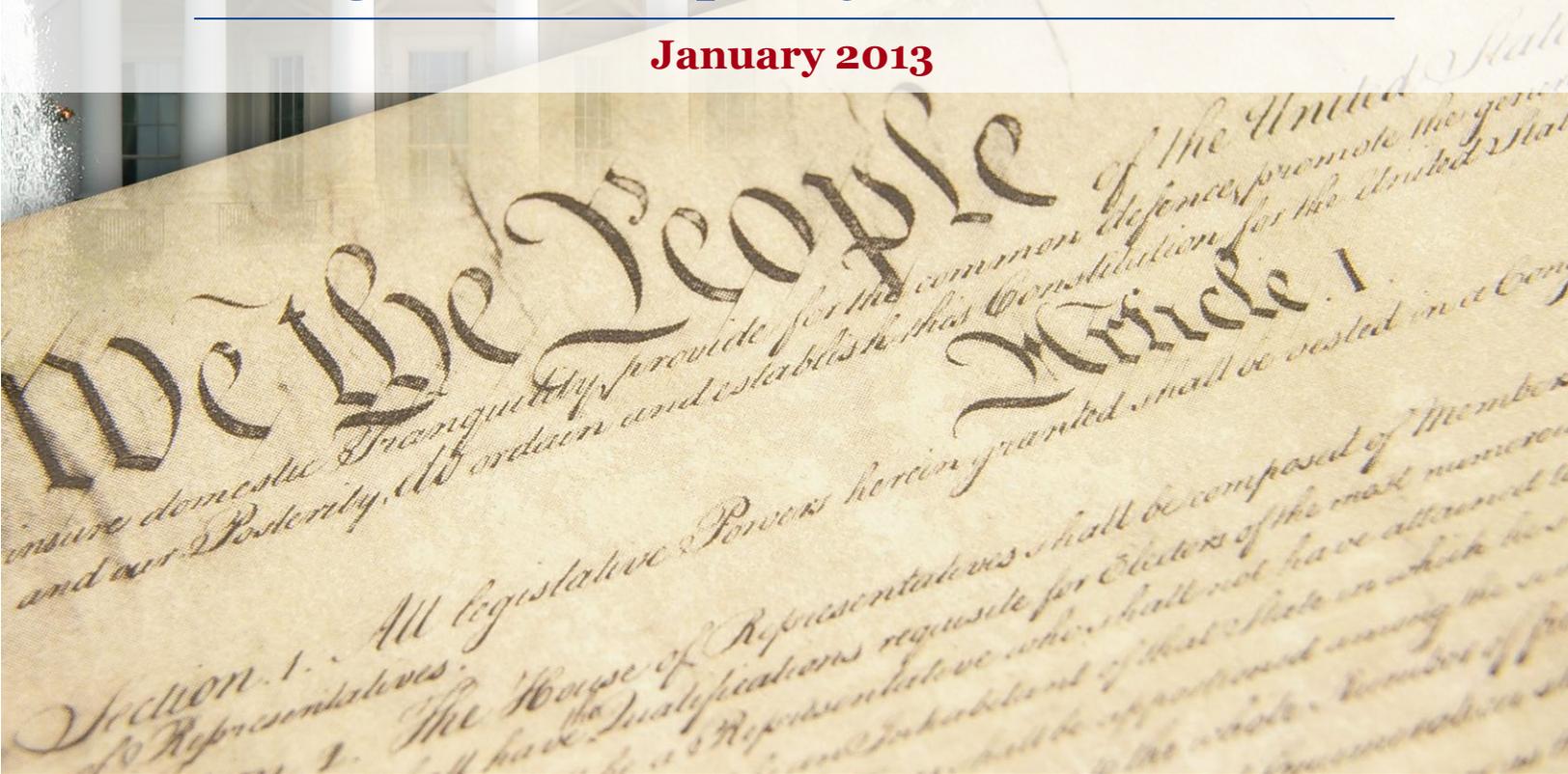




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Toward a More Perfect Union: *A Progressive Blueprint for the Second Term*

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**“What Process is Due?
A Return to Core Constitutional Principles in Immigration”**

by Aarti Kohli

Toward a More Perfect Union: *A Progressive Blueprint for the Second Term*

“Toward a More Perfect Union: A Progressive Blueprint for the Second Term” is a series of ACS Issue Briefs offering ideas and proposals that we hope the administration will consider in its second term to advance a vision consistent with the progressive themes President Obama raised in his second Inaugural Address. The series should also be useful for those in and outside the ACS network – to help inform and spark discussion and debate on an array of pressing public policy concerns. The series covers a wide range of issue areas, including immigration reform, campaign finance, climate change, criminal justice reform, and judicial nominations.

