# NOTES

# THE IMMIGRATION ACT OF 1990: CONGRESS CONTINUES TO AGGRAVATE THE CRIMINAL ALIEN

## *I. Introduction*

An omnibus immigration law, the Immigration Act of 1990 (hereinafter 1990 Act)[1] was the most extensive overhaul of United States immigration law in sixty-six years.[2] The eight-title act is principally centered upon the preference system and the numerical limits regulating legal immigration.[3] While considering the intricate and complex issues of legal immigration,[4] however, Congress inserted into the 1990 Act numerous provisions designed to assist the Immigration and Naturalization Service (hereinafter INS)[5] in the identification, apprehension and depor-

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[1] Pub. L. No. 100-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter 1990 Act].

[2] *See* President's Statement on Signing the Immigration Act of 1990, 22 WEEKLY COMP. PRES. DOC. 1946 (Nov. 29, 1990).

[3] CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION ACT OF 1990, 90-601, at 1 (Joyce C. Vialet & Larry M. Eig eds., 1990) [hereinafter CRS REPORT]. One commentator has summarized the 1990 Act's underlying themes as follows:

> 1) Overall immigration is increased.
> 2) The U.S. continues to place high value on family relationships as a basis for immigration.
> 3) Employment-sponsored immigration is improved with attention paid to protecting the domestic labor market.
> 4) The naturalization process is streamlined.
> 5) The value of periodic review of our immigration laws is recognized.

Howard S. (Sam) Myers III & Elizabeth A. Thompson, *Immigration Act of 1990 — A New Era of United States Immigration*, *in* FEDERAL IMMIGRATION REGULATIONS AND FORMS xxiii, xxv (West 1992). For a detailed analysis of all the 1990 Act's titles, see UNDERSTANDING THE IMMIGRATION ACT OF 1990: AILA'S NEW LAW HANDBOOK (Paul W. Schmidt ed., 1991).

[4] CRS REPORT, *supra* note 3, at 1.

[5] The INS is the federal agency that manages the United States' immigration and nationality laws. Included within its mission is the task of enforcing the administrative and criminal provisions of the Immigration and Naturalization Act, as well as other related federal laws. U.S. IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION ACT OF 1990 — REPORT ON CRIMINAL ALIENS 3 (Apr. 1992) [hereinafter INS CRIMINAL ALIEN REPORT].

tation of criminal aliens.[6] Furthermore, the 1990 Act expands the list of serious crimes and violations of law for which one or more convictions may preclude an alien from benefits or create new roadblocks for reliefs under the law.[7] Although Congress intended the 1990 Act to generate an immigration policy that was fair and would further our nation's economic interests,[8] the criminal alien provisions evidence that Congress was equally concerned with the need to eliminate the criminal alien population in the United States.[9]

At the heart of the criminal alien provisions lies the aggravated felony.[10] First introduced in 1988, the aggravated felony provisions have been significantly broadened.[11] The new aggravated felony provisions provide a formidable means of removing the criminal alien from the doorsteps of America.[12] Today, more than ever before, aliens convicted of aggravated felonies (hereinafter aggravated felons) will have their due process rights curtailed to facilitate an accelerated deportation process.[13]

This note will examine Congress' response to the criminal alien problem through its enactment of the aggravated felony provisions. Part II, which follows this introduction, surveys prior legislation enacted to control criminal aliens. Part III traces the apparent rise of criminal conduct among the alien population, with particular emphasis on drug-related crimes. Part IV chroni-

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6 An alien is any person who is "not a citizen or a national of the United States." Immigration and Nationality Act [hereinafter INA] § 101(a)(3), 8 U.S.C. § 1101 (1988).

7 H.R. REP. No. 955, 101st Cong., 2d Sess. 132 (1990) [hereinafter H.R. REP. No. 955].

8 *See* Barbara Vobejda, *Broad Immigration Changes Approved*, WASH. POST, Oct. 28, 1990, at A1 (quoting Sen. Kennedy (D-Mass.)).

9 *See* 136 CONG. REC. S17,117 (daily ed. Oct. 26, 1990). "The aggravated felony aliens' provisions in the 1988 act were important steps toward solving a major problem faced by Federal and State criminal justice systems — the problem of how to expeditiously remove from our streets those aliens who are convicted of murder, or trafficking in drugs and weapons." *Id.* (statement of Sen. Graham (D-Fla.)).

10 1990 Act, § 501 (amending INA § 101, 8 U.S.C. § 1101 (1988)).

11 *See infra* pp. 216-230.

12 *Id.*

13 *See* William E. McAlvanah & Jo Anne C. Adlerstein, *New Law Holds Alien Felons' Feet to the Fire*, 127 N.J.L.J. 68 (Jan. 10, 1991). In general, aliens may not be deprived life, liberty or property without due process of law. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Aliens in deportation hearings have same right to procedural safeguards as afforded in other administrative proceedings. Wong Yang Sung v. McGrath, 339 U.S. 522 (1954).

cles the legislative history of the 1990 Act. Part V delineates the aggravated felony provisions of the 1990 Act and its subsequent technical changes. Part VI addresses the pertinent issues of which both immigration and non-immigration practitioners need to be aware. Finally, Part VII analyzes the effects of the aggravated felony provisions.

## *II. Prior Legislation*

### A. *The Immigration and Nationality Act of 1952*

The Immigration and Nationality Act of 1952 (hereinafter INA) was a major recodification and revision of all previous immigration laws.[14] Although no aggravated felony provisions were incorporated into the INA, the INA did contain provisions regulating criminal aliens.

Under the INA, an alien was subject to deportation if convicted of a "crime involving moral turpitude" (hereinafter CIMT)[15] and if the crime was committed within five years after

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[14] The Immigration and Naturalization Act of 1952 (also commonly known as the McCarran-Walter Act), Pub. L. No. 82-414, 66 Stat. 163 (1952) (current version at 8 U.S.C. §§ 1101-1555 (1988 & Supp. III 1991)). The INA created classifications of immigrants by providing quota preference to skilled aliens and to family members of U.S. citizens and aliens. U.S. IMMIGRATION AND NATURALIZATION SERVICE, 1990 STATISTICAL YEARBOOK OF THE IMMIGRATION SERVICE A.1-12 (Dec. 1991) [hereinafter INS YEARBOOK]. In addition, the INA amended the existing classes of admission for non-immigrants. *Id.* Moreover, the INA broadened the grounds by which an alien was excluded or deported, established provisions for deportation procedures to afford aliens their basic due process rights and instituted procedures by which a non-immigrant alien could adjust his or her status to that of a permanent resident alien. *Id.* The INA stands today as the foundation of our immigration law. CRS REPORT, *supra* note 3, at 1.

[15] INA § 241(a)(4)(A), 8 U.S.C. § 1251(a)(4) (1988). Defining moral turpitude is difficult because there is no definition in the statute. *See* Mary L. Sfasciotti, *Representing Aliens in Criminal Cases — Recent Amendments to the Immigration and Naturalization Act*, 79 ILL. B.J. 78, 80 (Feb. 1991). One court has defined moral turpitude as conduct that "is so far contrary to the moral law, as interpreted by the moral good sense of the community, that the offender is brought public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons." Matter of D., 1 I & N Dec. 190, 194 (BIA 1942). All *malum in se* crimes have been considered crimes involving moral turpitude. Peter A. Schey, *Deportation Consequences of Criminal Convictions*, JUDGES J., Spring 1986, at 50 (citing Castle v. INS, 541 F.2d 1064, 1066 (4th Cir. 1976)). Consensual sodomy, as well as the solicitation thereof, is also a "crime involving moral turpitude" [hereinafter CIMT]. Velez-Lozano v. INS, 463 F.2d 1305, 1307 (D.C. Cir. 1972). *See also* Jordan v. De George, 341 U.S. 223, 229 (1951) (holding conspiracy to defraud the United States is a CIMT).

entry into the United States. The provision only applied when the alien was either sentenced to confinement or confined to a prison or correctional facility for a year or more.[16] In addition, an alien was deportable if convicted of two CIMTs, not originating from the same criminal scheme, and regardless of whether jailed or whether the convictions were in a single trial.[17] Finally, an alien convicted of violating drug[18] or firearm laws[19] was deportable.

### B. *Origins of Immigration Reform*

During the 1960s and 1970s, several perfecting amendments were enacted which, together with the INA, combined to define the present immigration system.[20] By the end of the 1970s, however, Congress initiated a serious inquiry into an overhaul of the INA; the result of the inquiry was the formation of the Select Commission on Immigration and Refugee Policy (hereinafter the Commission).[21]

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16 INA § 241(a)(4)(A), 8 U.S.C. § 1251(a)(4) (1988). The one year or more sentence of confinement satisfies this section even though the execution of the sentence is completely suspended and the alien never actually confined. Schey, *supra* note 15, at 38. *See also Velez-Lozano*, 463 F.2d at 1307 (holding the basic element of the statute is the imposition of the sentence rather than actually serving the sentence).

17 INA § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1988).

18 INA § 241 provided for the deportation of any alien who:

> at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21).

INA § 241(a)(11), 8 U.S.C. § 1251 (Supp. V 1987).

19 INA § 241(a) provided for the deportation of any alien who:

> at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun.

INA § 241(a), 8 U.S.C. § 1251(a)(14) (1982).

20 H.R. REP. No. 723, 101st Cong., 2d Sess., pt. 1, at 33 (1990) [hereinafter H.R. REP. No. 723, PT. 1]. *See, e.g.*, Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.); Immigration and Nationality Act Amendments of October 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1976) (codified as amended at 8 U.S.C. §§ 1101, 1151-1154); Immigration and Nationality Amendments of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

21 Pub. L. No. 95-412, 92 Stat. 907, 8 U.S.C. § 1151 (1988). The act authorized

The Commission recommended major reforms to deal with both legal and illegal immigration.[22] The Immigration Reform and Control Act of 1986[23] was Congress' response to the Commission's recommendation concerning illegal aliens and the need to deter further illegal immigration.[24] Congress, however, was still unprepared to tackle the Commission's recommended changes in legal immigration laws,[25] or the Commission's recommendations concerning improved enforcement of immigration law.[26]

### C. *The Anti-Drug Abuse Act of 1988*

Although still concerned with the future of legal immigration, Congress next turned its attention to the criminal alien quandary. In 1988, Congress passed an omnibus drug enforcement bill known as the Anti-Drug Abuse Act of 1988 (hereinafter 1988 Drug Act).[27] Incorporated within the 1988 Drug Act were provisions relating to criminal aliens.[28] Under the criminal alien provisions, a new category of deportable alien was established; such an alien would thereafter be called the "aggravated

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the creation of a 16-member commission to study and evaluate immigration and refugee policies, procedures and laws. H.R. REP. No. 723, PT. 1, *supra* note 20, at 33.

22 The Commission recommended tougher enforcement to prevent the entry of undocumented aliens and a more open policy to accept those aspects of legal migration that would benefit our nation. H.R. REP. 723, PT. 1, *supra* note 20, at 33. *See generally* SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Mar. 1, 1981).

23 Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered titles of the U.S.C.) [hereinafter IRCA].

24 Myers & Thompson, *supra* note 3, at xxiv. An illegal alien or undocumented alien is a broad term that could be defined as "any foreign-born person present in the United States who is in a deportable status." INS YEARBOOK, *supra* note 14, at 189. The term, however, could be narrowly construed to refer to those aliens who have established residence in the United States with the intention of staying here permanently. *Id.*

25 H.R. REP. No. 723, PT. 1, *supra* note 20, at 33. Rep. Peter W. Rodino (D-NJ), legendary chairman of the House Judiciary Committee, concluded that the proposed legal immigration bills were "premature," deleting legal immigration provisions from bills submitted during the 97th Congress. *Id.* at 34.

26 *Id.* at 33.

27 Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered titles of the U.S.C.).

28 The criminal alien provisions were contained in Title VII, Subtitle J, of the 1988 Drug Act. Except where otherwise provided, all of the provisions were deemed to be amendments to the INA. 1988 Drug Act § 7341.

felon."[29] The aggravated felony constituted a new, separate and distinct basis for deportability under the INA.[30]

Section 7342 of the 1988 Drug Act defined aggravated felonies as murder, any drug trafficking crimes,[31] or any illicit trafficking in any firearms or destructive devices,[32] or any attempt or conspiracy[33] to commit such acts, committed within the United

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29 Sfasciotti, *supra* note 15, at 80.

30 DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 7.4, at 7-55 (Dec. 1991).

31 Defined in § 924 of Title 18: "For purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2) (1988).

32 18 U.S.C. § 921 provides in relevant part:

> (3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.
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> (4) The term "destructive device" means —
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> (A) any explosive, incendiary, or poison gas—
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> (i) bomb,
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> (ii) grenade,
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> (iii) rocket having a propellant charge of more than four ounces,
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> (iv) missile having an explosive or incendiary charge of more than one-quarter ounce,
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> (v) mine, or
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> (vi) device similar to any of the devices described in the preceding clauses;
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> (B) any type of weapon (other than a shotgun or a shot gun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and
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> (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

18 U.S.C. § 921(a) (1988).

33 A conspiracy exists when two or more persons form a "confederacy or combination" to jointly commit "some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted action of the conspirators . . . ." BLACK'S LAW DICTIONARY 309 (6th ed. 1990). Conspiracy also applies to acts which use "criminal or unlawful means" toward the commission of a lawful act. *Id.*

States.[34]

One of the most significant features of the aggravated felony provisions of the 1988 Drug Act concerned expeditious procedures to deport criminal aliens. Section 7347 required that deportation proceedings must, to the extent possible, be completed before the alien was released from incarceration for the underlying sentence.[35] Both the initial deportation hearing and any administrative appeal should be concluded.[36] This ensures that the government would be in a position to deport the aggravated felon immediately upon release from prison.[37] Thus, the new provision envisioned an accelerated deportation process to reduce the enormous backlog of cases relating to criminal aliens who had returned to the streets after having served their sentences.[38] In response, the INS established programs to accelerate the deportation process.[39]

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34 1988 Drug Act § 7342 (amending INA § 101(a), 8 U.S.C. § 1101(a) (1982)). No effective date was given for this section. *Id.* However, many observers believed the new definition only applied to convictions occurring on or after November 18, 1988, the 1988 Drug Act's enactment date. KESSELBRENNER & ROSENBERG, *supra* note 30, § 7.4(a), at 7-57 & nn. 215-15.2. In Matter of A-A, Int. Dec. 3176 (BIA 1992), the Board of Immigration Appeals [hereinafter BIA] appears to have stifled the debate. The BIA, after construing all of the sections of the 1988 Drug Act, held that the sections prove, through "necessary implication," that the aggravated felony definition also applies to convictions occurring prior to November 18, 1988. *Id.* Accordingly, unless otherwise provided, the aggravated felony applies to all convictions occurring "before, on, or after" November 18, 1988. *Id.*

35 1988 Drug Act § 7347 (amending INA § 242A, 8 U.S.C. § 1252(a) (1982 & Supp. IV 1986)). Previously IRCA § 701 had established the Criminal Alien Hearing Program as a means for expediting deportations. Section 701 mandated that aliens convicted of crimes should have their deportation hearings while still in correctional custody. The drafters of IRCA intended that the hearings be accomplished as expeditiously as possible; however, the language of the provision was open-ended as to when it should be completed. Glenn R. Lawrence, *New Programs for the Administrative Judiciary in Education, Immigration & Housing Discrimination Law*, 36 FED. B. NEWS & J. 322, 325 (Sept. 1989).

36 1988 Drug Act § 7347 (amending INA § 242A, 8 U.S.C. § 1252(a) (1982 & Supp. IV 1986)).

37 Lawrence, *supra* note 35, at 325.

38 *See id. See also infra* notes 58-60 and accompanying text for examples of backlog.

39 Ira Sandron & Robert K. Bingham, *The INS Role in Criminal Justice: Deportation and Exclusion of Criminal Aliens*, 37 FED. B. NEWS & J. 275, 278 (June 1990). The INS and the Office of the Chief Immigration Judge instituted the Alien Criminal Apprehension Program [hereinafter ACAP]. ACAP's strategy was to assist in the initiation of deportation/exclusion hearings and to expedite the process of securing orders of deportation/exclusion against criminal aliens who were still incarcerated.

The 1988 Drug Act also ensured that the aggravated felon was to be detained during the interval between the time of release from incarceration until the conclusion of the deportation hearing. Section 7343(a) required the Attorney General to take into custody any aggravated felon upon completion of his or her sentence.[40] Furthermore, the section barred the Attorney General from releasing the aggravated felon from custody.[41]

Other provisions that further limited an aggravated felon's rights included eliminating voluntary departure[42] for any alien who was deportable as an aggravated felon,[43] creating a presumption of deportability for aggravated felons[44] and reducing the time period in which an aggravated felon may take an appeal to sixty days.[45]

Finally, section 7349 ensured that aggravated felons who are deported remain deported. The section prohibited a deported aggravated felon from applying for admission to the United States for a ten-year period, even if otherwise eligible for admission.[46]

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This ensured that the immigration process was not postponed until the alien fully served his or her prison term. *Id.* Instead of the typical immigration court setting, ACAP hearings were held at prison or correctional facilities. *Id.* Upon the granting of a final order of deportation/exclusion, the INS could arrange to remove the alien upon his or her release from confinement into INS custody, utilizing a detainer under 8 C.F.R. § 242.2(a) (1987). *Id.*

40 1988 Drug Act § 7343(a) (amending INA § 244(e), 8 U.S.C. § 1254(e) (1982)).

41 This is the no-bond provision later modified in both the 1990 Act and the 1991 Technical Corrections Act. *See infra* note 132 and accompanying text.

42 Although deportation is the most widely known mode of expelling aliens, most aliens are in fact removed under a method called "voluntary departure with safeguards." INS YEARBOOK, *supra* note 14, at 163. This process permits an alien to confess to his or her illegal status and agree to leave the United States. Moreover, the alien must consent to stay in INS custody until actual removal. *Id.*

43 1988 Drug Act § 7343(b) (amending INA § 244(e), 8 U.S.C. § 1254(e) (1982)).

44 *Id.* § 7347(c) (amending INA § 242A, 8 U.S.C. § 1252(A)(c) (1982)).

45 *Id.* § 7347(B) (amending INA § 106(a)(1), 8 U.S.C. § 1105(a)(1) (1982)). Previously an alien was granted a full six months to file a petition for review. Sfasciotti, *supra* note 15, at 82.

46 1988 Drug Act § 7349 (amending INA § 212(a)(17), 8 U.S.C. § 1182(a)(17) (1982)). Prior to the 1988 Drug Act it was only a five-year period. Daniel H. Smith, *Criminal Alien Provisions, in* UNDERSTANDING THE IMMIGRATION ACT OF 1990: AILA'S NEW LAW HANDBOOK 225, 232 (Paul W. Schmidt ed., 1991).

## *III. The Rise in Alien Criminality*

### A. *The Concern Over Rising Crime*

As immigration levels rose during the 1980s,[47] there was a corresponding rise in reported criminal alien activities.[48] Drug crimes constituted a substantial portion of the offenses.[49] These crimes or violations of law included drug trafficking and money laundering.[50] The INS and the Department of Justice recognized this trend; both increased their efforts to combat the problem[51]

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47 From 1981 to 1990, immigration to the United States rose to 7,338,062, a 61% increase above the period from 1971 to 1980. INS YEARBOOK, *supra* note 14, at 47. Moreover, in 1990 alone, 1,536,483 immigrants arrived at the United States, the highest total in our nation's history. *Id.* Nearly as many immigrants entered the United States during the 1980s as during the previous 20 years. *Id.* at 29. The INA defines immigrants as persons granted legal permanent residence in the United States. *Id.* at 37. Some immigrants arrive in the United States possessing immigrant visas that were issued abroad while others may modify their alien status during their stay in the United States from non-immigrant (temporary status) to legal permanent residence. *Id.* Non-immigrants are those aliens admitted for a predetermined, temporary period to the United States but not for legal permanent residence. *Id.* at 115. Albeit the common non-immigrant is a tourist visiting the United States for a short period, a myriad of categories of non-immigrant admissions exist. Familiar examples include exchange students and ambassadors. *Id.* The non-immigrant population has seen equally dramatic increases. In 1981, 11,757,000 non-immigrants arrived at the United States. By 1990, the figure rose to 17,574,000. *Id.* at 117.

48 INS CRIMINAL ALIEN REPORT, *supra* note 5, at 3. For example, a San Diego police department survey calculated that for felony arrests, 16% were illegal aliens. H.R. REP. No. 681, PT. 1, 101st Cong., 2d Sess. 146 (1990) [hereinafter H.R. REP. No. 681]. For misdemeanor offenses, 10% involved illegal aliens. *Id.*

49 *See* Sandron & Bingham, *supra* note 39, at 280 which states "[o]ne has only to read a daily newspaper or watch an evening newscast to realize the pervasive national concern over illicit drugs."

50 The Santa Ana Narcotics Task Force estimated 95% of all arrests (primarily drug trafficking offenses) were of illegal aliens. H.R. REP. No. 681, *supra* note 48, at 146.

51 The Department of Justice has recognized the removal of aliens involved in criminal activity as one of the highest departmental priorities. INS CRIMINAL ALIEN REPORT, *supra* note 5, at 3. Toward this end, the INS is diligently working to improve methods of identifying, tracking, arresting and detaining criminal aliens. *Id.* at 6. Currently, one third of its 1,100 field investigators is involved in investigating criminal alien activities. *Id.* at 3. Statistics indicate that the heightened emphasis on enforcement may have produced positive results. In 1988, there were 5,824 drug seizures with an estimated total INS "street value" of $803,535,000. U.S. IMMIGRATION AND NATURALIZATION SERVICE (STATISTICS DIVISION), COMMISSIONER'S FACT BOOK SUMMARY OF RECENT IMMIGRATION DATA 21 (July 1991). By 1990, however, the number of drug seizures climbed to 7,732 with an estimated street value of $1,739,345,000. *Id.*

and advocated significant changes in the laws concerning criminal aliens.[52] Thereafter, a growing number within Congress began to realize the gravity of the criminal alien drug problem[53] and the need to enact legislation to impose harsh penalties on criminal aliens and strengthen enforcement procedures.[54]

### B. *The Burgeoning Deportation Docket*

Coinciding with the rise in alien drug activity, the United States experienced a dramatic rise in its prison population.[55] Aliens constituted twenty-five percent of this population.[56] Detaining these aliens proved to be troublesome as detention costs surged[57] and the length of time required to deport them in-

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52 *See* Sandron & Bingham, *supra* note 39, at 280. "It is logical to expect that if the nationwide focus over illicit drugs (and crime in general) continues to intensify. . . .it might also be anticipated that efforts will be made to curtail certain forms of discretionary relief now available to aliens who have been convicted of serious crimes." *Id.*

53 *See* 136 CONG. REC. S17,118 (daily ed. Oct. 26, 1990). Sen. Graham profiled the problem as follows: "Of the 2,840 criminal aliens the Florida statewide prosecutor's office could provide me information on, 657 were convicted on cocaine trafficking — over 25 percent. This indicates the magnitude of the problem and the urgency of the need to provide States with relief." *Id.* (statement of Sen. Graham).

54 *See* 136 CONG. REC. S17,117-18 (daily ed. Oct. 26, 1990). Sen. Graham opined that Congress must act affirmatively:

> There are thousands of such aliens in our criminal justice system, and countless others who have somehow escaped justice or deportation. The 1988 act gave the Immigration and Naturalization Service and the Department of Justice new tools to close the loopholes through which criminal aliens were escaping. . . .It is the Federal Government's responsibility to protect our borders. If the Government fails to prevent dangerous aliens from crossing our borders, it then becomes the responsibility of the Federal Government to help the States cope with the crimes and the costs of prosecuting criminal aliens. Finally, the Federal Government must make sure that dangerous aliens are not on the streets, not allowed to commit new crimes and not caught in a lengthy deportation process.

*Id.* (statement of Sen. Graham).

55 Since 1980, the United States' prison population experienced a 134% increase. INS CRIMINAL ALIEN REPORT, *supra* note 5, at 3. By 1989, an estimated 4.1 million adults (about one in every 46) were subordinate to the custody or care of a correctional agency. *Id.*

56 The INS has concluded that of the 63,131 individuals housed in federal facilities as of October 1, 1991, 16,060 (or 25%) were foreign born. INS CRIMINAL ALIEN REPORT, *supra* note 5, at 5 & n.2. Federal and state prisons do not differentiate between non-citizens and foreign born. *Id.* In state facilities, 41,184 of an average prison population of 707,212 were foreign born. *Id.* at 5.

57 Criminal aliens typically are held in INS custody for 17 days; the average cost

creased.[58] The result was a huge backlog of deportation and exclusion cases.[59] The greatest backlog occurred in cases where some type of discretionary relief was sought.[60] By restricting avenues and reducing the reliefs available to aggravated felons, the INS concluded it could expedite the deportation process and thereby reduce the costs associated with lengthy immigration proceedings and confinement.[61]

In response, the Criminal Alien Deportation and Exclusion Act of 1990[62] was introduced by Sen. Alfonse D'Amato (R-NY) to reform a "system for deporting criminal aliens [that] simply does not work."[63] The bill, lacking support from key members of the Senate Subcommittee on Immigration and Refugee Affairs, failed to be reported out of the subcommittee.[64]

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of detention of an alien is $37.28 per day. *Id.* at 18. INS has calculated that it costs $50 million per year to detain 3,300 criminal aliens. 136 CONG. REC. S11,940-41 (daily ed. Aug. 2, 1990) (statement of Sen. D'Amato (R-NY)). In contrast, the estimated costs of deporting 17,000 criminal aliens is only $17 million. INS CRIMINAL ALIEN REPORT, *supra* note 5, at 18.

58 In New York and Los Angeles, 59% of deportation cases require at least one year to conclude from the point the alien is apprehended until the decision of the immigration judge. U.S. GENERAL ACCOUNTING OFFICE, IMMIGRATION CONTROL: DEPORTING AND EXCLUDING ALIENS FROM THE UNITED STATES 39 (1989) [hereinafter GAO REPORT]. If an appeal is taken, 81% require more than two years, and 21% require more than five years. *Id.*

59 Nationally, there was an overload of 240,000 deportation and exclusion cases pending disposition in immigration courts. 136 CONG. REC. S11,941 (daily ed. Aug. 2, 1990) (statement of Sen. D'Amato).

60 *See* GAO REPORT, *supra* note 58, at 43-45 (deportation cases where relief was sought took five times longer to complete).

61 *See* INS CRIMINAL ALIEN REPORT, *supra* note 5, at 18 (expansion and resulting centralization of the Institutional Hearing Program [hereinafter IHP] will substantially reduce detention costs by reducing the length of time an alien spends in detention). The IHP was founded by the Executive Office for Immigration Review [hereinafter EOIR] in cooperation with correctional agencies. *Id.* at 6. The IHP permits the INS and the EOIR to initiate deportation proceedings for aggravated felons before they have concluded their sentences. *Id.*

62 S. 2957, 101st Cong., 2d Sess. (1990).

63 136 CONG. REC. S11,940 (daily ed. Aug. 2, 1990) (statement of Sen. D'Amato).

64 Although many of the provisions mirrored those later enacted in the 1990 Act, it appears that S. 2957 was harsher and more restrictive than its successor. For example, § 5 of the bill provided that any alien subject to proposed expedited deportation proceedings would be ineligible for any type of relief provided under the INA. S. 2957, 101st Cong., 2d Sess. (1990). Moreover, § 7 would have specifically eliminated INA § 212(c) relief for aggravated felons. *See infra* notes 146-47 and accompanying text.

## *IV. Legislative History of the Immigration Act of 1990*

Proponents of reform of the criminal alien laws continued to maintain their stand. After eight years of contemplation, a renewed effort to address the Commission's recommendations on legal immigration was introduced in 1989.[65] S. 358, an extensive legal immigration reform bill, was passed by the Senate on July 13, 1989.[66] The bill was conceived as a compromise between Sen. Edward Kennedy (D-Mass.), chairman of the Senate Subcommittee on Immigration and Refugee Affairs, and Sen. Alan Simpson (R-Wyo.), ranking minority member of the Subcommittee.[67] The House of Representatives, however, failed to consider the bill during the remainder of the session.[68]

Nevertheless, beginning on September 27, 1989, the House Subcommittee on Immigration, Refugees, and International Law conducted numerous hearings on legal immigration.[69] As the hearings progressed, the Subcommittee listened to the testimony of fifty witnesses.[70] On March 19, 1990, Rep. Bruce A. Morrison (D-Conn.), chairman of the Subcommittee, introduced H.R. 4300, the Family Unity and Employment Opportunity Immigration Act of 1990, or the "Morrison Bill."[71] Following markup, the amended bill was reported by a vote of 6-4 to the full Judiciary Committee on April 18, 1990.[72]

While H.R. 4300 contains some provisions concerning aggravated felonies, the provisions were less restrictive than those

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65 *See supra* note 22.

66 S. 358, 101st Cong., 1st Sess. (1989) (popularly known as the Kennedy-Simpson bill). The bill passed by a vote of 81-17 after three days of debate and important amendments from the floor. H.R. REP. No. 723, PT. 1, *supra* note 20, at 35. The bill, however, contained provisions for legal immigration but none for criminal aliens. Paul W. Schmidt, *Overview of the Immigration Act of 1990*, *in* UNDERSTANDING THE IMMIGRATION ACT OF 1990: AILA'S NEW LAW HANDBOOK 1 (Paul W. Schmidt ed., 1991).

67 H.R. REP. No. 723, PT. 1, *supra* note 20, at 34-35.

68 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 1.01, at 5 (Immigration Act of 1990, Spec. Supp. 1991).

69 H.R. REP. No. 723, PT. 1, *supra* note 20, at 35.

70 *Id.* The witness list included: officials from the Departments of State, Justice and Labor; representatives of religious and ethnic groups; economists; labor and business leaders, as well as local officials. *Id.*

71 H.R. 4300, 101st Cong., 2d. Sess. (1990).

72 H.R. REP. No. 723, PT. 1, *supra* note 20, at 35.

eventually included in the Act.[73] Still, the American Immigration Lawyers Association (hereinafter AILA) and other immigration and law reform groups formed a "due process coalition"[74] in response to membership concerns that criminal alien legislation typically "receives little public criticism."[75] They strongly lobbied against the Morrison Bill's aggravated felony provisions.[76]

The Morrison Bill was considered by the Judiciary Committee on July 31, 1990.[77] On the following day, the Committee approved the amended bill by a vote of 23-12, sending the bill to the House.[78] Significantly, the Committee removed from the bill the criminal alien provisions in Title IV.[79] Nonetheless, AILA and other interested groups were cautiously monitoring the progress of pending crime bills that contained similar aggravated felony provisions directed against aliens.[80]

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73 *See* Smith, *supra* note 46, at 225 (numerous proposals were more severe than those included in final form). For example, H.R. 4300 § 406 was not included in the 1990 Act. Section 406 provided that any time which ensued between an administrative or judicial proceeding could not be counted for purposes of calculating an alien's continuous physical presence under INA § 244(a). H.R. 4300, 101st Cong., 2d Sess. (1990).

74 *Legal Immigration Bill Pending Consideration by the House Judiciary Committee*, AILA MONTHLY MAILING (AILA, Wash., D.C.), June 1990, at 376.

75 *"Criminal Alien" Proposals Drastically Change Asylum and Deportation Procedure*, AILA MONTHLY MAILING (AILA, Wash., D.C.), Apr. 1990, at 221. AILA maintained that the Title IV provisions of H.R. 4300 (the so-called "criminal aliens" section of the bill) were unnecessarily harsh and seriously weakened an alien's due process protections. *Id.*

76 *See Legal Immigration Bill Pending Consideration by the House Judiciary Committee*, AILA MONTHLY MAILING (AILA, Wash., D.C.), June 1990, at 373-76. AILA strongly urged, inter alia, that the House Judiciary Committee make the following reforms to the bill:

> 1. Elimination of the provision of general arrest authority to INS officers and employees.
> 2. Preservation of Attorney General discretion to accept the findings of judicial recommendations against deportation for convicted aliens.
> 3. Provide for stays of deportation for aliens pending adjudication of a motion to reopen a deportation case.
> 4. Elimination of the five-year prohibition against receipt of political asylum or administrative voluntary departure for aliens who do not appear at deportation hearings or for scheduled deportation.

*Id.* at 376.

77 H.R. REP. NO. 723, PT. 1, *supra* note 20, at 35.

78 *Id.*

79 *Legal Immigration Set for House Floor Action*, AILA MONTHLY MAILING (AILA, Wash., D.C.), Sept. 1990, at 532.

80 *"Criminal Alien" Bills Propose Deportation Without Hearing*, AILA MONTHLY MAIL-

On October 3, 1990, the House approved H.R. 4300 as amended.[81] Because H.R. 4300[82] and S. 368[83] were substantively different in content, congressional leaders decided that informal meetings would be conducted between the leaders and the staff of the House and Senate committees to resolve the conflicting issues in this multifarious legislative effort.[84] Nonetheless, many interested parties presumed that passage of an immigration bill would be unlikely before the close of the 101st Congress.[85]

The presumption nearly became reality after Sen. Simpson threatened to filibuster the negotiations because of his objections to a number of the proposed conference provisions.[86] Moreover, Sen. Simpson insisted on introducing new provisions to the Conference Report.[87]

In an eleventh-hour compromise, Sen. Simpson agreed to the proposed conference provisions in direct exchange for an inclusion of provisions concerning criminal aliens.[88] These provi-

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ING (AILA, Wash., D.C.), Sept. 1990, at 532-33. AILA was concerned with the progress of the Comprehensive Crime Control Act, H.R. 5269, 101st Cong., 2d. Sess. (1990); the Federal Death Penalty Act, S. 1970, 101st Cong., 2d. Sess. (1990); and the National Drug Control Strategy Implementation Act, S. 2652, 101st Cong., 2d. Sess. (1990).

81 GORDON & MAILMAN, *supra* note 68, at 6. The House passed the bill by a vote of 231-192. 136 CONG. REC. H8720-21 (daily ed. Oct. 3, 1990).

82 *See supra* note 71.

83 *See supra* note 66.

84 GORDON & MAILMAN, *supra* note 68, at 6. Although these negotiations were not open to the public's view, an informal legislative history unfolded as information now and then leaked to the press, to officials and to concerned organizations. *Id.*

85 *Id.* at 6. The upcoming November election and the need to confront the countless other bills still pending before Congress contributed to fears that the likelihood of passage of an immigration bill was "dim." *Id. See also Legal Immigration Reaching Final Stretch,* AILA MONTHLY MAILING (AILA, Wash., D.C.), Oct. 1991, at 605 (chances of Morrison Bill coming to a floor vote is uncertain).

86 Tom Kenworthy & Barbara Vobejda, *Immigration Bill Jeopardized,* WASH. POST, Oct. 19, 1990, at A14. Sen. Simpson opposed the deletion of a provision from the Senate bill that would have reduced the number of visas given to immediate family of U.S. citizens from the maximum number of visas available for extended family. At that time, no limit existed on the number of visas for immediate family members of U.S. citizens. *Id.*

87 Sen. Simpson's new proposals included a provision to construct border fences in order to restrict the flow of illegal immigration. *Id.*

88 Myers & Thompson, *supra* note 3, at xxxv (Sen. Simpson was the principal proponent of a number of "far-reaching" provisions for aggravated felons in the 1990 Act).

sions became Title V of the Conference Report and included all the provisions relating to aggravated felonies.[89] The provisions apparently were included to remind the Department of Justice of Congress' concern with the criminal alien population.[90] Due to the desire to pass the Conference Report before the close of the session, there was limited debate on the aggravated felony provisions.[91]

Upon final consensus on the outstanding questions, a conference committee was swiftly selected.[92] S. 368 was passed in lieu of the House bill after its language was amended to contain much of the House bill's text.[93] On October 24, 1990, a one-day conference was held that issued a report containing the agreed measure and the Committee's comments.[94]

The Senate agreed to the Conference Report on October 26, 1990.[95] The House passed the Report the following day.[96] Fi-

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89 Most of the language in the criminal alien provisions was first introduced by Sen. Simpson in an earlier bill in the 101st Congress. On May 9, 1989, Sen. Simpson introduced a bill to revise the INA's grounds for exclusion. S. 963, 101st Cong., 1st Sess. (1989). The bill included much of the language that Sen. Simpson later incorporated into the 1990 Act. *Id. See also supra* note 80.

90 *See* 136 CONG. REC. S17,118 (daily ed. Oct. 26, 1990). Congress' suspicion of Department of Justice apathy was expressed as follows:

> I question particularly the Department of Justice's commitment in carrying out the provisions of the 1988 Anti-Drug Abuse Act relating to aggravated felony aliens. I hope that passage of my amendments will not only bring the serious problem of criminal aliens back into the focus of Congress and the administration, but will also remind the administration of the tools we have given them to deal with aggravated felony aliens.

*Id.* (statement of Sen. Graham). *See also* H.R. REP. No. 681, *supra* note 48, at 145. "The Committee is deeply disturbed that INS has not placed higher priority on the criminal alien problem. Although the budget authority of INS in fiscal year 1989 exceeded $1 billion, less than $50 million was expended on investigating, detaining and deporting criminal aliens." *Id.*

91 *See* GORDON & MAILMAN, *supra* note 68, at 6 (some new proposals were adopted without debate as time became a critical factor).

92 *Id.*

93 H.R. REP. No. 955, *supra* note 7, at 119.

94 CRS REPORT, *supra* note 3, at 4.

95 136 CONG. REC. S17,118 (daily ed. Oct. 26, 1990). The bill passed by a vote of 89-8. *Id.*

96 136 CONG. REC. H12,368-69 (daily ed. Oct. 27, 1990). The bill passed by a vote of 264-118. *Id.* House approval was stalled by a group of Hispanic congressmen who refused to vote for the Conference Report until a provision supported by Sen. Simpson was deleted. Vobejda, *supra* note 8, at A1. The provision would have created a pilot I.D. program that would have developed driver license-like identifi-

nally, on November 29, 1990, President George Bush signed the bill into law as the Immigration Act of 1990.[97]

## V. *The New Aggravated Felon*

### A. *The Immigration Act of 1990*

Title V of the 1990 Act contains the provisions affecting aggravated felonies. While the 1988 Act was considered overly broad in its criminal alien provisions, the 1990 Act was said to add "critical spikes to a coffin."[98]

The definition of aggravated felonies was greatly expanded.[99] First, the new definition included a conviction for any offense relating to money laundering as defined in 18 U.S.C. § 1956.[100] Second, "crimes of violence," as defined in 18 U.S.C. § 16, were added to the list of aggravated felonies.[101] This in-

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cation cards for the purposes of identifying workers. *Id.* at A16. The congressmen feared that the provision could lead to the establishment of a national identity card. *Id.* at A1.

97 GORDON & MAILMAN, *supra* note 68, at 6.

98 Richard Prinz, *Deportation for Crime in the Nineties — Who Needs the Aggravation?*, *in* 1991-1992 IMMIGRATION & NATIONALITY LAW HANDBOOK 292, 293 (R. Patrick Murphy ed., vol. II, AILA 1991). The INS has warned that it will recommend a broad statutory interpretation of the new aggravated felony provisions. *Id.*

99 1990 Act § 501 (amending INA § 101, 8 U.S.C. § 1101 (1988)).

100 18 U.S.C. § 1956 (1988). Section 1956 provides criminal penalties for one who knowingly conducts or attempts to conduct financial transactions representing the proceeds from some type of specified unlawful activity with the intent to promote specified unlawful activity. *Id.* "Specified unlawful activity" encompasses a long list of crimes including racketeering activity, controlled substance violations and continuing criminal enterprises. Prinz, *supra* note 98, at 296. The immense definition may prove to be a great burden for the immigration attorney. 68 *Interpreter Releases* 197, 199 (Feb. 25, 1991).

101 Title 18 defines a crime of violence as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (1988). Defining a crime of violence may prove elusive because judicial decisions have illustrated the vagueness of the term. Burglary has been held to be a crime of violence. 68 *Interpreter Releases* 199 & n.3 (Feb. 25, 1991) (citing United States v. Flores, 875 F.2d 1110 (5th Cir. 1989)). Conspiracy to distribute narcotics, however, is not a crime of violence in certain circumstances. *Id.* at 199 & n.2 (citing United States v. Cruz, 805 F.2d 1464, 1469 (11th Cir. 1986), *cert. denied*, 481 U.S. 1006 (1987) (concluding sale of cocaine does not necessarily re-

cludes only those crimes of violence for which imprisonment of at least five years has been *imposed*, regardless of any suspension of such imprisonment.[102] Moreover, the definition again excludes those offenses that are purely political in nature.[103] Many observers have regarded the "crimes of violence" provision as a major change.[104]

Finally, the Act evidenced Congress' efforts to tackle the nation's illegal drug problem.[105] Under the new definition, any illicit trafficking of any controlled substance as defined in section 102 of the Controlled Substance Act,[106] including any drug trafficking defined in 18 U.S.C. § 924(c)(2),[107] constitutes an aggra-

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quire use of force as required by the statute)); United States v. Diaz, 778 F.2d 86, 88 (2d Cir. 1985), *cert. denied*, 488 U.S. 818 (1988) (selling drugs is often consensual and does not necessarily involve substantial risk of physical force); United States v. Jernigan, 612 F. Supp. 382, 383 (D.N.C. 1985) (Congress did not intend to include possession with intent to distribute as within meaning of definition of a crime of violence).

102 Courts have previously used the "sentence imposed" construction to define the limits to pre-1990 INA § 212(a)(9), the petty offense exception. Prinz, *supra* note 98, at 297 (citing Matter of Castro, Int. Dec. 3073 (BIA 1988) (reading plain language of statute to mean imposition of a sentence rather than time actually served)). Although some advocates have argued that the five-year requirement also applies to the other aggravated felony provisions, it appears that Congress intended that the requirement should only apply to crimes of violence. Patricia C. Smith, *New Asylum Regulations and Implementation*, *in* 14 IN DEFENSE OF THE ALIEN 112, 122 (Lydio F. Tomasi ed., 1992) (Congress clearly intended to broaden application of aggravated felony definition and five-year requirement would have narrowing effect).

103 1990 Act § 501 (amending INA § 101, 8 U.S.C. § 1101 (1988)). The "purely political offenses" exception will probably follow existing extradition, withholding of deportation and asylum case law. 68 *Interpreter Releases* 199 (Feb. 25, 1991) (citing Nicosia v. Wall, 442 F.2d 1005 (5th Cir. 1971)(recognizing State Department's intent to deny extradition in cases where extradition would threaten alien's life or freedom because of such alien's political beliefs)).

104 *See* Sfasciotti, *supra* note 15, at 80-81 (including crimes of violence in aggravated felony definition eliminates many remedies from deportation previously available to aliens deportable for turpitudinous offenses). Many state crimes such as assault, battery and a sizable number of sexual offenses will now be aggravated felonies. *Id.* at 81. In addition, crimes of violence will encompass a myriad of offenses previously regarded as CIMTs under INA §§ 241(a)(4) and 212(a)(9). *Id. See also* 68 *Interpreter Releases* 198 (Feb. 25, 1991) (crimes of violence provision is most significant expansion of the new definition).

105 *See* Prinz, *supra* note 98, at 293 (drug crimes are the largest and most important group of aggravated felony offenses).

106 Controlled Substance Act, Pub. L. No. 91-513, 84 Stat. 1242 (1988), 21 U.S.C. § 802 (1988).

107 *See supra* note 31.

vated felony. Furthermore, the definition now applies to cases where one attempts to violate these drug laws.[108]

The new definition makes aggravated felonies applicable to both federal and state convictions.[109] A conviction for state crimes for possession of narcotics with intent to deliver now constitutes an aggravated felony notwithstanding the quantity involved.[110] Section 501 also amends language which limited application of the definition to only those acts committed within the United States.[111] Now, an alien is considered an aggravated felon if he or she is convicted of a foreign offense which is similar in nature to those offenses included within the aggravated felony definition. This only applies, however, in cases where the term of imprisonment was completed within the previous fifteen years.[112] This requires practitioners to construe foreign laws according to American standards in order to ascertain if the foreign conviction is an aggravated felony under the INA.[113] The change will produce "interesting issues of proof, as well as the interpretation of foreign laws and procedures" and may be the source of an abundance of litigation.[114] Furthermore, the new definition now includes crimes committed both inside and outside the borders of

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108 1990 Act § 508 (amending INA § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1988)).

109 *Id.* § 501(a)(5) (amending INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1988)). This provision applies retroactively to any crime committed subsequent to November 18, 1988, the effective date of the 1988 Drug Act. *Id.* § 501(b) (amending INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1988)). The 1988 Drug Act was ambiguous as to whether convictions of state crimes constituted aggravated felonies. Sfasciotti, *supra* note 15, at 80. Section 501(a)(5) codified the holding of Matter of Barrett, Int. Dec. 3131 (BIA 1990) (digested in 67 *Interpreter Releases* 362 (Mar. 26, 1990)). In *Barrett*, an alien was convicted of possession of a controlled substance, a sufficient amount to evidence an intent to distribute in violation of Maryland law. Because of the conviction, the defendant was charged with deportability under INA § 241(a). This section makes any drug trafficking crime an aggravated felony if the offense is a felony "punishable under" one of the three statutes included in 18 U.S.C. § 924(c)(2). The court maintained that the statutory usage of "punishable under" did not mean "convicted under" but rather referred to conduct by which an alien "could be convicted" under these laws. Accordingly, the court concluded that state offenses are punishable according to a federal standard when the state offense is analogous to the referenced federal offense. *Id.*

110 Sfasciotti, *supra* note 15, at 80.

111 1990 Act § 501(a)(6) (amending INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1988)).

112 *Id.*

113 KESSELBRENNER & ROSENBERG, *supra* note 30, § 7.4(a), at 7-58 n.216.

114 Smith, *supra* note 46, at 229.

the United States.[115]

Attorneys should be wary of the effective dates of the new definition. The definition applies to convictions occurring on or after November 29, 1990,[116] except for offenses involving trafficking in controlled substances and violations of state law.[117]

In addition to the expanded definition, the 1990 Act restricts the rights of aggravated felons by creating serious procedural liabilities. Many of the provisions seem to eliminate important due process safeguards.[118] First, section 502(a) reduces the time period for filing a petition of review of a final deportation order from sixty days to thirty days.[119] Clearly, the filing restriction places an additional obstacle for those aggravated felons seeking judicial review of a deportation order.[120]

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115 1990 Act § 501(a)(4) (amending INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1988)).

116 *Id.* § 501(b) (amending INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1988)). The INS, however, has asserted that the definition applies to convictions occurring prior to November 18, 1988, the 1988 Drug Act's date of enactment, since the statute did not specifically address the issue. INS Legal Opinion (Feb. 21, 1991). *But see* Robert D. Ahlgren, *State Department Implementation of the 1990 Act: Grounds of Exclusion Related to Criminal Activity, in* 24TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 165, 178-79 (PLI Litig. & Admin. Practice Course Handbook Series No. 422, 1991) (citing Bruner v. U.S., 343 U.S. 112, 117 (1952) (statute should not be construed retroactively unless explicit language or necessary implication requires); Ayala-Chavez v. INS, 945 F.2d 288 (9th Cir. 1991) (bar to automatic stays of deportation pending judicial review does not apply to convictions of felonious conduct occurring prior to November 18, 1988)).

117 1990 Act § 501(b) (amending INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1988)). The two exceptions relate back to November 18, 1988. *Id.*

118 *See* Myers & Thompson, *supra* note 3, at xxv (enforcement remains a national priority, sometimes at expense of due process protections). One observer characterized the changes in the following manner:

> [A]ttorney[s] must advise the alien that each judge along the way has a clear mandate from Congress to rapidly deport aliens convicted of certain crimes. That list of crimes continues to increase. Small dungeon-like courtrooms where aliens opt for straight deportation orders, void of any semblance of the adversary process, are the result. The redundancy of the 'hearings' equal the redundancy of the savage provisions for deportation.

Prinz, *supra* note 98, at 292.

119 1990 Act § 502(a) (amending INA § 106(a)(1), 8 U.S.C. § 1105(a)(1) (1988)). These time limits apply to final orders or deportations issued on or after January 1, 1991. *Id.* § 502(b) (amending INA § 106(a)(1), 8 U.S.C. § 1105(a)(1) (1988)). Before the 1988 Drug Act, the filing period was six months. *See supra* note 45 and accompanying text.

120 Sfasciotti, *supra* note 15, at 82. *But see* KESSELBRENNER & ROSENBERG, *supra* note 30, § 7.4(e), at 7-62.1 (although the filing time is limited, the right to appeal is

Section 504(a) advances the intent of the 1988 Drug Act by ensuring that the aggravated felon is not released prior to his deportation hearing.[121] The 1990 Act requires the Attorney General to take an aggravated felon into custody upon his or her release regardless of whether such release is parole,[122] supervised release[123] or probation, and regardless of the possibility of re-arrest or further confinement with respect to the same offense.[124] The change was needed to clarify ambiguity in the 1988 Drug Act.[125] Similarly, section 504(b) requires the INS to detain aggravated felons upon completion of their sentences while awaiting a determination of excludability.[126] The excludable alien can be released if another country "denies or unduly delays

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maintained). Courts must insure that the right of appeal is a not impotent. Where an appeal is meritorious, and especially where the aggravated felon is a permanent resident alien and is eligible for deportation relief, the court must grant a stay. Without such a stay, the alien will be deported, rendering the appeal moot. *Id.*

121 *See supra* notes 35-37 and accompanying text.

122 "Conditional release from imprisonment which entitles parolee to serve remainder of his term outside confines of an institution, if he satisfactorily complies with all the terms and conditions provided in parole order." BLACKS LAW DICTIONARY 1116 (6th ed. 1990) (citing Thomas v. Ariz. State Bd. of Pardons & Paroles, 564 P.2d 79, 81 (Ariz. 1977)).

123 When imposing prison sentences for felonies or misdemeanors, courts may require, as part of the sentence, that the defendant serve a term of supervised release following a term of imprisonment. 18 U.S.C. § 3583(a) (1988). Supervised release is explicitly conditioned upon the requirement that the defendant not commit another local, state or federal crime during the period of release. 18 U.S.C. § 3583(d) (1988).

124 1990 Act § 504(a) (amending INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) (1988)).

125 The 1988 Drug Act provided for detention upon completion of the aggravated felon's sentence. A few courts, however, construed the law so as it would not take effect until the aggravated felon had completed any outstanding parole or probation period. *See* 67 *Interpreter Releases* 735 (July 9, 1990). Nevertheless, the BIA, after careful consideration of congressional intent, concluded that aggravated felons could be detained immediately upon release from custody, even if the aggravated felon remains on parole or probation status. *Id.* (citing Matter of Eden, Int. Dec. 3137 (BIA 1990)). Currently, the 1990 Act has been held to create a rebuttable presumption against release. Hon. Lauren R. Mathon, *Recent Developments in Deportation Procedures and Litigation: Impact of Immigration Act of 1990 on Immigration Court, in* 24TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 977, 982 (PLI Litig. & Admin. Practice Course Handbook Series No. 422, 1991) (citing Matter of De La Cruz, Int. Dec. 3155 (BIA 1991)).

126 1990 Act § 504(b) (amending INA § 236, 8 U.S.C. § 1226 (1988)). This provision covers aggravated felons arrested at the border (drug traffickers, for example) who are accordingly subject to a hearing for exclusion instead of deportation. *The Immigration Act of 1990*, IMMIGRATION L. REP. (Fragomen, Del Rey & Bernsen, Wash., D.C.), Feb. 1991, at 145, 147.

acceptance of the alien"[127] and where the alien is not found to pose a danger to others.[128] Some observers believe a challenge to this provision is inevitable.[129]

Section 504(a), however, proceeds to add one of the few provisions favoring the aggravated felon.[130] The provision eases the earlier mandatory detention provisions made in the 1988 Drug Act with respect to permanent resident aliens.[131] The new provision now clearly indicates that aggravated felons in deportation proceedings, who are lawful permanent residents, are eligible for consideration of a bond hearing if the Attorney General determines that the alien is not a threat to the community and is likely to appear at future hearings.[132] Non-permanent residents, however, will continue to be detainable without bail.[133]

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127 INA § 243(g), 8 U.S.C. § 1253(g) (1988).

128 1990 Act § 504(b) (amending INA § 236, 8 U.S.C. § 1226 (1988)).

129 68 *Interpreter Releases* 197, 202 (Feb. 25, 1991) (citation omitted).

130 *See* Prinz, *supra* note 98, at 300.

131 The change is Congress' response to district court litigation challenging the constitutionality of the no-bond provision of the 1988 Drug Act. *See supra* notes 40-41 and accompanying text. The 1988 Drug Act provision was harsh and often criticized. 68 *Interpreter Releases* 197, 202 (Feb. 25, 1991) (citation omitted). Many district courts found this provision unconstitutional. *See* Fernandez-Santander v. Thornburgh, 751 F. Supp. 1007, 1011 (D. Me. 1990) (postulating that detention without possibility of bond hearing to ascertain risk to community is excessive even when compared to Congress' goal of assuring deportability of aggravated felons); Hernandez-Highsmith v. Smith, No. C90-1555R (W.D. Wash. Nov. 15, 1990), digested in 68 *Interpreter Releases* 57 (Jan. 14, 1991) (statute's presumption that all aggravated felons present a risk of harm or flight is inconsistent with due process rights); Agunobi v. Thornburgh, 745 F. Supp. 533, 537 (N.D. Ill. 1990) (arguing statutes failure to afford any bail determination to aggravated felons violates Excessive Bail Clause of Eight Amendment); Leader v. Blackman, 744 F. Supp. 500, 508 (S.D.N.Y. 1990) (providing bail hearing would not produce a serious financial or administrative hardship to the government and would reduce likelihood of a wrongful denial of a liberty interest); Paxton v. INS, No. 90-CV-72436 (E.D. Mich. Sept. 20, 1990), digested in *Another Court Finds INA No-Bond Provision for Aggravated Felons Unconstitutional*, AILA MONTHLY MAILING (AILA, Wash., D.C.), Nov. 1990, at 675 (holding failure to provide bond hearing violates both substantive and procedural due process as well as the Excessive Bail Clause of the Eighth Amendment); Leader v. INS, No. 90 CIV. 1218 (S.D.N.Y. Aug. 8, 1990), digested in *N.Y. District Court Also Holds INA Detention Provision for Aggravated Felons Unconstitutional*, AILA MONTHLY MAILING (AILA, Wash., D.C.), Nov. 1990, at 617 (holding statute was excessive even after considering Congress' legitimate interest in protecting society from criminal aliens). *But see* Morrobel v. Thornburgh, 744 F. Supp. 725, 728 (E.D. Va. 1990) (finding Congress' intent to remove aggravated felons because of their threat to society is a facially legitimate and bona fide rationale to deny bail).

132 1990 Act § 504(a) (amending INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) (1988)).

133 The INS considers the detention of non-permanent resident aggravated

Section 505 entirely eliminates "judicial recommendations against deportation" (hereinafter JRAD)[134] for both aggravated felonies and crimes involving moral turpitude.[135] In addition, executive pardons by a governor or the president will be unavailable to aggravated felons.[136]

Section 506 of the 1990 Act eliminates the provision that permitted the deportation of aggravated felons prior to completion of the alien's criminal sentence.[137] Previously, the Attorney General could release an aggravated felon for deportation before the end of his or her sentence upon written request from a chief prosecutor or trial judge.[138] Such requests, however, were rarely made.[139]

Section 509 states that aggravated felons are now barred from demonstrating "good moral character."[140] Because a finding of good moral character is a prerequisite to establishing eligibility for such benefits as suspension of deportation under INA § 244(a),[141] registry under INA § 249,[142] voluntary departure[143]

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felons its "first priority." 68 *Interpreter Releases* 197, 202 (Feb. 25, 1991) (citing INS IMMACT Wire No. 25 ¶ 2 (Dec. 24, 1990). The government is scared of litigation concerning mandatory detention of non-permanent residents as aggravated felons because the right fact pattern may force a court to order bond for a non-permanent resident. *See* Prinz, *supra* note 98, at 300-01.

134 "A JRAD is an order entered by the court sentencing an alien which recommends to the Attorney General that the alien not be deported." Sfasciotti, *supra* note 15, at 80.

135 1990 Act § 505 (amending INA § 241(b), 8 U.S.C. § 1251(b) (1988), 8 C.F.R. § 241.1 (1988)). Previously, a conviction would not warrant a deportation if the sentencing judge recommended against deporting the alien; the judge's recommendation was binding on INS. McAlvanah & Adlerstein, *supra* note 13, at 55. Excluding controlled-substance offenses, JRADs were obtainable for all types of convictions. *Id.*

136 1990 Act § 505 (amending INA § 241(b), 8 U.S.C. § 1251(b) (1988)). Although the 1990 Act expressly states that § 505 applies to convictions entered before, on or after November 29, 1990, it is unclear whether JRADs made prior to that date are worthless. *Id.* The INS, however, has asserted that this provision is applicable to "all final convictions *except* those for which JRADs had been granted prior to date of enactment." INS IMMACT90 Wire 5 (Nov. 28, 1990) (emphasis in original), reproduced in 67 *Interpreter Releases* 1362 (Dec. 3, 1990).

137 1990 Act § 506 (amending INA § 242A(d)(2), 8 U.S.C. § 1252a(d)(2) (1988)).

138 KESSELBRENNER & ROSENBERG, *supra* note 30, § 7.4(b), at 7-60 n.223.

139 *See* McAlvanah & Adlerstein, *supra* note 13, at 55. "While this would certainly be a desirable result for aliens facing long prison terms who had no hope of any waiver of deportation, in practice such requests were not made." *Id.*

140 1990 Act § 509 (amending INA § 101(f)(8), 8 U.S.C. § 1101(f)(8) (1988)).

141 8 U.S.C. § 1254(a) (1988).

and naturalization,[144] such benefits are no longer available to aggravated felons.

Although the 1990 Act broadened the definition of aggravated felonies, the Act's restrictions on relief are more drastic.[145] One form of relief previously available for permanent residents convicted of aggravated felonies was a waiver of deportability under INA § 212(c).[146] Section 511, however, eliminates the opportunity for waiver to those aggravated felons who have served

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142 *Id.* § 1259 (1988).

143 *See supra* note 42.

144 INA § 316, 8 U.S.C. § 1427 (1988).

145 *See* Prinz, *supra* note 98, at 298. "The sweep of the 1988 Drug Act encompasses minor drug and firearm charges, while the '90 amendments limit relief to those most deserving the dispensation." *Id.* One commentator has summed up the situation as follows:

> Nowhere is it more difficult to obtain discretionary relief from an Immigration Judge than with respect to an aggravated felon. Clearly expressed statutory, Congressional, and executive policy favor the prompt removal of such criminal aliens from the United States. Immigration Judges are invariably law-abiding and enforcement-oriented individuals who feel a personal commitment to implement stated national policy objectives. The burden of proof is clearly upon the respondent in applying for discretionary relief, and the initial attitude of many Immigration Judges may be to give a respondent his "day in court" and *then order him deported.*

Martin L. Rothstein, *Practicality of Obtaining Discretionary Relief from Deportation in Aggravated Felony Cases, in* 1991-1992 IMMIGRATION & NATIONALITY LAW HANDBOOK 302, 303-04 (R. Patrick Murphy ed., vol. II, 1991) (emphasis in original).

146 INA § 212(c) provides in relevant part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)).

INA § 212(c), 8 U.S.C. § 1182(c) (1988 & Supp. III 1991). The immigration judge will evaluate the basis of the deportation or exclusion hearing against any adverse factors. *See* Sandron & Bingham, *supra* note 39, at 279; *see also In re* Marin, 16 I & N 581 (BIA 1979) (immigration judge must balance the alien's negative characteristics against the best interest of the United States as well as any humane and social interests offered by the alien). If the immigration judge grants relief, the crime is waived, thus aborting the deportation proceedings. Sandron & Bingham, *supra.* The INS, prior to the 1990 Act, contended that § 212(c) relief did not apply to aggravated felons. Rothstein, *supra* note 145, at 303. By explicitly limiting availability to only those aggravated felons serving a sentence of five years, however, Congress has *implicitly* affirmed that § 212(c) relief is available to a qualified class of aggravated felons. *Id.*

a prison term of at least five years.[147] The provision was ambiguous as to whether an alien who has served sentences for two or more convictions as an aggravated felon totaling at least five years would be eligible for relief.[148] Equally uncertain was how to determine which convictions were counted for purposes of the amendment. The INS's position is that the amendment applies to crimes that are now considered aggravated felonies despite the fact the conviction occurred prior to the enactment of the 1988 Drug Act.[149] Assuming such a position, a permanent resident of twenty-five years convicted of a drug crime twenty years ago, for which he served five years or more, will be deported.[150] Obviously, such a retroactive effect could severely threaten the lives of many longtime permanent resident aliens.

Section 511(b) states "subsection (a) shall not apply to admissions occurring after the date of the enactment of this Act."[151] INS has taken the position that "admissions" applies to granting 212(c) relief rather than admission of aliens into the United States.[152]

Section 513 eliminates automatic stays of deportation pending the filing of a petition for judicial review.[153] Unlike most administrative orders, INS may now proceed with deportation unless the aggravated felon is granted a stay by a court.[154] Consequently, a motion to stay deportation must be filed simultane-

147 1990 Act § 511 (amending INA § 212(c), 8 U.S.C. § 1182(c) (1988)). It appears that the change was to correct a loophole. Since a criminal's domicile is often a prison, some believed it would be unconscionable for them to use a seven-year prison term as a basis to receive a waiver of deportation. *See* 136 CONG. REC. S11,942 (daily ed. Aug. 2, 1990) (statement of Sen. D'Amato).

148 Prinz, *supra* note 98, at 298. *See also infra* notes 183-84 and accompanying text.

149 Prinz, *supra* note 98, at 298.

150 *See id.* at 298-99.

151 1990 Act § 511(b) (amending INA § 212(c), 8 U.S.C. § 1182(c) (1988)).

152 Prinz, *supra* note 98, at 299. Nonetheless, some observers believe that the provision does not apply to an aggravated felon who is simply applying for INA § 212(c) relief in a deportation hearing and not seeking an "admission." KESSELBRENNER & ROSENBERG, *supra* note 30, § 7.4(d), at 7-62. Therefore, it is possible that this provision may permit all permanent resident aggravated felons, regardless of any prison time served, an opportunity to receive INA § 212(c) relief. *Id.*

153 1990 Act § 513 (amending INA § 106(a)(3), 8 U.S.C. § 1105a(a)(3) (1988)). This provision applies to petitions for review filed after January 28, 1991. *Id.*

154 KESSELBRENNER & ROSENBERG, *supra* note 30, § 7.4(e), at 7-62.1.

ously with a petition for review.[155] Otherwise, the aggravated felon may be deported while awaiting his appeal.[156]

Section 514 continues the 1988 Drug Act's efforts to stall any attempts by deported aggravated felons to return to the United States. Previously, an aggravated felon who was actually deported could not be admitted to the United States for a ten-year period.[157] Section 514 increases the period of inadmissibility to twenty years, even if otherwise admissible.[158]

Section 515(a)(1) disqualifies aggravated felons from eligibility for political asylum.[159] This amendment applies to applications for asylum on or after November 29, 1990.[160] In enacting this provision, Congress decided that aggravated felons must be returned to their homeland despite having to confront a possible peril.[161]

Section 515(a)(2) states that aliens convicted of aggravated felonies are considered to have per se committed a "particularly serious crime."[162] The amendment thus activates one of the bars to withholding of deportation under INA § 243(h)(2).[163] The

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155 *Id.*

156 *Id.*

157 *See supra* note 46 and accompanying text.

158 1990 Act § 514 (amending INA § 212(a)(17), 8 U.S.C. § 1182(a)(17) (1988)).

159 *Id.* § 515(a)(1) (amending INA § 208(d), 8 U.S.C. § 1158(d) (1988)).

160 The INS contended that the provision applies to convictions "on, before or after" November 29, 1990. KESSELBRENNER & ROSENBERG, *supra* note 30, § 7.4(c), at 7-61. Thus, any conviction of an offense, which after November 18, 1988 (effective date of the 1988 Drug Act), would be considered an aggravated felony, would bar the alien from receiving political asylum. *Id.* One observer has held this construction to be inconsistent with the 1990 Act's plain language. *Id.* at n.228.

161 *See* McAlvanah & Adlerstein, *supra* note 13, at 55. "Congress evidently has no qualms about shipping felons out of the U.S. to places where they face persecution on account of their race, religion, nationality or social group or political beliefs." *Id.*

162 1990 Act § 515(a)(2) (amending INA § 243(h)(2), 8 U.S.C. § 1253(h)(2) (1988)). A crime is determined to be "particularly serious" by examining the nature of the conviction, the circumstances surrounding the conviction, the sentence imposed and whether the alien will be a threat to the community. Smith, *supra* note 102, at 122-23 (citing In Matter of Frentescu, 18 I & N Dec. 244 (BIA 1982)).

163 INA § 243h provides in pertinent part:

> Withholding of deportation or return
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> (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

loss of possible relief under a withholding of deportation may seriously impact those aliens unable to return to their homeland, as well as those desiring to postpone deportation in order to accumulate seven years of residency.[164] Moreover, the provision is retroactive to any aggravated felony convictions entered at any time.[165] Still, the constitutionality of this provision may be in jeopardy because of a pre-Act Ninth Circuit decision.[166] Accordingly, it is anticipated that this provision will generate a plethora of litigation.[167]

Title V also includes the means to facilitate the enforcement of these provisions. Under section 507, each state is required to

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(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that-

(B) the alien, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the United States;

INA § 243h, 8 U.S.C. § 1253(h) (1988 & Supp. III 1991). While facially similar, a withholding of deportation is not as beneficial as asylum. Smith, *supra* note 102, at 128. Asylees may apply to have their status adjusted to permanent residency, remain lawfully in the United States indefinitely and have their dependents accompany or join them. *Id.* No such benefits are afforded to an alien granted a withholding of deportation; such aliens are only protected from deportation to a particular country. *Id.*

164 Prinz, *supra* note 98, at 299.

165 1990 Act § 515(a)(2) (amending INA § 243(h)(2), 8 U.S.C. § 1253(h)(2) (1988)). The section applies to convictions entered "before, on or after" November 29, 1990. *Id.*

166 In Beltran-Zavala v. INS, 912 F.2d 1027 (9th Cir. 1990), a Salvadorian national was arrested in the United States after selling marijuana to an undercover police officer. Responding to an Order to Show Cause concerning deportation, Beltran filed for asylum. The asylum application evidenced that while Beltran was a college student in El Salvador, a friend and family member were murdered when Beltran angered a professor who was affiliated with an El Salvadorian "death squad." Accordingly, Beltran argued his life would be placed in jeopardy if forced to return to his home country. The BIA held that Beltran was convicted of a "particularly serious crime," which under INA § 243(h)(2)(b) prevented him from a withholding of deportation. The court concluded that per se "particularly serious crimes" do not exist; determinations must be made on a case-by-case basis by examining the circumstances and the underlying facts. *Id.* at 1032-33. Since the sale of marijuana would now be considered an aggravated felony (illicit trafficking in a controlled substance), Beltran would have been found to have committed a per se "particularly serious crime." 68 *Interpreter Releases* 200 (Feb. 25, 1991) (citation omitted). Thus, it is questionable if the provision will withstand judicial scrutiny. *Id.* Nevertheless, the BIA has followed the new provision, arguing Congress clearly repudiated the case-by-case analysis used in *Beltran-Zavala* by explicitly creating a per se classification for aggravated felons. Matter of C-, Int. Dec. 3180 (BIA 1992).

167 Prinz, *supra* note 98, at 299.

establish a system to provide the INS with certified conviction records of aliens who have been convicted of violating the state's criminal law.[168] The records must be provided within thirty days of conviction, free of charge. The reporting systems will enable INS to obtain the necessary criminal records to initiate an expeditious deportation proceeding against the aggravated felon.[169] If a state fails to implement a system, the state will not receive grants under the Omnibus Crime Control and Safe Streets Act of 1968.[170] Finally, section 512 authorizes Congress to fund the appointment of twenty new Department of Justice immigration judges for fiscal years 1991-1995 in order to expedite deportation proceedings against criminal aliens.[171] One commentator speculates whether Congress will actually appropriate the funds.[172]

### B. *The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991*

In 1991, Congress passed a corrections bill[173] to provide "technical changes" to the 1990 Act.[174] Nonetheless, the Correc-

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168 1990 Act § 507(a) (amending 42 U.S.C. § 3753(a) (1988)). This section appears to be in response to INS difficulties in identifying aliens within the prison populations. Because there are 3,344 local jails, 1,220 state correctional institutions, 96 federal facilities and approximately 3,005 offices supervising offenders release programs, INS could not conceivably monitor all of them, even if every field investigators was responsible for criminal alien detection. INS CRIMINAL ALIEN REPORT, *supra* note 5, at 4.

169 Establishment of a reporting system is critical since INS is required by law to present a certified record of conviction during an INS deportation hearing. INS CRIMINAL ALIEN REPORT, *supra* note 5, at 8.

170 Pub. L. No. 90-351, 82 Stat. 197 (1970), 42 U.S.C. § 3753(a) (1988). Section 3753(a) established detailed procedures for states to follow in order that they may receive a federal grant under this act. The requirements included states to submit plans designed to combat drug trafficking, violent crime and serious offenders. Additionally, the section requires a strategy for coordinating such plans with other federal programs. *Id.*

171 1990 Act § 512. *See* INA § 242A(d), 8 U.S.C. § 1252a(d) (1988 & Supp. III 1991).

172 *See* 68 *Interpreter Releases* 197, 202 (Feb. 25, 1991) (citation omitted).

173 The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991) (codified as amended in scattered sections of 8 U.S.C.). The short title for Title III is the Immigration Technical Corrections Act of 1991 [hereinafter Corrections Act].

174 Technical changes are commonly needed to rectify problems such as correcting typographical errors and clarifying vague provisions.

tions Act included some substantive changes in the law requiring INS to update its newly published regulations.[175] The substantive corrections seem to be the result of a change in Congress' needs or expectations after living with the 1990 Act for an entire year.[176]

Under section 306(a)(4) of the Corrections Act, Congress continues to wrestle with the deprivation of bail provisions. While the 1990 Act provided bail hearings only for legal permanent aliens, the new amendment guarantees bail hearings to all legal aliens convicted of aggravated felonies.[177] The section now authorizes the release of any lawfully admitted alien convicted of an aggravated felony, either before or after a determination of deportability, if the alien establishes that he or she is not a threat to the community and that he or she is likely to appear before a scheduled hearing.[178] Again, the amendment appears to be a reaction to recent case law challenging the constitutionality of the no-bond provisions.[179]

Additionally, the Corrections Act includes provisions for detaining aliens pending a determination of excludability. