Out of Sight, Out of Mind

Crime and the Consequences for Immigrants: Deportation Policy, Aggravated Felonies, and Judicial Review

Introduction

In an effort to deter illegal immigration and decrease the threat to public safety, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was passed in 1996, granting the U.S. government authority to detain virtually all immigrants who have committed a crime for an indefinite period of time[1]. As a result of IRRIRA[2], the number of immigrants held in detention facilities has exploded, "prompting the U.S. Citizenship and Immigration Services to lease space in county jails and private detention centers around the country[3]." Detention facilities are overflowing with immigrants and deportation policy is one way to combat overcrowding in prisons, while also deporting dangerous immigrants who commit crimes. This paper focuses on immigrants who commit aggravated felonies and are subject to deportation without judicial review. I begin with a brief overview of the rationale and progression of deportation policy since the mid-1980s, including the policy specifics of IIRIRA and Immigration Reform and Control Act (IRCA) – IRCA being responsible for targeting immigrant felons. I then identify four major problems with current deportation policy: 1) No differentiation in punishment with respect to the type of crime committed, 2) No consideration of prior criminal history in determining punishment, 3) No judicial review in the deportation process, and 4) No regard for the potential loss of economic contribution to society. I conclude by proposing policy alternatives that would better address the intended

[1] "For nationals of countries with which the US does not have repatriation agreements, the law has resulted in detention without any foreseeable end" http://www.visalaw.com/00feb1/6feb100.html

[2] The Antiterrorism and Effective Death Penalty Act (AEDPA) passed April 24, 1996, and posed similar problems that IIRIRA does. However, AEDPA is not discussed at length in this paper.

[3] Immigration Law and Policy

objectives of removing criminal immigrant offenders who represent the most serious threat to public safety and national security.

Background

Immigrants by definition are precluded from partaking in certain rights and benefits afforded to citizens. Their presence in the United States is authorized by the government prior to entry and can be terminated as well. It is a privilege for immigrants to reside and work in the United States, and therefore, Congress has jurisdiction over the rights and the treatment of immigrants: "Congress has the authority to discriminate with impunity; it has done so on the basis of national origin and race, and currently employs a system of priorities that excludes, among others, persons with undesirable political beliefs, moral character, and mental or physical disability[4]". The great power that Congress has over immigrants affords little protection towards immigrants who violate the law, and can result in deportation if necessary.

The U.S. Citizenship and Immigration Services (USCIS), formerly known as the Immigration and Naturalization Service (INS) prior to its transition into the Department of Homeland Security (DHS) in 2003, defines deportation as "the formal removal of an alien from the United States when the alien has been found removable for violating the immigration laws[5]". Not only can immigrants be deported for committing certain crimes, but they can also be deported for unlawful legal status by way of illegal entry, poor

[4] Weissbrodt, p.399.
[5] CIS

health, marriage fraud, visa overstays, unlawful voting, and any other act that "renders them inadmissible at the time of entry or adjustment of status[6]". Furthermore, there is no statute of limitations; therefore, immigrants can be "removed any time after the prohibited act is committed[7]". The deportation process involves the following:

> An immigration judge weighs evidence presented by both the alien and DHS, assesses the facts and renders a decision that can be appealed to the Board of Immigration Appeals. When the decision rendered is to depart the country, [the Office of Detention and Removal (DRO)] DRO takes over the responsibility to facilitate the process and ensure the alien does, in fact, depart. The process includes coordination with foreign government and embassies to obtain travel documents and country clearances, coordinating all the logistics and transportation necessary to repatriate the alien and, when required, escort the alien to his or her home of record[8].

While the process may appear fair and efficient, it is both tedious and unreasonable because "aliens (non-citizens) who are apprehended and not released from custody are placed in detention facilities.[9]" The United States Immigration and Customs Enforcement (ICE) currently has sixteen detention facilities throughout the country to "transport aliens, manage them while in custody waiting for their cases to be processed, and to remove unauthorized aliens from the United States when ordered[10]".

Deportation of Immigrant Felons

Since the enactment of the IRCA in 1986, a separate category of "aggravated felonies" committed by immigrants was drafted to remove the most dangerous immigrant

[6] Weissbrodt, p.177.
[7] ibid, p.182
[8] ibid.
[9] http://www.ice.gov/graphics/dro/
[10] http://www.ice.gov/graphics/dro/index.htm

offenders in an effort to maintain public safety and national security. IRCA was an appropriate policy response to rising anti-immigration sentiment insofar as it appeared to mitigate the fears of American citizens who believed immigrants were saturating the job market, committing more crimes, and introducing unwanted cultural traits. However, with regard to its ability to expel the most dangerous offenders, IRCA failed as an effective policy strategy.

IRCA did little to increase the number of deportations "because courts and immigration officials did not systematically share records; many immigrants convicted of crimes eventually served their sentences and returned to their normal lives in American society. Criminal aliens who faced removal proceedings could [also] be granted relief by immigration judges who considered their family ties to U.S. citizens and permanent residents[11]". IRCA's ineffectiveness combined with the fiscal burden of "incarcerating prison inmates who are foreign-born," resulted in the belief that "immigrants who commit crimes are costly to society – both in terms of their criminal activities and in government spending on police forces prosecution and jail space – and therefore do not deserve the right to remain[12]".

Furthermore, the criminal alien provisions of 1986 were also provoked by sharp increases in the severity and length of punishment for drug offenses. The heightened focus on tackling the drug problem in the 1980s and 1990s can be explained by the increase in drug convictions illustrated by the Table A below from 1984 to 1994. The Bureau of Justice Statistics reports that non-citizens serving federal prison sentences "increased an average of 15% annually while the overall Federal prison population

[11] Green, p.65
[12] Green, p.66-7.

increased an average of 10% annually[13]". While there was an increase in drug crimes committed by non-citizens, Table B illustrates that this was not the case with respect to violent crimes for which IRCA was designed to address. Immigrants were committing more crimes overall, however, two important factors negate the goals of IRCA: First, of all criminal immigrant offenses from 1984-1994, violent crimes remained virtually static and far below that of drug, public-order, and property offenses. Table C below shows that less than 2% of immigration offenses were violent: far less than 500 non-citizens were serving federal sentences for violent crimes during that ten-year span compared to drug crimes where the number of non-citizens steadily increased to 14,226 by 1994[14]. Furthermore, "1.4% of non-citizens prosecuted in Federal court were charged with a violent crime compared to 8.5% of citizens, therefore the more serious threat of violence was from the citizen population and not necessarily the immigrant population[15]". Second, drug sentencing laws significantly contributed to the increase of immigrants in prison. Table C illustrates the steady increase (an average of 13% annually) of non-citizens serving time in prison for drug offenses.

[13] Scalia, p.9.
[14] See Table B
[15] Scalia, p.1

TABLE A[16]: Bureau of Justice Statistics, Special Report

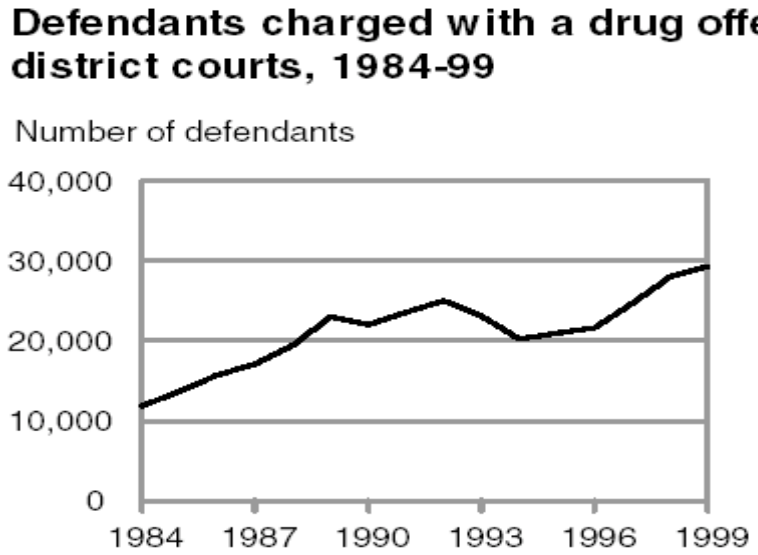
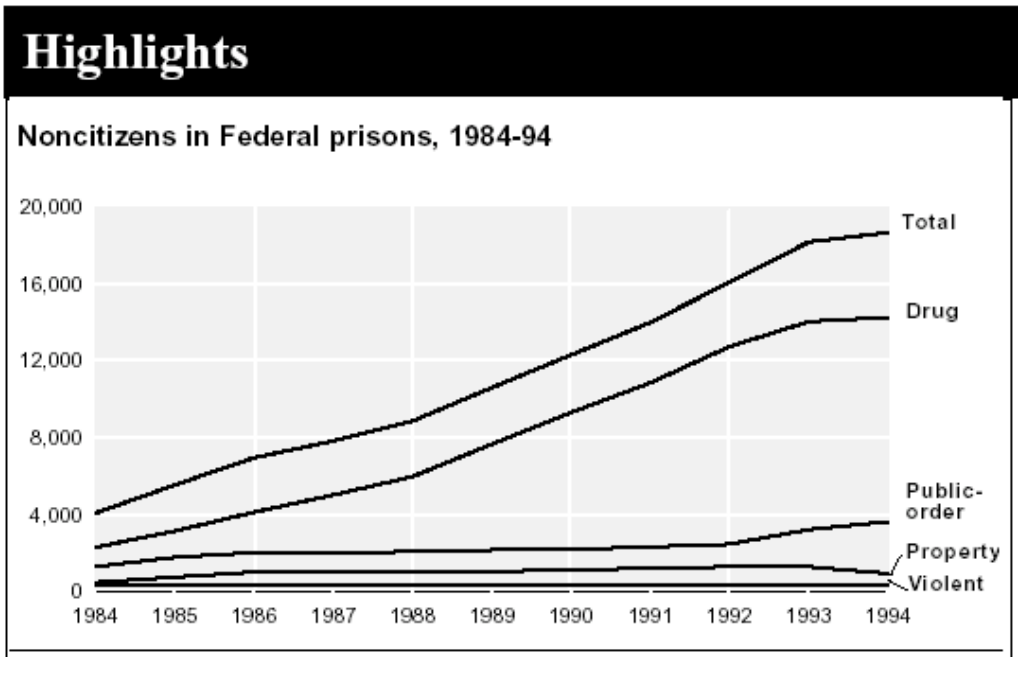


TABLE B[17]



[16] Scalia, p.1
[17] Scalia, p.1.

TABLE C[18]

Table 12. Noncitizens serving a sentence of imprisonment in a Federal prison, 1984-94

Most serious offense of conviction	Noncitizen Federal prison inmates										
	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Total*	4,088	5,561	6,966	7,851	8,871	10,658	12,349	14,046	16,117	18,218	18,929
Violent offenses	290	298	329	349	338	313	298	270	295	316	343
Property offenses	228	357	483	507	497	509	541	592	622	622	658
Fraudulent	144	245	327	363	369	376	411	459	482	479	522
Other	84	112	156	144	128	133	130	133	140	143	136
Drug offenses	2,270	3,111	4,099	4,978	5,948	7,647	9,284	10,817	12,706	14,012	14,226
Public-order offenses	1,251	1,740	2,003	1,967	2,049	2,125	2,154	2,285	2,431	3,197	3,614
Regulatory	69	82	95	118	109	96	104	110	100	108	95
Other	1,182	1,658	1,908	1,849	1,940	2,029	2,050	2,175	2,331	3,089	3,519
Immigration	872	1,275	1,469	1,345	1,363	1,542	1,515	1,549	1,568	2,118	2,478

Note: Data represent the Federal prison population on December 31.
*Includes cases for which the offense category could not be determined.
Data source: United States Department of Justice, Bureau of Prisons, SENTRY System data file, annual.

Federal mandatory minimum sentence reforms like the Comprehensive Crime Control Act of 1984 (CCCA) and the Anti-Drug Abuse Act of 1986 (ADAA) increased "the proportion of drug defendants sentenced to a term of imprisonment from 72% during 1984 to 89% during 1999. Nearly two-thirds of those sentenced during 1999 were subject to a statutory minimum prison term. The proportion of the sentence that drug offenders entering Federal prison could expect to serve increased from 48% to 87%[19]". As a result, Federal prison space increased, although, that alone was not enough to curtail the backlog of criminal caseloads. However, deportation of immigrant felons was one way to work towards that end. More stringent forms of deportation policy, like IIRIRA, were sold on the presumption that deporting immigrant felons would reduce incarceration costs: "Primary architect of IIRIRA, Representative Lamar Smith, R-Texas, argued that 'U.S.

[18] Scalia, p.9
[19] Scalia, p.2.

taxpayers are unwilling to spend money incarcerating the prison inmates who are foreign-born; it would be better to have them deported[20]"".

TABLE D[21]

Table 9. Imprisonment imposed on noncitizens sentenced in U.S. district courts, 1994

Most serious offense of conviction	Number of defendants	Prison term imposed	
		Mean	Median
Total	7,647	50.1 mos.	27 mos.
Violent offenses	96	81.1	52
Property offenses	689	14.2	10
Fraudulent	581	13.5	10
Other	108	17.6	12
Drug offenses	4,283	69.9	51
Public-order offenses	2,579	25.6	21
Regulatory	62	11.0	6
Other	2,577	26.6	24
Immigration	1,978	22.6	21

Note: Of the 7,703 noncitizens convicted in U.S. district courts during 1994 who received a sentence that included a term of imprisonment, 11 were excluded because of missing data describing the term of imprisonment and 45 were excluded because the defendant received a sentence of life imprisonment.
Data source: United States Sentencing Commission, Monitoring data file, annual.

Table D above emphasizes the overall result of mandatory minimum sentencing reforms that drastically increased the length of imprisonment of non-citizens:

> During 1994, 4.322 non-citizens convicted of a Federal drug offense received a prison sentence with an average term of 69.9 months. U.S. citizens convicted of a Federal drug offense received prison sentences with an average term of 85.2 months. By law, Federal prisoners must serve at least 85% of the sentence before being released. Therefore, a non-citizen convicted of a drug offense and sentenced to the average term of imprisonment could expect to serve 61 months before being released and deported[22].

[20] Green, p.66.
[21] Scalia, p.8
[22] Scalia, p.2. Note: "The 85% rule applies to all defendants sentenced pursuant to the Sentencing Reform Act of 1984" (Scalia, p.2). Of all defendants convicted of a felony offense during 1993, approximately 96% were sentenced pursuant to the Sentencing Reform Act".

Not only was IRCA unsuccessful in deporting immigrants who committed crimes because of administrative hold-ups, but America's "War on Drugs" played a significant role in contributing to the prison population crisis.

Policy Specifics of Current Deportation Policy

With IIRIRA's passage, judicial review was abolished, the policy was made retroactive, and immigrants can now be deported before, during, or after criminal sentences are being served. Furthermore, IIRIRA added a provision that made crimes of violence, for which the sentence is at least one year, count as an aggravated felony, giving more weight to the sentence rendered as opposed to the crime committed in some cases. In Title II Section (A) entitled, "Conviction of Certain Crimes," IIRIRA classified crimes of moral turpitude[23] as a deportable offense if the sentence carries one year or more, and has further classified certain misdemeanor offenses warranting removal: domestic violence, stalking, child abuse, child neglect, child abandonment, and violation of protective or restraining order[24]. As a result, whether a person commits a misdemeanor crime like petty theft or first degree murder, had a clean record for several years or is a repeat offender, deportation would apply without consideration to such staggering differences.

By utilizing its full discretion to regulate immigrants, Congress has not only made deportation of immigrant felons a policy goal, but has also truncated several forms of

[23] Unfortunately, there is no statutory definition of "moral turpitude." Generally, the term encompasses crimes involving fraud or evil intent. In general, crimes involving theft, fraud, and violence tend to qualify as crimes involving moral turpitude. http://www.vakililegal.com/CI_cmts.htm
[24] Converse, p.1.

legal recourse against deportation in an effort to reduce crime. The absence of judicial review precludes the ability of immigrant felons subject to deportation to appeal a decision they believe was unfairly or unconstitutionally arrived upon by the Board of Immigration Appeals (BIA). Courts defer to the executive branch to not only handle deportation cases, but also appeals cases. The Attorney General appoints immigration judges who serve on an administrative court, and there is no policy provision in place to allow for intervention by the judicial branch to review the removal decisions of the administrative courts.

The retroactive nature of IIRIRA is especially problematic because "convictions of non-citizens throughout the United States continue to occur by plea bargains" with an understanding that once prison time is served the immigrant charged would not have to consider additional penalties as a result of his/her decision to plea bargain[25]. Immigrants may opt to plead guilty with the understanding there would be no further punishment or negative immigration consequences[26]. Furthermore, many criminal defendant lawyers are unfamiliar with the specific consequences for immigrants who commit certain crimes, and therefore, are not always able to serve in the best interest of their client in court.

Lastly, immigrants can be deported at anytime once convicted of an aggravated felony. Immigrants can also be held in detention if unable to immediately be deported after serving their prison sentence. Furthermore, IIRIRA's "'expedited removal' provision allows for non-citizens to be deported without ever seeing an immigration judge [and] mandates that the individual be detained until deported. Mandatory detention could require incarceration thousands of miles away from family members while

[25] Immigration Appealworks.
[26] American Civil Liberties Union, Immigrant Rights Section

awaiting the results of lengthy and uncertain appeals,[27]" thereby cutting the social support network non-citizen criminal offenders may need from family and friends and increasing the chances for emotional instability of both non-citizens and their families.

Regulatory Authority and Egalitarianism: A Balancing Act for Congress

Immigration policy decisions have important implications for U.S. national interests, and are in fact made based on those interests: "fears of overcrowding, unemployment, scarcity of resources, and fears of cultural fragmentation make the politics of immigration extremely complex[28]". U.S. immigration trends coincide with the state of economic affairs as well as hot-button issues like illegal entry and terrorism. However, policy responses to maintain economic stability may not always agree with policy responses to combat illegal entry and other criminal offenses committed by immigrants:

> The strong national response to these incidents reveals Americans' ambivalence-both political and personal-toward illegal immigrants. On one hand is the conviction that people should obey the laws and the fear that hordes of immigrants will arrive unchecked. But these viewpoints are balanced by the dependence of important sectors of the economy on the labor of illegal immigrants and the humanitarian claims their situations so often pose[29].

Immigrants also face the stark reality of restrictive legislation that prevents them from fully benefiting from the opportunities afforded and guaranteed to U.S. citizens[30]. Because state and federal governments have the right to discriminate with respect to immigrants, it is especially important that Congress pass legislation that works to achieve

[27] Cook, p.1
[28] Weissbrodt, p.47.
[29] Green, p.43
[30] Weissbrodt, p.398.

the intended policy goal while also treating immigrants fairly. There is both an economic and moral justification to do so: 1) Immigration encourages "economic growth and an enlarged workforce" and 2) The U.S. is a nation of immigrants, "all whom have benefited from immigration and should not claim any right to exclude future immigrants. Also, family reunification is at the core of much of our immigration policy and is based upon a fundamental respect for the right to be with one's loved ones[31]". Therefore, policies that best serve the United States are policies that treat immigrants fairly while also bringing them to justice. If the United States admits immigrants to this country that can contribute to the U.S. economy and society, then laws and policies applied to non-citizens should mirror policies towards citizens as closely as possible.

Immigration crime policies are just one example of a policy that suffers from unnecessary harshness and unfairness. The failure of the criminal justice system to ensure due process must not be the reason for deportation – rather, deportation orders should be arrived at with proper justification of the immigrant's criminal behavior. Deportation does not have to be eradicated in order to be fair to immigrants. However, the Supreme Court can still be involved in assuring that Congress does not abuse its authority over immigration matters.

Current Policy Problems and Policy Alternatives

A comprehensive list of aggravated felonies can be found in the "Criminal Alien Provisions" section of IIRIRA law under "Title III: Inspection, Apprehension, Detention,

[31] Ibid, p.48.

Adjudication, and Removal of Inadmissible and Deportable Aliens[32]". Below is a summary list of current federal offenses that constitute aggravated felonies for which deportation applies.

Aggravated Felonies Category for Immigrants[33]

1) Murder, rape, sexual abuse of a minor
2) Drug trafficking
3) Weapons trafficking
4) Money laundering
5) Crimes of violence as defined in 18 U.S. C. 16 for which the sentence is at least one year (crimes of moral turpitude)
6) Theft or burglary offenses for which the sentence is at least one year
7) Kidnapping offenses
8) Child pornography offenses
9) RICO (Racketeer Influenced Corrupt Organization) offenses
10) Pimping or involuntary servitude offenses
11) Espionage offenses
12) Fraud or tax evasion in excess of $10,000
13) Alien smuggling for commercial advantage
14) Document trafficking offenses for which the sentence is at least one year
15) Failure to appear for service of sentence if the underlying offense is punishable by two years or more
16) Illegal re-entry after deportation if the accused was previously convicted of an aggravated felony
17) and attempts or conspiracies to commit any of the above.

There are four major problems with the current policy: *1) No differentiation in punishment with respect to the type of crime committed, 2) No consideration of prior criminal history in determining punishment 3) No judicial review in the deportation process, and 4) No regard for the potential loss of economic contribution to society.*

Policy Problems

28. Illegal Immigration Reform and Immigrant Responsibility Act SEC. 1. 1996.
33 Converse, p.1.

1. No differentiation with respect to the type of crime committed

The 1994 report issued by the U.S. Commission on Immigration Reform, which later provided a useful backdrop in support of the immigration reforms that took place in 1996, explicitly articulates the intent of deporting immigrants who commit crimes: "An effective procedure for prompt removal of aliens that are ordered for deportation is an essential part of a credible deterrence policy. At present, the Commission limits its specific recommendations to the removal of criminal aliens who represent the most serious threat to public safety and national security. The top priority of enforcement strategies should be the removal of criminal aliens from the U.S. in such a way that the potential for their return to the U.S. will be minimized[34]". However, whether a non-citizen commits murder, drug trafficking, tax evasion, prostitution, or terrorism, they are subject to the same punishment. There is no distinction between violent and nonviolent crimes, and thus no way to isolate more serious threats to society from others.

2. No consideration of prior criminal history

The process of differentiating punishment with respect to the crime committed entails consideration of not only the crime committed, but also whether or not the individual has a prior criminal record. Therefore, the problem with not considering a non-citizen's prior history of criminal activity can also be seen as an extension of tackling the first policy problem[35].

[34] U.S. Commission on Immigration Reform, 27-28.
[35] U.S. Commission on Immigration Reform.

The United States Sentencing Commission (USSC) is an independent agency in the judicial branch of government that was established to create a series of "guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes [and to] advise and assist Congress and the executive branch in the development of an effective and efficient crime policy[36]". The USSC has an elaborate set of rules that pay very close attention to the crime committed, criminal history, and the specific circumstances surrounding the nature of the crime. Such factors are carefully considered and applied in order to administer the appropriate punishment. Given the fact that the USSC has a history of establishing sentencing policies for U.S. citizens since 1984, it is surprising that IRRIRA has deviated from the USSC rules and regulations.

According to the USSC, prior criminal histories are just as important as the severity of the crime committed:

> The sentencing guidelines provide federal judges with fair and consistent sentencing ranges to consult at sentencing. The guidelines take into account both the seriousness of the criminal conduct and the defendant's criminal record. Based on the severity of the offense, the guidelines assign most federal crimes to one of 43 "offense levels." Each offender is also assigned to one of six "criminal history categories" based upon the extent and recency of his or her past misconduct[37].

The likelihood of the crime being committed again by the same person has a substantial impact on the risk posed to society because repeat offenders are more likely to commit a crime. Furthermore, "repeated criminal behavior is an indicator

[36] United States Sentencing Commission, p.2.

[37] Ibid, p.7

of a limited likelihood of successful rehabilitation," thus serving as an additional reliable measure of the severity of the threat a criminal poses to society, while also justifying the need to impose a harsher sentence[38].

The significance of taking into account prior criminal records is to also give equal consideration to criminals with *no* prior criminal records, or first time offenders. Not only are first time offenders less likely to commit another crime compared to repeat offenders, but the lack of a criminal history is indicative of someone who poses little risk to public safety and is more likely to be successfully rehabilitated. The Department of Justice's 1996 Report, "Non-citizens in the Federal Criminal Justice System, 1984-94," offers a comparative view of criminal records of citizen and non-citizen defendants prosecuted in U.S. district courts in 1994. Interestingly enough, Table 4 below indicates that of those with a prior criminal history, a higher percentage of citizens commit misdemeanors and felonies (both violent and nonviolent). U.S. citizens are also more likely to be repeat offenders while non-citizen offenders are more likely to be first time offenders. Furthermore, non-citizen offenders commit more nonviolent felonies (21.4%) than violent felonies (9.3%). *First time* offenders, citizen or non-citizen, should be judged more so on the nature of the crime.

[38] United States Sentencing Commission Guidelines Manual, p.349.

BUREAU OF JUSTICE STATISTICS REPORT
DEPARTMENT OF JUSTICE, AUGUST 1996[39]

Table 4. Criminal history of citizen and noncitizen defendants prosecuted in U.S. district courts, 1994

	U.S. citizens		Noncitizens	
	Number	Percent	Number	Percent
Total[a]	32,401	100.0%	10,352	100.0%
No known criminal history	10,707	38.6%	4,975	56.3%
Prior criminal history				
Misdemeanor only	5,765	20.8%	1,153	13.0%
Felony	11,245	40.6	2,714	30.7
Nonviolent	6,336	22.9	1,891	21.4
Violent	4,909	17.7	823	9.3
Number of prior convictions				
1	5,582	32.8%	1,444	37.3%
2 to 4	7,008	41.2	1,595	41.2
5 or more	4,420	26.0	828	21.4

Note: Of the 59,351 defendants prosecuted in U.S. district courts and terminating pretrial supervision or detention during 1994 data were available for 45,169. An additional 2,416 were excluded because of missing data describing citizenship.
[a]Includes 1,510 noncitizens and 4,684 citizens for whom information describing criminal history was unavailable.
Data source: Administrative Office of the U.S. Courts, Pretrial Services Agency data file, annual.

TABLE 4 IN BRIEF	US CITIZENS		NON-CITIZENS	
	Number	Percent	Number	Percent
With Criminal History	17,031	61.4 %	3, 862	43.7 %
With No Criminal History	10, 707	38.6 %	4,975	56.3 %
TOTAL	*27, 738*	*100 %*	*8837*	*100 %*

3. No Judicial Review

Perhaps the most draconian measure of IIRIRA pertains to the strict limitations of the litigation process outlined for immigrants in Section I, Title III of IIRIRA law.[i] Limitations include no judicial review for anyone convicted of an aggravated felony: "other than the granting of asylum, no court has jurisdiction to review discretionary decisions or actions of the Attorney General, including

[39] Non-citizens in the Federal Criminal Justice System, 1984-94, p.4.

denials of discretionary relief under cancellation of removal and suspension, voluntary departure, or adjustment[40]". Administrative officials in the USCIS have full authority over deportation hearings and make the final decision of who gets deported. Without judicial review, there is no option for an immigrant felon to take legal action if the USCIS acts irresponsibly, or more importantly, unconstitutionally. The following reasons highlight the need for judicial review:

1) Immigration judges are appointed by the Attorney General and "serve as both prosecutor and judge."
2) The government does not provide legal representation for immigrants
3) In cases where an interpreter is needed, the interpreter may be incompetent or "only direct questions and statements to the alien and the alien's responses; accordingly, the alien may not understand additional testimony, arguments of counsel, and other matters arising in the hearing"[41].

These three factors severely restrict the right to a fair hearing because immigration judges are more likely to be biased in favor of the Attorney General's interpretation of immigration law and policy. As long as the option for judicial review remains absent from the judicial process of immigrants who commit aggravated felonies, the legal process will continue to suffer from its inability to ensure a fair hearing, and non-citizens implicated in this process may suffer with no protection under the law.

4. No regard for potential loss of economic contribution to society

The U.S. invests in immigrants primarily because of the benefits it receives from immigration. By offering opportunities for immigrants to receive an

[40] "Sec I, Title III: Inspection, Apprehension, Detention, Adjudication, and Removal of Inadmissible and Deportable Aliens: Subtitle A--Revision of Procedures for Removal of Aliens." Illegal Immigration Reform and Responsibility Act 30 September 1996. 22 Jul 2005.
[41] Weissbrodt, p.206-209.

education and work in the U.S., the economy and society are positively affected by immigrant labor, thereby contributing to diversity, and validating the idea that the U.S. is a country of freedom, liberty, and prosperity. In fact, the 1997 Report to Congress on Immigration Policy by the U.S. Commission on Immigration Reform states the following: "Immigrants contribute in many ways to the United States: to its vibrant and diverse communities; to its lively and participatory democracy; to its vital intellectual and cultural life; to its renowned job-creating entrepreneurship and marketplaces; and to its family values and hard-work ethic[42]". Immigrants contribute to the economy in several ways, most significantly with respect to employment and legal permanent resident (LPR) status. The fact that IRRIRA policy applies to LPRs, or other working non-citizens, means those immigrants who commit aggravated felonies will no longer be contributing to the economy. The loss of this contribution also extends to those persons dependant on the financial, emotional, and psychological support from the potential deportee. Finally, the economic costs incurred by the U.S. government would also increase due to the greater number of people who would then potentially be in need of social welfare benefits[43].

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[42] United States Commission on Immigration Reform Report to Congress, p.2. <http://www.utexas.edu/lbj/uscir/becoming/fr-toc.html.

[43] It would be interesting to examine the *potential to commit a crime* for those non-citizens or citizens affected by a close one being deported for an aggravated felony or otherwise. The financial and psychological burden of dealing with such a loss could be so unbearable that others are then led into a life of crime (who otherwise would not have been) in order to cope and survive without the benefits the deportee offered.

Employment

It is in the national interest of the United States to assess whether or not deporting immigrant felons outweighs the economic loss to society in order to avoid attempting to resolve a crime problem by creating an economic one. And this can be achieved through appropriate measurements of the projected economic loss to family members and others dependant upon the financial support of the immigrant felon charged with deportation. Employment provides an opportunity for immigrants to fully integrate themselves into the cultural norms and practices of American society. Interestingly enough, a substantial number of immigrants to the U.S. have been able to find employment without fully integrating themselves into American cultural and educational institutions. Due to the changing demographics of immigrants coming to the United States as a result of the 1965 immigration amendments, labor markets have shifted to give more opportunities to unskilled workers or immigrants willing to work for less pay: "The 1965 Amendments 'redistributed' visas from advanced, industrialized economies to developing countries. Because the average educational attainment in developing countries is below that of industrialized economies, the immigrants who arrived in the 1980s and 1990s would then tend to be less educated than the immigrants who arrived in the 1950s[44]". Additionally, today's immigrants overall "have less education than native workers. Just as immigrants' educational status tends to be concentrated at relatively extreme levels, they tend to hold jobs that reflect either

[44] Borjas, p.45.

a great deal of skill and training such as college teaching, science, or health care or that require little skill, such as housekeeping, farm labor, or taxicab driving[45]".

Even though levels of educational attainment have dropped, the value of unskilled labor has increased. Although George Borjas in *Heaven's Door: Immigration Policy and the American Economy* downplays the impact of discrimination in the U.S. labor market in explaining wage differentials between immigrants and citizens, there is some truth to the fact that "even the influx of unskilled workers – often the group most feared for the potential to sap the country's social programs and resources – aid U.S. economic growth by filling jobs that many U.S. citizens and permanent residents do not want[46]". Unskilled labor means cheap labor and is not only profitable for the U.S. economy, but offers more opportunity for immigrants without an education or not as much education to make a living in America.

Family Ties and LPR Status

Immigrants with employment, combined with the substantial number of family-based immigration, suggests that deporting immigrants for crimes translates into a consequential financial loss for all persons dependant on that immigrant for income like children and the elderly, particularly because many immigrants may not have the educational background to change job careers or obtain a better job in the same field. The government's recognition of the significance of social networks and supportive family structures is not only

[45] Green, p.42.
[46] Weissbrodt, p.48.

evidenced in the fact that the largest category of immigrant admissions to the U.S. is family-based (approximately 70%[47]), but also because immigration policy is based on social and humanitarian grounds:

> The federal government not only holds that citizens should have a right to bring close family members to the country but also recognizes that new immigrants with family ties are likely to have more success in resettling than immigrants without these kinds of social networks. Family preferences also make sense politically. Citizens who would not derive any direct economic benefit from the entry of immigrants might not support an expansion of skills-based immigration. But if their relatives are able to come to the United States, they may be more willing to support an expansion of immigration that benefits businesses as well[48].

Conversely, by not properly considering the negative impact or economic loss to society due to the deportation of immigrant felons, deportation may end up hurting the U.S. economy more than helping it. Additionally, the fact that most immigrants are children, parents, and spouses (and not single or living independently) suggests that immigrants place a high priority on family/group dependence or social networks and rely on one another in helping maintain a productive, healthy, and stable life in the U.S. whether by financial, emotional, or other means.

Substantial portions of family-based immigrants are also legal permanent residents. LPRs or green-card holders are immigrants lawfully admitted to live and work in the United States. They "are most like citizens: this country is their permanent home; they pay taxes, are subject to military service, contribute to the economic and cultural life of their communities, and generally have a stake in the

[47] http://www.migrationinformation.org/USfocus/display.cfm?ID=263#3
[48] Green, p.77.

country that a nonimmigrant alien cannot ordinarily claim. LPRs are entitled to protection under the Equal Protection guarantees of the Fifth and Fourteenth Amendments[1]". LPR status not only affords non-citizens certain benefits like the right to live and work in the United States, but also is indicative of a law-abiding person capable of being a U.S. citizen, and LPRs are given the opportunity to apply for citizenship. Other benefits include the right to own property, attend public school and college, request a visa for immediate family members, receive social welfare services, leave and return to the U.S. under certain conditions, etc[1]. The USCIS clearly differentiates LPR status from other immigrant-entry categories by granting them the most similar rights and responsibilities to that of citizens. However, when it comes to aggravated felonies, LPRs are treated no differently than other immigrants, such as temporary workers or even illegal aliens. The significance of differentiating LPRs from other immigrants with respect to crime is the fact that LPRs are arguably the most productive, long-term contributors to the U.S. economy and society both in monetary and social wealth compared to other immigrant groups. Not only have their assimilation and integration into society fostered their ability to enjoy the benefits and opportunities America has to offer, but has also made it possible for immigrants to substantially give back to the society and help expand opportunities to both Americans and other immigrants seeking entry to the United States.

Policy Alternatives

A policy that would better achieve the intended policy objectives of IIRIRA, is one that that differentiates between violent and nonviolent aggravated felonies, takes into

consideration prior criminal records, while also re-instituting judicial review to ensure due process under the law in accordance with the U.S. Constitution. Furthermore, in order for the punishment to be commensurate with the crime, priority should be given to the most egregious offenses within the aggravated felons category. Judicial review can then be exercised to ensure that courts take into account prior criminal history or lack thereof, employment, and LPR status in order to determine if deportation is warranted[49].

1. *Differentiate between violent and nonviolent crimes*

The first step in implementing a credible crime-deterrent policy is separating non-violent crimes from violent crimes, such as tax evasion from murder, for example. In fact, the USSC's Offense Category List is an extensive catalog of crimes categorized by the similarity and severity of the criminal offense: Offenses Against the Person, Basic Economic Offenses, Offenses Involving Drugs, Offenses Involving Criminal Enterprises and Racketeering[50], etc. Violent crimes are defined here as crimes committed against another person, and most likely involve physical or mental abuse. All other crimes are deemed nonviolent. Below is a list of aggravated felonies separated into violent and nonviolent crimes. While there is no variation in treatment within the nonviolent and violent category, and the potential for more than one type of crime to occur in the same criminal act may be likely, at the very least, such a category provides the first step towards assigning harsher sentences to more violent crimes.

[49] This could be used as a conclusion or taken out if redundant. It's an intro paragraph for the policy alternative section that speaks to policy problems 1 thru 4.
[50] United States Sentencing Commission Guidelines Manual, (p.iii-v).

Aggravated Felonies Category for Immigrants[51]

VIOLENT	*NONVIOLENT*
Murder, rape, sexual abuse of a minor Crimes of violence as defined in 18 U.S. C. 16 for which the sentence is at least one year (crimes of moral turpitude) Pimping or involuntary servitude offenses Theft or burglary offenses for which the sentence is at least one year *(treated as violent if victims are present, otherwise treated as nonviolent)* Kidnapping offenses Child pornography offenses	Drug trafficking Weapons trafficking Money laundering RICO (Racketeer Influenced Corrupt Organization) offenses Espionage offenses Alien smuggling for commercial advantage Fraud or tax evasion in excess of $10,000 Document trafficking offenses for which the sentence is at least one year Illegal re-entry after deportation if the accused was previously convicted of an aggravated felony Failure to appear for service of sentence if the underlying offense is punishable by two years or more

In addition to the category of offenses above, there also exists an "offender characteristics" category that takes into account the specifics of the crime as well as prior criminal offenses. There is a point system in place as well as a guideline range of offenses that determine the final sentence. There even exists the ability for judges to depart from the guideline statutes in atypical

[51] Converse, p.1.

criminal cases in order to make the best and most appropriate determination of punishment. The offender characteristics category should be applied to the aggravated felonies category for immigrants.

Lastly, the USSC outlines Congress's policy objectives in designing the sentencing guideline scheme that it utilizes:

1) Honesty in sentencing to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by 'good time' credits.
2) Uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders.
3) Proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity[52].

There is no reason why the same logic *with the same policy objectives* cannot be utilized for non-citizens – after all the crime is the same, the only factor that varies is the immigration status of the person committing the crime.

2. *Institute policy mechanism that appropriately considers criminal history or lack thereof*

Similar to policy alternative 1, the USSC guidelines can also be utilized to allow for proper consideration of prior criminal records or lack thereof. The Comprehensive Control Act of 1984, which "overhauled the federal sentencing system and revised bail [and] extended federal jurisdiction over crime control to areas once considered to be within state and local jurisdiction," is explicitly cited

[52] Ibid, p.2.

in the "Criminal History and Criminal Livelihood" section of USSC guidelines[53]. The opening paragraph of the recidivism section of the USSC guidelines states "a defendant's record of past criminal conduct is directly relevant to the purposes of [CCA]. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment[54]". In addition to the point system below, point (g) has been added as a policy alternative consideration in order to implement policy alternative 1:

Criminal History Category[55]

(a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
(b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a)
(c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this item.
(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
(e) Add **2** points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If **2** points are added for item (d), add only **1** point for this item.
(f) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of **3** points for this item. *Provided,* that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.
(g) If a nonviolent immigrant offender, follow steps (a) through (f), only applying half of the points allocated for that particular stipulation. In the cases where 1 point is allocated, zero points would be allocated.

[53] O'Bryant, Joanne, Summary Page
[54] United States Sentencing Commission Guidelines Manual, p.349.
[55] Ibid.

The rationale for point (g) is to impose a less harsh sentence for a less harsh crime while still punishing nonviolent offenders for the crime they committed.

3. Re-institute judicial review for nonviolent crimes

Judicial review is one of the most sacred powers utilized by the courts to ensure that the other branches of government adhere to the Constitution. Therefore, if the executive branch, for example, is perceived to have abridged the Constitution or violated the Constitutional rights of an individual, judicial review would allow the courts to review policy decisions that account for the violation of the Constitution. Furthermore, in some cases, courts have the power to reverse those policy decisions that are perceived to be inconsistent with the Constitution.

Therefore, the first policy alternative reads as follows:

a) Immigration judges can continue to make decisions in removal hearings, however, with respect to nonviolent offenses committed by immigrants, defendants should have the right to petition for review from an impartial judge not appointed or working for the Attorney General, thereby instituting a check by the courts to ensure that immigration judges' decisions are constitutional and in compliance with the statutory obligations of immigration law.

Prior to the passage of IIRIRA, "on a petition for review, the court may review not only a finding of removability, but also denials of motions to reopen. The reviewing court decides the case on the basis of the administrative record, not by

taking new evidence of its own[56]". Therefore, policy alternative b would read as follows:

b) Given the reinstatement of judicial review for nonviolent crimes, when reviewing a case, judges reserve the right to request new evidence of its own if the BIA failed to properly take into consideration 1st time offender status or other factors relating to the potential loss of the deportee's economic contribution to society: job, education, years living in the U.S., family ties, etc. Impartial judges also reserve the right to reverse the decision and or send the case to the BIA for further review along with new evidence.
c) If a combination of violent and nonviolent crimes occur for a first time immigrant offender, the judge reserves the right to adhere to point b above.

Such options would ensure that immigration courts strictly adhere to the sentencing guidelines with regard to the nature of the offense (offense category) and the individual circumstances and criminal history (offender characteristics) when deciding to deport an immigrant for an aggravated felony. Furthermore, if it is the case that an immigration judge arrived at an unjustifiable, improper, or unclear decision, policy alternative (b) and (c) afford impartial judges the ability to reverse the decision or send it back to the BIA for further review with new evidence if necessary.

4. Re-institute ability to apply for a waiver for deportation for nonviolent offenders along with other forms of discretionary relief. Also provide nonviolent offenders and first time violent offenders, with the exception of murder, the option to present employment and LPR status factors in court for consideration. However, the BIA reserves the right to deny such factors if able to prove atypical determination (explained in policy alternative e below).

According to USSC guidelines, nonviolent offenses could have serious consequences depending up on the characteristics of the offender. For example,

[56] Weissbrodt, p.219.

economic offenses like embezzlement or fraud could result in deportation if committed several times, or if a prior criminal record exists with regard to other crimes. The case for a waiver is perhaps most strongly made when considering LPR status. Consider the following scenario: Jane is a single mother with three children, has LPR status, and has been living in the U.S. for 15 years. She is charged and convicted with prostitution. The fact that Jane can be deported for prostitution and lose her children, job, money, and all other ties to the U.S., one wonders how someone like Jane even qualifies as a threat to national security given the circumstances of her case. Therefore, policy alternatives in this case should read as follows:

Nonviolent offenders and first-time violent offenders (except murder) Only:

a) Immigrants who commit nonviolent offenses have the ability to apply for a waiver for deportation.
b) Provide first time violent offenders with the option to present employment and LPR status factors in court for consideration, however, the BIA reserves the right to deny option if able to prove atypical case.
c) With regard to employment documents, non-citizens may present an estimate of projected loss of income to family or persons dependent on that income. Also, if more than 60% of income covers living expenses (rent, mortgage, utilities, and groceries), including expenses for education, non-citizen reserves the right to testify in court along with persons dependent on that income for consideration.
d) In the case of LPRs who are first time offenders in the case of murder, option b does not apply.

The option to present employment documents and projected loss of income allows for more serious consideration of how substantial of an economic loss to society will be incurred compared to the crime for which the non-citizen is being deported. Dependency, as defined by living and educational expenses, in excess

of 60% of a non-citizen's income suggests that more than half of the non-citizen's paycheck is taking care of others. The rationale for 60% is that regardless of the overall income of the non-citizen, more than half of the income is utilized for others, suggesting substantial dependency of others on the noncitizen's income.

Murder is the exception to the rule for LPR offenders because murder is arguably the most egregious violent crime within the violent crime category. Additionally, "IIRIRA specifically bars judicial review of any decision by the Attorney General with respect to discretionary relief. [Forms of discretionary relief are asylum requests, registry[57], voluntary departure, cancellation of removal[58], adjustment of status[59], etc.]. If the alien believes s/he is eligible for any type of discretionary relief, s/he must apply during the removal hearing or risk being denied the opportunity to apply. Furthermore, even if the alien meets the statutory requirements, the BIA concluded that the granting of the relief is still discretionary[60]". Perhaps there are atypical cases in which the BIA is justified in dismissing discretionary relief for nonviolent offenders even if the immigrant meets the statutory requirements for relief, however, this should *only* be the case in atypical situations and should not qualify for typical cases, especially when considering nonviolent offenses. Therefore, an additional policy alternative would read as follows:

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[57] "Record of LPRs[prior to 1/1/1972 that can prove LPR status, good moral character, and eligibility to apply for citizenship" (Weissbrodt, p.242).
[58] "Only available to certain LPRS and roughly corresponds to pre-IIRIRA relief" (Weissbrodt, p.229).
[59] "Adjustment relieves certain aliens, whose status would otherwise entitle them to remain in the U.S., from the hardship and expense of going abroad for long waits while an immigrant visa is processed" (Weissbrodt, p.236).
[60] Weissbrodt, p.229.

e) Institute option to apply for discretionary relief for nonviolent offenses with the ability to apply either during the removal hearing or before 90 days after the hearing. If immigrant meets statutory provisions for relief, the BIA reserves the right to deny relief only in atypical cases and must prove atypical determination.

Prior to IIRIRA, the Immigration and Nationality Act (INA) authorized a ninety-day limit for "an alien to reopen proceedings of a final administrative order and one motion to reconsider the decision within 30 days of the date of entry of a final administrative order of removal[61]". The ninety-day limit is constructed in an effort to give the immigrant the ability to fairly and fully represent him or herself with the charge in court without the additional burden of making a case for discretionary relief. If deportation is then decided upon, the immigrant charged will have up to three months to review the nature of his/her case and have enough time to gather adequate resources to build his/her case for discretionary relief.

Backlogging of Federal Criminal Caseloads

The most problematic aspect of the policy alternatives set forth in this paper are the increase in federal criminal caseloads as a result of the legal stipulations and time allotments offered to provide a just and effective deportation policy. In the 2002 Report, *Implementing Case Completion Goals at the U.S. Department of Justice, Board of Immigration Appeals,* an earlier report conducted by the Federal Judicial Center offered policy suggestions to combat the problem they call the "Crisis of Volume" is mentioned:

1) Increasing the number of judges to hear appeals

[61] Weissbrodt, p.216.

2) Fashioning truncated appellate procedures that includes the staff's initial review of the issues raised in the appeal
3) Generating dispositions which are rarely published
4) Special panel reviews without argument or filing of briefs[62].

In 2002, 35,000-40,000 cases awaited review and some of them dated back as far as 1996[63]. In May of 2005, an LA Times report stated the following: "The trend is nationwide**,** federal records show, but bearing the brunt of this sudden surge is the San Francisco-based U.S. 9th Circuit Court of Appeals. In the year ending June 30, 2001, the immigration caseload was 965. It skyrocketed to 4,835 cases in the year ending in June 2004.'Three years ago, immigration cases were 8% of our calendar,' said 9th Circuit Judge Michael Daly Hawkins. 'Today, as we speak, that percentage is 48%.[64]'".

In 2002, Attorney General John Ashcroft said, "Since 1995, the problem of mounting backlog of cases has been addressed by incremental increases in the size of the Board…However, the problem with the board is not of personnel. Rather, the problem is rooted in the structure and procedures of the Board, which make it nearly impossible for Board members to accomplish their mission[65]…". Ashcroft then imposed a streamlining initiative that currently accounts for the ineffectiveness of deportation policy by eradicating legal avenues in an effort to speed up the hearing process[66].

However, with a more improved deportation policy that distinguishes between nonviolent and violent crimes, criminal caseloads may potentially decrease gradually if for example the following policy alternative is taken into consideration:

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[62] Gunderson, p.1.
[63] Ibid.
[64] Moore, Solomon and Ann M. Simmons, p.1
[65] Gunderson, p.16-17.
[66] Ibid.

f) Where nonviolent offenders or LPR nonviolent offenders are entitled to forms of discretionary relief, including application for a waiver for deportation, staff and judges can specialize in dealing with such offenders separate from other non-citizen criminals. Judges that specialize in overseeing certain cases can then be designated solely to address crimes committed by LPRs in order to make more-informed decisions about granting relief or charging deportation.

Specialization aids efficiency. Training judges to further specialize in certain criminal court cases concerning immigrant felons will also help establish a more logical policy repercussion that will expedite the appeals process. Why? Because judges will have more familiarity with the special circumstances, and thus be more likely to exercise fairness more applicable to that circumstance. For example, first time violent offenders are different from repeat violent offenders and thus judges will be able to discriminate more fairly. Even if the number of judges' increase as a result of specialization, it does not necessarily translate into a backlog of cases. In fact, specialization may greatly aid in alleviating the backlog problem.

Conclusion

In this paper, I have attempted to provide policy alternatives aimed at isolating immigrant felons who pose the most dangerous threat to society, while also proposing a model of differential punishment for violent and nonviolent crimes that utilize the USSC sentencing guidelines. I have also made recommendations that better justify deportation for immigrant felons, including tracking prior criminal records, re-instituting judicial review for nonviolent crimes, accounting for legal permanent resident and employment status, and encouraging judges to further specialize their expertise when presiding over cases of immigrants who commit aggravated felonies.

Deportation policy suffers from several structural barriers and flawed rules and regulations that inhibit the ability of the U.S. government to achieve its intended objective of tackling overcrowded detention facilities by addressing crimes committed by immigrants. However, the opportunity for a more effective deportation policy that is conducive to combating issues of detention, aggravated felons, and judicial review is an extant possibility, should more attention be paid to the aforementioned deportation policy problems.

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