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What Process is Due? A Return to Core Constitutional Principles in Immigration

*Aarti Kohli**

Introduction

Sixty years ago, the Director of the Bureau of the Budget, Frederick J Lawton, sent a missive to then Secretary of State Dean Acheson about the pending 1952 McCarran and Walter Acts, large companion immigration bills that included a nationality-based quota system.¹ He wrote:

These bills raise fundamental questions with respect to the treatment that should be accorded aliens who seek to enter this country and with respect to the position aliens should occupy in our society. In this connection, much has been made by the proponents of these bills of the fact that as a sovereign nation, the United States can admit as many or as few aliens as it chooses on whatever terms and conditions it deems desirable. The conclusion drawn from this is apparently that aliens have no rights. We do not believe that that conclusion is sound or that it provides an adequate basis upon which to construct immigration and naturalization policy.

We do not believe that “aliens” differ in any fundamental respect from other human beings. We believe that the worth and dignity of all individuals, citizens or not, demand respect. And we believe that it is particularly incumbent upon the United States, as a democracy, to guarantee that that respect shall be paid. Our willingness to offer such a guarantee is the measure of the strength of our professed beliefs.

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¹ Memorandum from Frederick J. Lawton, Director of the Bureau of the Budget, to Dean Acheson, Secretary of State (May 9, 1952), in *I FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954*, 243 (John P. Glennon, ed. 1989), available at <http://history.state.gov/historicaldocuments/frus1952-54v01p2/d24>.

Despite Budget Director Lawton's protestations, the McCarran-Walter Act passed and the belief that "aliens" have very limited rights with respect to admission and removal is the basis for constructing immigration policy. The cumulative result of decades of legislating based on this principle is that Mr. Lawton's warnings have been realized; the United States has fallen far short of the ideal "that the worth and dignity of all individuals, citizens or not, demand respect."

In fact, the United States has deported almost 4 million people since Congress passed the last major immigration law in 1996.² Many of these individuals were long-term permanent residents and a significant number left behind children, spouses and parents. As policymakers contemplate another comprehensive reform effort, we have an opportunity to correct our course and return to core democratic principles in our immigration policy, such as justice, liberty, and due process that attract immigrants to our shores in the first place.

Proponents of immigration reform have echoed Frederick Lawton's sentiments, arguing that it is untenable for a democracy tacitly to allow 11 million residents to remain in a second-class undocumented status where they are subject to deportation at any time and to require even lawful immigrants to satisfy byzantine rules and regulations to achieve and sometimes also to maintain their lawful status. If the reform effort is to be truly comprehensive, they argue, we must allow approximately 11 million undocumented residents in the U.S. today a path to earned citizenship, revamp ineffective and overly burdensome aspects of our legal immigration system and create viable avenues for future migrants.

Opponents to reform are reluctant to reward the undocumented, whom they perceive as 'law-breakers,' and some argue that we should limit lawful immigration as well. If past proposals are any guide, restrictionists will likely advocate for provisions that limit the rights of immigrants, targeting those who have even minor or very old criminal convictions or have violated civil immigration laws, with the twin goals of punishing and deterring future unauthorized immigration.

This Issue Brief focuses on a fundamental question: how should our democracy treat immigrants who have run afoul of the law? Part I provides a basic historical overview of constitutional rights afforded noncitizens who are facing criminal and civil prosecution; Part II examines the genesis of key provisions in current law that require

² U.S. Dep't of Homeland Security, Yearbook of Immigration Statistics: 2011, Aliens Removed or Returned: Fiscal Years 1892 to 2011, Tbl. 39 (2012), *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2011-3>. This figure only constitutes removals (formal deportations) rather than returns, which are often effectuated at the border or offered on a discretionary basis by immigration authorities.

mandatory deportation or that punish civil immigration violations; and the final section focuses on both broad principles and offers specific recommendations for reform.³

I. The Constitutional Rights of Noncitizens

American legal history is replete with cases in which courts struggle to define what rights noncitizens have under the Constitution when seeking to come to the United States, or to stay here. Proponents of a broad reading of noncitizens' rights have often come up against a judicially created limiting principle, the Plenary Power doctrine, which gives the political branches of government a wide berth in legislating and administering immigration laws. The rationale behind the principle, which was first raised in a case denying a challenge to the discriminatory Chinese Exclusion Act, is that Congress should have broad control over the rules that govern who is permitted to enter and remain and who must be removed, no matter how severe and unjust those rules are.⁴ Over a century of jurisprudence reveals that the consequence of the Plenary Power doctrine is that the Supreme Court has allowed legislative and executive actions against noncitizens that would violate constitutional principles if applied to citizens.⁵ This is not to say that noncitizens do not have any constitutional protections. The Fourteenth Amendment protects 'any person within the jurisdiction' of the U.S. and, along with the Fifth Amendment, has been held to apply to noncitizens in criminal proceedings. While noncitizens are entitled to due process protections such as a trial by jury, right to counsel and protections against unreasonable searches and seizures in criminal proceedings, civil deportation cases are another matter.

Immigration law operates on many theoretical pronouncements; a primary one is that deportation is not punishment. This principle stems from the holding in an 1893 Chinese Exclusion Act case, *Fong Yue Ting v. United States*, where the Supreme Court

³ It is important to note that this Issue Brief was written before the recent unveiling of immigration reform principles by key senators and the president in January 2013. Both proposals provide a roadmap to citizenship and also contain restrictions for those with criminal convictions. In the Senate's proposal, those with serious criminal convictions would be subject to immediate deportation. Serious crimes are undefined. The President's plan emphasizes continued interior enforcement at federal and state prisons and jails. There is little mention of due process in either proposal. However, the legislative process has just begun and hopefully, the issues raised in this Brief will be aired in future immigration policy conversations. For more information about the pending proposals, see Press Release, The White House, Fixing our Broken Immigration System so Everyone Plays by the Rules (Jan. 29, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules>; Senator Chuck Schumer, et al., Bipartisan Framework for Comprehensive Immigration Reform (U.S. Senate, Jan. 28, 2013), available at <http://www.nytimes.com/interactive/2013/01/23/us/politics/28immigration-principles-document.html>.

⁴ *Chae Chan Ping v. U.S.*, 130 U.S. 581, 603-610 (1889). See Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255-307 (1984); Louis H. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

⁵ *Id.*

upheld the deportation of a laborer who failed to get a residency permit after living in the United States for fourteen years.⁶ The Court held that deportation is not punishment for a crime, nor is it “banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.”⁷ If deportation is not punishment, the Court concluded, then it is also not a deprivation of life, liberty, or property giving rise to procedural due process rights in immigration proceedings.

Consequently, the Court held that noncitizens challenging deportation are not entitled to a host of protections normally afforded those facing punishment in the criminal context, including a trial by jury, the suppression of evidence based on unlawful searches and seizures, and the right to challenge cruel and unusual punishment.⁸ These holdings have generally been reaffirmed and expanded upon in the century of jurisprudence following *Fong Yue Ting*.⁹ Courts have held that there is no right to bail while deportation proceedings are pending,¹⁰ nor is there a Sixth Amendment right to counsel in deportation proceedings.¹¹ One of the few rights afforded immigrants is a right to an administrative hearing prior to deportation at which they have the right to call witnesses and the right to representation at no expense to the government, but even that is limited to those who have been formally admitted to the U.S.;¹² arriving immigrants can be subject to expedited removal without a hearing.¹³

The limitations on noncitizen rights are particularly severe when an immigrant — even a long time permanent resident — is convicted of any number of crimes, some major and many minor. In a recent significant shift in constitutional law relating to immigrants, the Supreme Court acknowledged that deportation is an integral and important part of the penalty imposed on criminal defendants.¹⁴ In *Padilla v. Kentucky*, the Court held that under the ambit of the Sixth Amendment, criminal defense counsel have a duty to inform their noncitizen clients regarding the immigration consequences of a plea. In this case, Jose Padilla, a Vietnam War veteran and a legal resident of the U.S. for forty years, pled guilty to transporting a large quantity of drugs after his criminal counsel incorrectly informed him that there would be no adverse immigration

⁶ 149 U.S. 698 (1893).

⁷ *Fong Yue Ting*, 149 U.S. at 730.

⁸ *Id.*

⁹ *Burr v. INS*, 350 F.2d 87 (9th Cir. 1965) (holding that deportation does not constitute cruel and unusual punishment). *See also* *Bassett v. INS*, 581 F.2d 1385, 1387-1388 (10th Cir. 1978).

¹⁰ *United States ex rel. Carapa v. Curran*, 297 F. 946 (2d Cir. 1924). *See also* *Demore v. Kim*, 538 U.S. 510 (2003).

¹¹ *United States v. Campos-Ascencio*, 822 F.2d 506, 509 (5th Cir. 1987).

¹² *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903). 8 U.S.C. § 1229a(b)(4)(A) (2006).

¹³ Even those individuals who are physically within the U.S. can be considered “arriving” noncitizens. 8 U.S.C. § 1225(b)(1)(A)(i) (2006). *See also* *American Immigration Lawyers Ass’n v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998).

¹⁴ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010).

consequences as a result of the plea. Padilla was subsequently subject to mandatory deportation as a result of the criminal drug conviction.

Scholars have opined that the implicit recognition of deportation as a penalty in *Padilla* may well signal the willingness of the Court to extend due process protections in civil immigration proceedings. Whether the law is headed in that direction, the Court is acutely aware that presently little due process or judicial discretion awaits those who are placed in deportation proceedings. Writing for the *Padilla* majority, Justice Stevens noted that “the ‘drastic measure’ of deportation or removal... is now virtually inevitable for a vast number of noncitizens convicted of crimes.”¹⁵ Despite the Court’s willingness to intervene in this case, the combined effect of the Plenary Power doctrine and the still prevailing legal interpretation of deportation as not constituting punishment for the purpose of extending rights has essentially left noncitizens at the mercy of Congress and the executive branches of government. Congress has legislated broadly punitive measures and the executive branch has enforced them vigorously.

II. The Expanding Law of Deportation

Since the last major legalization program, the Immigration Reform and Control Act of 1986 (IRCA), the idea of preventing ‘criminal aliens’ from entering or remaining in the U.S. increasingly has driven the discourse on immigration. Historically, noncitizens who committed offenses involving ‘moral turpitude’¹⁶ could be deported but, for better or for worse, the executive branch wielded a large amount of discretion in deportation decisions. Post-IRCA, Congress began a concerted effort with consecutive pieces of legislation to strip discretion from the executive and the judiciary in exclusion and deportation decisions.

A. Aggravated Felonies

In the Anti-Drug Abuse Act (ADAA) of 1988, a crime-control bill that was a hallmark of the War on Drugs, Congress instituted mandatory deportation for a new category of offenses called ‘aggravated felonies.’¹⁷ In the 1988 legislation, aggravated felonies were narrowly defined to include murder, arms trafficking and high-level drug trafficking.¹⁸ Shortly thereafter, in the Immigration Act of 1990, family and immigrant visa numbers were increased, but Congress once again enhanced penalties for criminal convictions, expanded the definition of aggravated felonies, and limited due process for immigrants. One of the key procedures eliminated in the 1990 bill was the Judicial

¹⁵ *Padilla*, 130 S. Ct. at 1478.

¹⁶ Derrick Moore, “*Crimes Involving Moral Turpitude*”: *Why the Void-For-Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT’L L.J. 813, 822 (2008).

¹⁷ President Ronald Reagan, Remarks on Signing the Anti-Drug Abuse Act of 1988, Nov. 18, 1988, available at <http://www.reagan.utexas.edu/archives/speeches/1988/111888c.htm>.

¹⁸ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 7342, 102 Stat. 4181, 4469 (1988).

Recommendation Against Deportation (JRAD), which functioned as far more than a recommendation: immigration authorities were prevented from deporting an individual when a judge determined during the sentencing phase of a criminal case that the noncitizen should not be deported and issued a JRAD.¹⁹ Ironically, the adjudicator most familiar with the criminal conduct who had already weighed the severity of the criminal behavior against equities in the criminal sentencing process was no longer able to prevent deportation.

Following on the heels of a Republican-led Congress' 1994 "Contract with America," restrictionists were intent on passing reforms aimed at punishing and thereby deterring illegal immigration. The Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) of 1996, a massive piece of legislation, built upon previous efforts to limit due process for immigrants, broaden categories of deportable immigrants, streamline deportation processes by limiting and eliminating procedural protections and further limit discretion of the executive and judicial branches of the government in deportation proceedings. Mandatory deportation was no longer limited to murderers and drug kingpins; the definition of aggravated felonies expanded once again to include minor drug offenses, thefts, and crimes of violence.²⁰ In addition, mandatory detention was required for all those classified as aggravated felons with no opportunity to apply for bond (the equivalent of bail in immigration detention).

Another 1996 bill passed immediately before IIRIRA, the Anti-Terrorism and Effective Death Penalty Act (AEDPA), also added crimes such as gambling and bribery to the aggravated felony category.²¹ As a result of the enactment of these laws, writing a bad check, jumping a subway turnstile, and pulling someone's hair (a battery in some states) have led to noncitizens being placed in deportation proceedings as aggravated felons after 1996.²² Notably, the underlying criminal offenses do not have to be felonies and even individuals handed a suspended sentence are deportable. The provision mandating deportation of those convicted of aggravated felonies is applied retroactively, thus long forgotten offenses can come back to haunt noncitizens. And in AEDPA and

¹⁹ The JRAD procedure allowed a sentencing court to issue a declaration within 30 days of imposing judgment that the defendant should not be deported because of the crime at issue. The court was required to provide notice to the Attorney General and allow prosecuting attorneys and the immigration service an opportunity to weigh in. The decision was binding on the immigration service. 8 U.S.C. § 1251(b)(2) (repealed 1990). See Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002).

²⁰ Illegal Immigrant Reform and Immigrant Responsibility Act, Pub. L. No. 104-208 § 321, 110 Stat. 3009-546 (1996).

²¹ Crimes such as bribery and gambling rendered a noncitizen deportable. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]; 142 CONG. REC. H3617 (daily ed. Apr. 18, 1996).

²² Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939-41 (2000).

IIRIRA, Congress sought to severely limit judicial review for immigrants convicted of crimes.²³

B. Bars to Reentry

With the passage of the 1996 bills, all noncitizens, including long-term lawful permanent residents, with aggravated felony convictions are subject to mandatory detention and deportation.²⁴ Once deported, they have a lifetime ban on returning to the U.S. or as Justice Ginsburg put it, “[they] must never ever darken our doors again.”²⁵ Undocumented immigrants and other noncitizens with aggravated felony convictions are also prohibited from ever adjusting to a lawful status.

Given this extremely harsh and permanent consequence, it is not surprising that many of those deported, undocumented immigrants and former lawful permanent residents alike, seek to re-enter the United States. Recent analysis of Secure Communities, an interior enforcement program that targets deportable noncitizens, reveals that approximately 40% of deportees report having a U.S. citizen spouse or child.²⁶ In California, the state with largest share of the undocumented population, this figure is close to 60%. And these data undercount those with immediate family in the U.S. since they do not report on lawful permanent resident or other family members residing in the U.S.

Although the crimes of illegal entry and re-entry were created in 1917, it was not until 1996 that Congress instituted strict limits on re-entry after deportation that range from a five-year ban for those who are caught at the border to a lifetime ban for anyone deported because of an aggravated felony. In fact, illegal re-entry is itself a felony;²⁷ in 2011 it surpassed even unlawful entry, a misdemeanor, as the most common charge in federal criminal prosecutions.²⁸ The average sentence for those who had illegally re-entered the U.S. after deportation was 14 months in federal prison in 2011,²⁹ and illegal

²³ Lenni Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1444-1448 (1997).

²⁴ AEDPA and IIRIRA together limited access to relief for immigrants convicted of crime. Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 107-115 (1998).

²⁵ Transcript of Oral Argument at 31, *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010).

²⁶ Aarti Kohli, Peter L. Markowitz, and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY AND DIVERSITY (Research Report 2011), available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

²⁷ 8 U.S.C. § 1326 (2006).

²⁸ ILLEGAL REENTRY BECOMES TOP CRIMINAL CHARGE, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (2011), available at <http://trac.syr.edu/immigration/reports/251/>.

²⁹ *Id.* For a critical analysis of the prosecution program see Joanna Lydgate, *Assembly –Line Justice: A Review of Operation Streamline*, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY AND DIVERSITY (Policy Brief, 2010).

re-entry still remains the most charged crime in the United States today.³⁰ Some might argue that these are serious violent offenders seeking to re-enter to commit further crimes and placing them in federal prisons is necessary to protect communities. However, the government's own data on deportees indicates that the vast majority are either non-criminals or those who were convicted of non-violent misdemeanor offenses.³¹

Scholars have asserted that the sentences imposed upon those convicted of illegal re-entry violate the Eighth Amendment prohibition on cruel and unusual punishment because they often lack proportionality.³² For those with past criminal convictions, it is common for the sentence for illegal re-entry to be higher than the original sentence for the underlying crime.³³ For example, in *Almendarez-Torres v. United States*, Mr. Almendarez-Torres received a sentence of seven years because he was encountered in the U.S. after being deported for a burglary offense for which he had been sentenced to one-year in jail.³⁴ The seven-year federal sentence was for illegal re-entry alone, not for any other criminal behavior. While certainly punitive, criminalizing illegal re-entry appears to have little deterrent effect, as evidenced by the continuing efforts of those who seek to re-enter in the face of possible incarceration.

C. The Roots of the Unlawful Entry Problem

Learning from historical migration flows is important not only to gain a better understanding of illegal re-entry but also to fashion more workable policies in the future. The U.S. has a long history of first importing immigrant labor, and then crafting immigration policy to prevent disfavored groups, particularly racial minorities, from accessing citizenship. In 1790, the first immigration act granted citizenship only to a 'free white person.' A hundred years later, immigration laws specifically began excluding Asian immigrants from citizenship, among them Chinese, Japanese and Indian immigrants.³⁵

³⁰ See Administrative Office of the U.S. Courts, *Federal Courts Hit Hard by Increased Law Enforcement on Border*, THE THIRD BRANCH (Jul. 2008), http://www.uscourts.gov/News/TheThirdBranch/08-07-01/Federal_Courts_Hit_Hard_by_Increased_Law_Enforcement_on_Border.aspx.

³¹ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, NATIONWIDE IDENT/IAFIS INTEROPERABILITY REPORT 2008- 2012 (2012), available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2012-to-date.pdf.

³² Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012).

³³ Doug Keller, *Why The Prior Conviction Sentencing Enhancements In Illegal Re-Entry Cases Are Unjust And Unjustified (And Unreasonable Too)* 51 B.C. L. REV. 719 (2010).

³⁴ 523 U.S. 224, 226–27 (1998).

³⁵ Chinese Exclusion Act, 22 Stat. 58 (1882); see also Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 L. & HIST. REV. 69, 73 (2003).

Differential treatment based on race was not limited to citizenship and often coincided with American labor needs. Mexican labor was welcomed during the early 1900s expansion boom. After the Great Depression, when the economy contracted and they were no longer needed, Mexican and Asian migrants were disproportionately deported for being poor or for the crime of unlawful entry.³⁶ Even U.S. citizen children of Mexican parents were forcibly deported.³⁷ In the 1940's, farmers clamored for a pliable, seasonal workforce and the infamous Bracero temporary worker program was instituted; at its peak in the 1950's more than 400,000 farmworkers were imported from Mexico annually.³⁸

Despite grower protests, the Bracero program was ended in 1964 and was soon followed by the Immigration Act of 1965. The 1965 bill was viewed as landmark, progressive legislation because it ended national origin quotas in immigration and opened doors to non-white immigrants, particularly those from Asia. Yet, as a result of the 1965 Act and subsequent legislation, Western Hemisphere (including Mexican) migration that had annually numbered in the hundreds of thousands prior to 1965 was artificially capped at 120,000 lawful (mostly family-based) visas per year for the entire region.³⁹ In 1976, the artificially low per-country cap of 20,000 visas was applied to Mexico.⁴⁰ With limited means of lawful migration, Mexican workers continued the well-established tradition that had developed since the beginning of the 20th century and intensified during the Bracero program of crossing the border to seek work. While some continued to come and go as seasonal migrants, many of these undocumented workers remained in the U.S. and were joined by El Salvadorans, Guatemalans and other Central Americans who were fleeing civil strife in their countries. The undocumented population grew and in the 1980s a debate emerged, not unlike the present one, over how to address the issue.

In 1986, after a long, hard-fought battle Congress passed the Immigration Reform and Control Act (IRCA), legalizing approximately 3 million people, allocating increased resources for border enforcement, and instituting employer sanctions, a regime of fining employers who knowingly hired unauthorized workers. Mexican-born immigrants constituted the bulk of those legalized (approximately 75%), followed by Central

³⁶ Memorandum, G. C. Wilmoth to INS Commissioner General, Nov. 3, 1938; Memorandum, William Blocker to Secretary of State, Nov. 3, 1938; Memorandum, G. C. Wilmoth to INS Commissioner General, Nov. 29, 1938 (on file with U.S. Citizenship and Immigration Serv., file 55819/402C, box 75, accession 58A734).

³⁷ Frank D. Bean, Rodolfo Corona, Rodolfo Tuirán, and Karen Woodrow-Lafield, *The Quantification of Migration Between Mexico and the United States* 7 (Team Report to Mexico/United States Binational Study on Migration, 1997).

³⁸ U.S. GEN. ACCOUNTING OFFICE, THE H-2A PROGRAM: PROTECTIONS FOR U.S. FARMWORKERS 11 (1988), available at <http://archive.gao.gov/t2pbat16/137107.pdf>.

³⁹ Doug Massey and Karen Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America* 38 POP. & DEV. REV. 1, 10 (Mar. 2012).

⁴⁰ *Id.* at 18.

Americans and Asians.⁴¹ Although legalized immigrants were able to petition (apply for a visa) for immediate family members after IRCA, workers without close family ties still had limited avenues for entering the U.S. lawfully, and low-income workers essentially had no avenue at all. Even lawful permanent residents who sponsored spouses, children and parents were subject to the cap of 20,000 visas per country that became quickly backlogged for Mexico, China and India.

Spouses, children and parents who were waiting for a backlogged family visa sometimes crossed the border unlawfully to join the sponsor before the visa was available. It was always difficult for people unlawfully present to obtain the visa that they were legally eligible for given their family relationships, and the 1996 Act made it more difficult by imposing penalties for a person's previous unlawful presence. In IIRIRA Congress instituted 3 and 10-year prohibitions (known as "bars") on re-entry for illegal presence. These prohibitions state that those who accumulated six months or more of unlawful presence after April 1, 1997 and then left the country, cannot return to the U.S. for 3 years; those who accumulated one year or more of unlawful presence after April 1, 1997 and then departed cannot return to the U.S. for 10 years. This provision is particularly cruel towards those who have a family visa petition pending but can only avail of that petition by leaving the country, thereby triggering the 3 and 10-year bars. Although there are waivers of the bars available, one has to prove extreme hardship to the U.S. citizen or permanent resident spouse or parent in order to circumvent the bar.⁴²

D. Limited Path to Legalize Status

It is clear that current law is inadequate to address the plight of undocumented residents who seek to earn a path to citizenship. On the affirmative side, immigration is limited to those who have permanently present immediate family, and then, only after a wait that takes years, at minimum, and at maximum can take decades. For those who are encountered by immigration authorities and placed in deportation proceedings, the path is even more difficult. One of the few options for undocumented immigrants in deportation proceedings is a mechanism known as cancellation of removal requiring evidence of 10 years of continuous residence and "exceptional and extremely unusual hardship" to U.S. citizen or Lawful Permanent Resident (LPR) immediate relatives.⁴³ As noted above,

⁴¹ Kitty Calavita, *U.S. Immigration and Policy Responses: The Limits of Legislation*, in *CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE* 68 (Wayne A. Cornelius, et al., eds. 2004).

⁴² The Obama Administration has initiated a provisional waiver process where an immediate relative of U.S. citizen spouses and parents can file the extreme hardship waiver and have it adjudicated prior to departing the country. This process will go into effect once a final rule has been published in the Federal Register. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, PROPOSED PROVISIONAL UNLAWFUL PRESENCE WAIVERS (Jun. 6, 2012), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=bc41875decf56310VgnVCM100000082ca60aRCRD&vgnnextchannel=bc41875decf56310VgnVCM100000082ca60aRCRD>.

⁴³ Prior to IIRIRA, a similar provision allowed residents with 7 years of continuous residency to apply for suspension of deportation.

aggravated felons are ineligible for cancellation of removal, and there is an annual cap of 4000 grants of relief. Therefore 1% of the approximately 400,000 people who are currently processed through immigration courts every year can legalize their status through cancellation of removal.

E. Unintended Consequences of Immigration Control Measures

Even after Congress tried to crack down on unauthorized border crossers with severe penalties for unlawful entry and presence, the undocumented population almost doubled from 5.8 million in 1996 to the current estimate of 11 million undocumented residents. While there are numerous reasons why people migrate, scholars have shown that the main draw for undocumented migrants has been the availability of jobs.⁴⁴ In 1986, the new regime of employer sanctions was to be the magic bullet that would prevent employers from hiring undocumented workers. However, in the decades following IRCA, the government rarely prosecuted employers who were able to hide behind the intent requirement that they “knowingly” hired an unauthorized immigrant,⁴⁵ rather, employers wielded the ability to call immigration authorities as a weapon when workers demanded better labor conditions. Thus, employer sanctions failed to deter both employers and workers.

Employer sanctions are not the only immigration control measure with unintended results. An unintended consequence of the renewed effort to militarize and patrol the southern border after the tragic events of September 11, 2001, has been the reduced circularity of migration. Migrants who would cross the U.S. Mexico border to work seasonally in the past have decided to stay put in the U.S. to avoid an increasingly expensive and dangerous crossing.⁴⁶ The number of unauthorized immigrants continued to rise after 2001 and peaked at 12 million in 2007,⁴⁷ well after increased border controls had been implemented, reinforcing the argument that migrants were staying put rather than returning home.

III. Recommendations for Reform

Legislative changes in the past thirty years have been increasingly punitive towards any noncitizen who has violated our laws. These punitive policies have failed to

⁴⁴ JORGE DURAND, NOLAN J. MALONE, AND DOUGLAS S. MASSEY, *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* (2003).

⁴⁵ Immigration Reform and Control Act of 1986, Pub.L. 99–603 §101, 100 Stat. 3359 (1986).

⁴⁶ See Wayne A. Cornelius, et al., *Current Migration Trends from Mexico: What are the Impacts of the Economic Crisis and U.S. Enforcement Strategy?*, CENTER FOR COMPARATIVE IMMIGRATION STUDIES 26-27 (Jun. 2009), available at http://www.immigrationpolicy.org/sites/default/files/docs/Migration_Cornelius060809.pdf.

⁴⁷ Jeffrey Passel and D’Vera Cohn, *Unauthorized Immigrants: 11.1 Million in 2011*, PEW HISPANIC RESEARCH CENTER (Dec. 6, 2012), <http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011/>.

deter undocumented immigration, not because they are not harsh (they are), but because they fail to understand demographic and economic realities. Unless future reform creates avenues for lawful circular migration, with strong worker protections, it is likely that we will again have to address the issue of unauthorized immigrant workers in the future.⁴⁸ Fixing broken federal laws will also preclude the need for state legislators and local law enforcement officials to justify racially motivated actions in the name of immigration enforcement. Until we address the problems with our current immigration regime, individuals such as Sheriff Joe Arpaio will continue to trample on the Fourth Amendment rights of Latinos, citizens and immigrants alike. Rather than continuing on the road of ever-escalating and expensive penalties, we should embrace the opportunity in immigration reform to restore due process in our laws. The recommendations below are by no means comprehensive; rather, they highlight key issues discussed in this Issue Brief.

A. Implement a Balancing Test for Deportation Based on Criminal Conduct

Rather than using limited resources to place any noncitizen who has ever committed a crime in deportation proceedings, we should consider focusing immigration enforcement resources on those who have been convicted of serious, violent felonies. Regardless of the crime, mandatory detention and deportation are fundamentally contradictory to our justice system which aims to provide a full and fair hearing with a decision-maker who can exercise discretion. A mandatory deportation system can be easily replaced with a balancing test where an immigration judge takes into account the following factors in determining whether deportation is in order:

- the age the noncitizen immigrated and the length of residence;
- the nature and the severity of the offense;
- the impact on the noncitizen's family life, particularly the economic and emotional hardship on children, partners and parents;
- employment history;
- service in the armed forces;
- rehabilitative behavior by the noncitizen;
- the noncitizen's ties to the country of origin, including language ability;
and

⁴⁸ Scholars and development experts have pointed to the benefits of voluntary circular migration for both receiving and sending countries. See Kathleen Newland, *Circular Migration and Human Development*, UNITED NATIONS DEVELOPMENT PROGRAMME 42 (Human Development Reports Research Paper 2009).

- the noncitizen’s medical and psychological status.

A similar balancing test was applied in the past for immigrants who were seeking relief from deportation because of a criminal conviction and had resided in the United States for seven years.⁴⁹ Many of these common sense factors have also been implemented by the European Court of Human Rights in its balancing test for deportation and have been recommended by the Inter-American Commission of Human Rights.⁵⁰ Creating a more fair, balanced process for the future, however, will not resolve the problems of thousands of families who are currently separated from a loved one because of a previous deportation. We should create a similar balancing test that would allow prior deportees to demonstrate that they are not a threat to the U.S. and that they merit a chance at reunifying with family members in the U.S.

B. Decriminalize Unlawful Entry and Re-entry

Social scientists have shown that the majority of unlawful border crossers enter the U.S. in search of work or family reunification. While certainly a violation of our immigration laws, should this conduct be equated with criminal behavior implying an intent to harm the public? As to whether there is public harm, economists have shown that immigration in the long-term “unambiguously improves employment, productivity, and income,” with small negative impacts in the short-term during an economic downturn.⁵¹ In addition, there has been no published evidence that federal prosecutions actually deter future unlawful entry or re-entry.

Policymakers should consider decriminalizing unlawful entry and re-entry to the extent it is the only conduct at issue. Like unlawful presence, unlawful entry should be a civil violation unless there is evidence that the individual is entering the U.S. to commit a serious offense. Decriminalizing unlawful entry would not prevent taking this conduct into consideration in criminal cases. If an individual re-enters and commits a felony, unlawful re-entry could still be considered in the sentencing phase.

Immigration authorities already have administrative authority to deport individuals for violating civil laws and, other than burdening the federal courts and prison system, it appears little is gained from federal criminal prosecution. In his recent year-end report on the state of the courts, Justice John Roberts pointed to the financial

⁴⁹ Immigration and Nationality Act of 1965, Pub. L. 89-236 § 212(c), 79 Stat. 911 (1965); 8 U.S.C. § 1182(c) (1994) (repealed 1996). Anthony Distinti, *Gone But Not Forgotten: How Section 212(c) Relief Continues To Divide Courts Presiding over Indictments for Illegal Reentry*, 74 *FORDHAM L. REV.* 2809, 2819 (2006).

⁵⁰ DANIEL KANSTROOM, *AFTERMATH. DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* 222-223 (2012).

⁵¹ Giovanni Peri, *The Impact of Immigrants in Recession and Economic Expansion*, *MIGRATION POLICY INST.* 4 (2010), available at <http://www.migrationpolicy.org/pubs/peri-june2010.pdf>.

constraints the Judiciary is operating under;⁵² two years ago, his year-end report noted that “[i]mmigration offenses accounted for much of the criminal caseload...”⁵³ This conclusion is supported by the 2011 Sentencing Commission report stating that approximately 35% of the federal criminal caseload is primarily immigration illegal re-entry cases.⁵⁴ If these cases were instead handled by the civil immigration system, it is likely the federal judicial system could redirect resources to cases where public safety is paramount, such as murder and gun trafficking.

C. Reinstate JRAD

In the *Padilla* case, the majority highlighted the combination of eliminating the Judicial Recommendation Against Deportation in 1990 and the broadening of aggravated felonies in 1996 as legislative trends that “confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”⁵⁵ If indeed, as *Padilla* recognizes, criminal convictions are inextricably linked to deportation, policymakers should bring back the JRAD procedure where a criminal sentencing judge can weigh that aspect of the penalty.⁵⁶ Under the *Padilla* standard, criminal defense counsel already have a duty to inform the noncitizen about possible immigration consequences; many may also follow Justice Stevens’ advice to attempt to craft a plea that does not lead to deportation. However, in those cases where deportation is likely, the JRAD procedure would serve an important purpose: it would provide the noncitizen the assistance of counsel who is already familiar with the facts of the offense to argue for relief. The importance of access to counsel in criminal proceedings cannot be overstated because once the criminal process is complete, immigrants are placed in civil deportation proceedings where the government does not provide pro bono counsel to indigent defendants. Notably, in immigration proceedings nationwide only approximately 15% of detained individuals have counsel.⁵⁷ It is unlikely that consideration of a JRAD as part of the sentencing phase of the trial would substantially increase the workload of

⁵² CHIEF JUSTICE JOHN ROBERTS, 2012 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (Dec. 2012) (“Because the Judiciary has already pursued cost-containment so aggressively, it will become increasingly difficult to economize further without reducing the quality of judicial services.”), available at <http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf>.

⁵³ CHIEF JUSTICE JOHN ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (Dec. 2010), available at <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>.

⁵⁴ U.S. SENTENCING COMMISSION, 2011 ANNUAL REPORT 5 (Dec. 2011), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/ar11toc.htm.

⁵⁵ *Padilla*, 130 S. Ct. at 1480.

⁵⁶ Other scholars have suggested going further by combining the JRAD procedure with the deportation hearing for criminal noncitizens. See Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002).

⁵⁷ *The US Immigration Court System: Workload and Due Process Challenges*, CENTER FOR MIGRATION STUDIES (Feb. 2012), available at <http://cmsny.org/2012/02/21/osuna-on-us-immigration-court-system/>.

criminal courts, but it may have significant impact on alleviating the pressure on the civil deportation system, which processes approximately 400,000 people annually.

Conclusion

In an increasingly connected world where goods, information and money move freely, people are sure to follow. Therein lies both an opportunity and a challenge for the United States. The major lesson learned from past reforms is that harsh, punitive measures, both in criminal and civil immigration law have not deterred unlawful immigration nor have they made us safer; rather our current laws wreak havoc on families, particularly U.S.-born children who have been left fatherless or motherless. We are now presented with an opportunity to craft immigration laws that adhere to our values and offer a more balanced approach to crime and deportation. This is not to say that the government cannot or should not deport individuals who are deemed a threat; rather, that we work towards creating a full, fair and transparent process that reflects our democratic principles.