(3)(B); (2) has been removed from the United States pursuant to the alien terrorist provisions of INA §§ 501-07;[10] or (3) was released from incarceration by the Attorney General to be removed pursuant to INA § 241(a)(4)(B).[11] Such aliens can be fined, imprisoned for up to 10 years, or both.[12]

This penalty originated in 1929 and was carried forward in the 1952 codification of the Immigration and Nationality Act (INA).[13] The 1952 Act, however, added the language punishing such an alien who is "found" in the United States, thus avoiding the need for proving the unlawful reentry.[14] In addition, the 1952 Act imposed the criminal penalty on one who reentered improperly after exclusion or deportation, while the 1929 Act applied only to one who had been arrested and deported. As mentioned above, subsequent amendments have increased the penalties for improper reentry following conviction of a felony.

The statute effectively limits judicial review of one of the underlying elements that establishes this crime—removal.[15] Nor can an alien collaterally attack the validity of his or her prior deportation or removal order unless all administrative remedies were exhausted, the proceedings deprived the alien of judicial review, and the entry of

---

[8] *See* § 1326(b)(1).

[9] *See* § 1326(b)(2); 6 YALE, *supra* note 1, §§ 71.05[2], 72.05, at 71-162 (discussing deportability following a conviction for an aggravated felony).

[10] *See* § 1326(b)(3); 6 Yale, *supra* note 1, § 72.11, at 72-257 (discussing alien terrorist removal provisions).

[11] *See* § 1326(b)(4).

[12] *See* § 1326(b)(3)-(4).

[13] *See id.*

[14] *See* United States v. Whitaker, 999 F.2d 38 (2d Cir. 1993) (stating that "found in" is synonymous with "discovered in"); *See* 8 YALE, *supra* note 1, § 111.08 [2][d][ii][D], at 111-130.1.

[15] *See* §§ 1225(b)(1)(C), 1252.

the order was fundamentally unfair.[16] This has caused concern about using a civil deportation or removal proceeding, or an expedited removal by an individual border patrol agent to establish an element of a crime, which by statute has a limited opportunity for judicial review.[17]

Constitutional challenges to INA § 276 have not succeeded.[18] As a result, successfully defending an individual against an unlawful reentry charge is quite difficult.[19]

II. ELEMENTS OF THE CRIME OF ILLEGAL REENTRY

A. In General

To prove a violation of INA § 276, the government must establish the following four elements: the defendant (1) is an alien; (2) who previously was denied admission, was excluded, deported or removed, or has departed the United States while an order of exclusion, deportation, or removal is outstanding; (3) and subsequently attempted to, reentered, or was found in the United States; (4) without having the express consent of the Attorney General.[20]

---

[16] *See* § 1326(d).

[17] *See* 8 YALE, *supra* note 1, § 111.08[2][d][ii], at 111-127. *See also* David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820 (1998).

[18] *See* 8 YALE, *supra* note 1, § 111.08[2][d][iii], at 111-130.4.

[19] *See generally* Daniel P. Blank, Note, *Suppressing Defendant's Identity and Other Strategies for Defending Against a Charge of Illegal Reentry After Deportation*, 50 STANFORD L. REV. 139 (1997).

[20] *See* § 1326. *See generally* United States v. Cardenas-Alvarez, 987 F.2d 1129, 1131-32 (5th Cir. 1993).

B. Alienage

Alienage is an essential element of the crime.[21] A prior deportation or removal order, without more, is insufficient to establish alienage.[22] However, adequate proof can consist of a prior deportation or removal and an oral admission by the individual stating that the individual is in fact an alien.[23]

When alienage has been established in a prior criminal prosecution and judgement, the principle of collateral estoppel may preclude the defendant or the government from relitigating the defendant's citizenship status.[24] But such estoppel may not result from a finding of alienage in a deportation or removal proceeding, in which the "clear, unequivocal, and convincing" burden of proof is not as exacting as the "beyond a reasonable doubt" standard applicable in criminal cases.[25] Although a prior guilty plea and other admissions of

---

[21] *See* § 1326(a). *See* United States v. Marin-Cuevas, 147 F.3d 889 (9th Cir. 1998) (stating that despite the government's various references to INS findings of alienage, and the judge's failure to provide a limiting instruction, the jury was not misled about the burden of proof pertaining to alienage and properly denied the defendant's claim of derivative citizenship).

[22] *See* United States v. Ortiz-Lopez, 24 F.3d 53 (9th Cir. 1994).

[23] *See* United States v. Hernandez, 105 F.3d 1330 (9th Cir. 1997) (oral admission to a Border Patrol agent); United States v. Contreras, 63 F.3d 852 (9th Cir. 1995) (oral admission under oath at a deportation hearing).

[24] *See* Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968) (holding that a judgment in a criminal case may operate to collaterally estop the relitigation of alienage; court suggests that acquittal in prior prosecution would not necessarily estop the government from future prosecution). *See* Barragan- Cepeda v. United States, 29 F.3d 1378 (9th Cir. 1994) (holding that the government was collaterally estopped because evidence clearly indicated that the alienage issue was necessarily decided in a previous criminal trial in the defendant's favor); United States v. Rangel-Perez, 179 F. Supp. 619 (S.D. Cal. 1959) (finding that alienage in prior conviction for unlawful entry establishes such alienage as of date of such conviction in later prosecution for another unlawful entry by doctrine of res judicata or collateral estoppel; alienage status usually will be presumed to continue).

[25] *Ortiz-Lopez*, 24 F.3d at 56 ("[A]llowing deportation orders to establish the element of alienage in a later criminal trial would eviscerate the element altogether.").

alienage may be used as evidence to establish this element,[26] the circuits treat prior guilty pleas in criminal cases differently when applying collateral estoppel. Of the circuits that have addressed this specific issue so far, only one court has prohibited the government from using a prior guilty plea to collaterally estop a defendant from relitigating his or her alienage in a § 276 prosecution.[27] This prohibition seems prudent, since many aliens may plead guilty to receive voluntary departure or a lesser sentence, and may not be fully aware that their guilty plea may preclude them from litigating their alienage status in the future. Those who are fully aware of being collaterally estopped at some future date may refrain from pleading guilty. Another consideration is the fact that there need only be a factual basis for a guilty plea, a lesser standard than the proof beyond a reasonable doubt burden in criminal trials.

C. Previously Denied Admission, Excluded, Deported, or Removed

The defendant also must have been previously denied admission, excluded, deported,[28] or removed, or have departed the United States while an order of exclusion, deportation, or removal is

---

[26] *See* Farrell v. United States, 381 F.2d 368 (9th Cir. 1967) (finding that alienage proved by plea of guilty for prior § 276 violation, and prior oral and written admissions). *Cf.* United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980) (holding that although guilty plea under INA § 275(a) can be used in admission of alienage, its inadequately explained use for this purpose in prosecution under § 276 is found to be in error). *See* 8 YALE, *supra* note 1, § 111.08[2][c], at 111-124.

[27] *See* United States v. Gallardo-Mendez, 150 F.3d 1240 (10th Cir. 1998) (stating that the government may not use a judgment following a plea of guilty to collaterally estop a criminal defendant from relitigating an issue in a subsequent criminal proceeding; holding otherwise would violate the due process clause). *But see* Hernandez-Uribe v. United States, 515 F.2d 20, 22 (8th Cir. 1975) ("[The] general rule is that collateral estoppel, where applicable, applies equally whether the previous criminal conviction was based on a jury verdict or a plea of guilty.").

[28] *See* Arriaga-Ramirez v. United States, 325 F.2d 857 (10th Cir. 1963) (stating that despite not knowing an order of deportation was issued, a defendant who voluntarily left the country was deemed to have been deported).

outstanding.[29] Until April 1997, the alien had to have been arrested as well.[30] For cases started prior to April 1997, the issuance of an arrest or deportation warrant may be sufficient restraint to constitute arrest for this purpose.[31] The failure to issue a warrant of deportation has been held to preclude criminal liability under this statute.[32] The statute's penalty does not extend to one who has voluntarily left the United States when not subject to a final deportation or removal order.[33] No court has yet decided whether a crewman who is deported after his or her conditional landing permit has been revoked has been arrested and deported for the purposes of this statute.[34]

In cases involving removal orders, the government must also prove that the defendant actually was removed.[35] This can be accomplished by introducing the warrant of deportation or removal order containing an endorsement showing its execution, or a statement of the defendant admitting the facts, or by other evidence.[36] One who leaves the United States while an order of deportation or removal is outstanding is deemed to have been deported or removed.[37] Thus, a

---

[29] *See* 8 U.S.C. § 1326(a)(1) (Supp. III 1997).

[30] *See* United States v. Bahena-Cardenas, 70 F.3d 1071 (9th Cir. 1995) (defining the term arrested as requiring that a warrant of deportation be served on the defendant; mere issuance is not an arrest). The United States Congress eliminated the term arrested. *See* § 1361.

[31] United States v. Hernandez, 693 F.2d 996, 998 (10th Cir. 1982) (stating that issuance of deportation warrant constituted arrest); United States v. Farias-Arroyo, 528 F.2d 904 (9th Cir. 1975) (stating that arrest does not necessarily require physical restraint).

[32] *See generally* United States v. Quezada, 754 F.2d 1190 (5th Cir. 1985) (stating that issuing and service of warrant of deportation adequately established).

[33] *See* United States v. Wong Kim Bo, 466 F.2d 1298 (5th Cir. 1972); United States v. Wong Kim Bo 472 F.2d 720 (5th Cir. 1972) (rehearing denied).

[34] *See* United States v. DiSantillo, 615 F.2d 128 (3d Cir. 1980) (questioning whether a seaman was in fact arrested).

[35] *See* 8 U.S.C. § 1326(a)(1) (Supp. III 1997).

[36] *See, e.g.*, United States v. Contreras, 63 F.3d 852 (9th Cir. 1995) (revealing testimony that an alien was seen walking toward foreign soil across a bridge was adequate for the court to infer that he actually reached foreign soil, and thereby deported).

[37] *See* § 1101(g). *See, e.g.*, United States v. Watterworth, 162 F. Supp. 527, 530 (D. Md. 1958) ("Clearly an alien against whom a final order of deportation is

seaman under order of deportation who left the United States on a round trip voyage to a foreign port was found to have reentered the United States after deportation even though he did not leave the vessel at the foreign port.[38]

The alien must have been removed according to law.[39] For example, when the INS removed an alien while his deportation appeal was pending, as a matter of law he was not deported for purposes of INA § 276.[40]

Resolving a conflict in the lower courts, in 1987, the United States Supreme Court held that while the lawfulness of the prior deportation was not an essential element of proof in the criminal proceeding, a defendant could mount a collateral challenge to the deportation order in a pretrial application to determine whether there was a violation of due process.[41] Since then all circuits have held that to mount a successful collateral attack, it is not enough simply to show that procedural due process was violated; the defendant must show that the violation was prejudicial.[42] One court has defined prejudice in this context as "[a] reasonable likelihood that the result

---

outstanding executes that order and brings about his own deportation if he thereafter leaves the United States.").

[38] *See* United States v. Maisel, 183 F.2d 724 (3d Cir. 1950).

[39] *See* United States v. Lagarda-Aguilar, 617 F.2d 527 (9th Cir. 1980) (stating that failure to give written notice of termination of parole precluded prosecution for subsequent reentry). *Cf.* United States v. Ortiz-Diaz, 849 F. Supp. 734 (E.D. Cal. 1994) (determining unwritten automatic termination of parole to be adequate).

[40] *See* United States v. Fermin-Rodriguez, 5 F. Supp. 2d 157 (S.D. N.Y. 1998) (dismissing the indictment).

[41] *See* United States v. Mendoza-Lopez, 481 U.S. 828 (1987) (where there is a violation of due process, the government may not rely on the deportation order as conclusive proof of an element of a criminal offense).

[42] *See* United States v. Loaisiga, 104 F.3d 484 (1st Cir. 1997); United States v. Fares, 978 F.2d 52 (2d Cir. 1992); United States v. McCalla, 821 F. Supp. 363 (E.D. Pa. 1993); Figeroa v. INS, 886 F.2d 76 (4th Cir. 1989); United States v. Encarnacion-Galvez, 964 F.2d 402 (5th Cir. 1992); United States v. Galaviz-Galaviz, 91 F.3d 145 (6th Cir. 1996); United States v. Espinoza-Farlo, 34 F.3d 469, (7th Cir. 1994); United States v. Polanco-Gomez, 841 F.2d 235 (8th Cir. 1988); United States v. Proa-Tovar, 975 F.2d 592 (9th Cir. 1992); United States v. Meraz-Valeta, 26 F.3d 992 (10th Cir. 1994); United States v. Holland, 876 F.2d 1533 (11th Cir. 1989).

would have been different if the error in the deportation proceeding had not occurred."[43] So despite telephonic hearings,[44] "mass silent waivers"[45] and other due process violations,[46] a defendant may be convicted of an INA § 276 violation if the defendant fails to prove prejudice as a result. In fact, the United States Congress amended the INA in 1996 to prohibit collateral attacks on the underlying deportation or removal order unless the alien could prove that all other administrative remedies for relief have been sought, the deportation proceedings deprived the alien of judicial review, and the entry of the order was fundamentally unfair.[47] If the alien does not meet all these factors, a collateral attack will be unsuccessful.

At least one commentator has expressed concern that making it more difficult to mount a collateral attack on a prior deportation or removal order, combined with the statutory limitation on an alien's opportunity for judicial review of the deportation or removal order[48] violates an alien's due process rights.[49] Also, since deportation is a civil proceeding, the alien has no Sixth Amendment right to counsel. This concern is heightened when an alien was previously subjected to expedited removal. Under INA § 235(b), individual immigration officers (with some exceptions) may expeditiously remove certain aliens from the United States without further hearing or review.[50] Furthermore, this section prohibits collateral attacks in subsequent INA § 276 proceedings by stripping jurisdiction from a court.[51] Though there have been no cases on this matter to date, we express

---

[43] United States v. Loaisiga, 104 F.3d 484, 487 (1st Cir. 1997).

[44] *See* United States v. Contreras, 63 F.3d 852, 855 (9th Cir. 1995) (holding that an alien has a right to an in-person deportation hearing; however, this due process violation was of no consequence because the alien failed to prove prejudice as a result of the violation).

[45] United States v. Lopez-Vasquez, 1 F.3d 751 (9th Cir. 1993) (holding that mass silent waivers do not comport with due process because they incorrectly presume acquiescence).

[46] *See* 1 Yale, *supra* note 1, § 9.06, at 9-26.

[47] *See* 8 U.S.C. § 1326(d) (Supp. III 1997).

[48] *See* § 1252.

[49] *See* Grable, *supra* note 17, at 861-64.

[50] *See* § 1225(b)(1)(A)(i).

[51] *See* § 1225(b)(1)(D).

grave concern that an alien prosecuted for illegal reentry after being expeditiously removed is effectively denied due process since an element of the offense—prior removal—is statutorily void of judicial review.[52]

D. Attempted to Reenter, Reentered, or Found in the United States

The government must also prove that the alien attempted to reenter, did reenter, or was at any time found in the United States.[53] Since the statute punishes unlawful presence in the United States separately,[54] the government does not have to charge or prove willfulness or a specific intent to commit a crime for § 276 purposes.[55] Apparently the only requirement is a general intent to do the prohibited act; in other words, that the reentry was voluntary.[56]

An alien can be deemed to have attempted a reentry despite never attaining freedom from official restraint at the border.[57] An alien who improperly reenters without permission after deportation is also subject to removal.[58] However, since removal proceedings are not criminal, amenability to removal does not preclude a criminal

---

[52] *See* Grable, *supra* note 17, at 825-27.

[53] *See* § 1326(a)(2).

[54] *See* § 1325(a).

[55] *See* United States v. Trott, 227 F. Supp. 448 (D. Md. 1964) ("[A]n allegation of willfulness in an indictment under 8 U.S.C.A. § 1326 is unnecessary, and would ordinarily be surplusage, which need not be proved."). The United States Court of Appeals for the Seventh Circuit is the only circuit that allows a reasonable belief defense against a charge of illegal reentry. United States v. Anton, 683 F.2d 1011, 1017 (7th Cir. 1982).

[56] *See* United States v. Espinoza-Leon, 873 F.2d 743 (4th Cir. 1989); Pena-Cabanillas v. United States, 394 F.2d 785, 790 (9th Cir. 1968) ("[O]bviously if appellant was drugged and carried across the line, he would not be guilty of this offense.").

[57] *See* United States v. Cardenas-Alvarez, 987 F.2d 1129, 1133 (5th Cir. 1993) ("To graft 'freedom from official restraint' onto the crime of attempted entry would make that crime synonymous with actual entry.").

[58] *See* 6 YALE, *supra* note 1, § 71.04[2][e], at 71-78.

prosecution for illegal reentry.[59]

The statute makes a deportee's unauthorized presence in the United States a crime in itself.[60] This provision facilitates the prosecution of a deportee who returns to the United States without permission.

Being found in the United States is an independent basis for prosecution under INA § 276.[61] One court has ruled that the found in language applies to "aliens who have entered surreptitiously, bypassing a recognized immigration port of entry," among other illegal means.[62] However, the impact of the statute of limitations may be different for one who entered through normal immigration channels than for one who entered surreptitiously.[63]

E. Attorney General's Consent

The government must also establish that the Attorney General did not consent to the deportee's reentry.[64] An official certificate that

---

[59] *See* United States v. Ramirez-Aguilar, 455 F.2d 486 (9th Cir. 1972). *See also* 6 YALE, *supra* note 1, § 71.02[3][g].

[60] *See* United States v. Burgos, 269 F.2d 763, 766 (2d Cir. 1959) (holding that an alien's mere presence in the United States is classified as a felony, and thus could be arrested without a warrant); 8 YALE, *supra* note 1, § 111.09[3], at 111-163 (discussing statute of limitations).

[61] *See* 8 U.S.C. § 1326(a)(2) (Supp. III 1997). *See also* United States v. Bernal-Gallegos, 726 F.2d 187 (5th Cir. 1984) (applying criminal penalty to alien "found" in United States at any time without prior permission, even though 1981 statutory amendment limited reentry preclusion for visa purposes to five years).

[62] United States v. Canales-Jimenez, 942 F.2d 1284, 1287 (11th Cir. 1991).

[63] *See* United States v. DiSantillo, 615 F.2d 128 (3d Cir. 1980) (being found in the United States is not a continuing offense when alien entered through a recognized immigration port of entry and therefore, five year statute of limitation applies as proscribed by 18 U.S.C. § 3282; when alien enters surreptitiously, the statute of limitations begins to run only after the alien is discovered by immigration authorities).

[64] *See* § 1326(a)(2). *See* United States v. Martus, 138 F.3d 95 (2d Cir. 1998) (holding that the failure of Border Patrol agents to stop or question defendant as he overtly walked across the border did not satisfy explicit consent of Attorney General because there is no statute or regulation giving Border Patrol agents the authority to grant such consent). *But see* United States v. Anton, 683 F.2d 1011,

no such consent was found in INS records will be received in evidence for this purpose.[65]

One court has suggested that § 276, in view of § 212(a)(6)(B), may allow a defense to a charge of illegal reentry if the alien waited five years after his or her deportation to reenter even without obtaining the consent of the Attorney General.[66]

F. Constitutional Attacks

As previously mentioned, INA § 276 has been laden with constitutional challenges, many stemming from the due process mandate of the United States Constitution.[67] In 1987, the United States Supreme Court ruled that where there is a violation of due process, the government may not rely on the prior deportation order as conclusive proof of an element of a criminal offense.[68] However, as noted above, an alien must show a prejudicial due process violation.[69] Proving such prejudice is very difficult.

Some aliens have challenged INA § 276 on Eighth

1017-18 (7th Cir. 1982) ("If the defendant reasonably believed that he had the consent of the Attorney General to reenter the United States, it would certainly be unjust to subject him to this criminal sanction.").

[65] *See* United States v. Oris, 598 F.2d 428, 430 (5th Cir. 1979) ("[T]he jury could reasonably assume that any expression of the Attorney General's consent would appear in the INS files.").

[66] *See* United States v. Idowu, 105 F.3d 728 (D.C. Cir. 1997).

[67] *See, e.g.*, United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[68] *See id.*

[69] *See id.*

Amendment,[70] vagueness,[71] double jeopardy,[72] and other grounds.[73] To date the statute has withstood these constitutional challenges.

G. Prosecution After a Prior Criminal Conviction

The provision of INA § 276 regarding aliens who illegally reenter the United States after a conviction for an aggravated felony[74] has created a few problems. First, courts have differed on defining aggravated felonies for INA § 276 purposes because the definition of aggravated felony in the INA[75] differs slightly from that provided in the United States Sentencing Guidelines.[76] Second, the effective dates of amendments to the INA have created confusion on how to treat aliens who committed a crime that was not an aggravated felony when committed but because of later amendments was subsequently defined as an aggravated felony by statute when the alien was charged with illegal reentry.[77] Congress attempted to resolve this problem in 1996 by adding that the term aggravated felony applies regardless of whether the underlying criminal conviction was entered before, on, or

---

[70] *See* United States v. Ayala, 35 F.3d 423 (9th Cir. 1994).

[71] *See* United States v. Ortiz-Gutierrez, 36 F.3d 80 (9th Cir. 1994).

[72] *See* United States v. Flores-Peraza, 58 F.3d 164 (5th Cir. 1995) (stating that a prosecution for illegal reentry following a prosecution for illegal entry does not violate double jeopardy clause); United States v. Ramirez-Aguilar, 455 F.2d 486 (9th Cir. 1972) (stating that deportation proceedings do not place the alien in peril of life or limb, the subsequent criminal prosecution under § 276 does not constitute double jeopardy).

[73] *See* United States v. Hernandez-Guerrero, 147 F.3d 107 (9th Cir. 1998); United States v. Alvarado-Soto, 120 F. Supp. 848 (S.D. Cal. 1954) (stating that the statute does not amount to an ex post facto law).

[74] *See* 8 U.S.C. § 1326(b)(2) (Supp. III 1997).

[75] *See* § 1101(a)(43).

[76] *See* United States v. Cazares-Gonzalez, 152 F.3d 889 (8th Cir. 1998) (suggesting that the definition of aggravated felony in INA § 101 is not dispositive, the court ruled that United States Sentencing Guideline § 2L1.2 stands independently of INA § 101(a)(43) definition).

[77] *See* United States v. Gomez-Rodriguez, 96 F.3d 1262 (9th Cir. 1996) (holding that the enhanced penalty under INA § 276 for aggravated felons applies only to aliens whose underlying conviction was classified as such at the time of the conviction).

after the enactment date of the definition paragraph.[78]

Third, until recently, there was a circuit split on whether INA § 276(b) is merely a penalty enhancing provision or an offense separate and independent from § 276(a). Of the ten circuits that addressed the question, all but the Ninth Circuit declared that § 276(b) was in fact a sentencing enhancing provision.[79] Thus, the fact of the alien's earlier aggravated felony conviction did not have to be charged in the indictment.

The United States Supreme Court resolved this split in 1998 in *Almendarez-Torres v. United States*.[80] A 5-4 majority of the Court agreed with the majority of the circuits that neither the statute nor the United States Constitution requires the government to charge an earlier conviction in the indictment.[81] The majority claimed that INA § 276(b)(2) is a typical sentencing factor and asserted that a contrary interpretation risks unfairness by introducing factors that may prejudice a jury.[82] The majority rejected the arguments that courts have a tradition of treating recidivism as an element of related crimes and that any significant increase in a statutory maximum sentence triggers a constitutional elements requirement.[83] The majority expressed no view on whether a heightened standard of proof is required for sentencing determinations bearing significantly on the

---

[78] *See* § 1101(a)(43). *See also* United States v. Perez-Gonzalez, 121 F.3d 718, 718 n.1 (9th Cir. 1997) (noting that the court did not employ 1996 definition of "aggravated felony" apparently because action was taken before enactment of that amendment).

[79] United States v. Forbes, 16 F.3d 1294 (1st Cir. 1994); United States v. Cole, 32 F.3d 16 (2d Cir. 1994); United States v. DeLeon-Rodriguez, 70 F.3d 764 (3d Cir. 1995); United States v. Crawford, 18 F.3d 1173 (4th Cir. 1994); United States v. Vasquez-Olvera, 999 F.2d 943, (5th Cir. 1993); United States v. Munoz-Cerna, 47 F.3d 207 (7th Cir. 1995); United States v. Haggerty, 85 F.3d 403 (8th Cir. 1996); United States v. Valdez, 103 F.3d 95 (10th Cir. 1996); United States v. Palacios-Casquete, 55 F.3d 557 (11th Cir. 1995). *But see* United States v. Campos-Martinez, 976 F.2d 589 (9th Cir. 1992). *See generally* Blank, *supra* note 19, at 148-50.

[80] 523 U.S. 224 (1998).

[81] *See id.*

[82] *See id.*

[83] *See id.*

severity of sentence.[84]

The dissent maintained that INA § 276(a) and INA § 276(b)(2) are separate criminal offenses, and that a prior conviction of an aggravated felony must be charged as an element of the latter offense.[85] Criticizing the majority for its failure to invoke the doctrine of constitutional doubt, the dissent stated that the constitutional question was not clear.[86] Moreover, according to the dissent, even if this doctrine did not apply, the rule of lenity dictated that the criminal defendant's right to jury findings should be preserved.[87] The dissent also argued that the majority was unable to clearly articulate the difference in degree of unfairness in the possibility of tainting the jury with prejudice and denying the defendant a jury determination beyond a reasonable doubt on the critical question of a prior conviction.[88]

This ruling has implications for the admissibility of any evidence that may refer to an alien's previous criminal record.[89] One court interpreting *Almendarez-Torres* held that while the Court only interpreted INA § 276(b)(2) (addressing aggravated felonies) to be a sentence enhancing provision, INA § 276(b)(1) (addressing previous crimes other than aggravated felonies) is also a sentence enhancing provision.[90] Another court has ruled that an alien who was previously deported can have his or her sentence enhanced under INA § 276(b)(2) even though the section only mentions removal, not deportation.[91]

A final issue to consider is when an alien receives probation instead of jail time for a § 276 violation. When a convicting court

---

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] *See id.*

[89] *See* United States v. Alviso, 152 F.3d 1195 (9th Cir. 1998) (holding that evidence pertaining to prior felony conviction may not be admitted); United States v. Esparza-Ponce, 7 F. Supp. 2d 1084 (S.D. Cal. 1998) (holding that the indictment and evidence may not refer to defendant's prior convictions).

[90] *See Alviso*, 152 F.3d 1195 (9th Cir. 1998).

[91] *See* United States v. Pantin, 155 F.3d 91 (2d Cir. 1998).

grants probation to an alien found guilty of illegal reentry on condition that the alien would not attempt to reenter for three years, such probation can be revoked upon a subsequent illegal entry into the United States.[92]

III. CONCLUSION

As denials of admission and removals at the border increase and as the INS gains more enforcement resources, the number of prosecutions for illegal reentry will continue to rise. The complex case law in this area suggests that defending an alien against such a charge is growing increasingly difficult. For some, the only defense is a constitutional attack. But, because courts are hostile to such claims and since the INS is more zealously finding illegal reentrants, more and more aliens will face prison in the United States for a conviction under INA § 276.

---

[92] *See* United States v. McLeod, 608 F.2d 1076 (5th Cir. 1979).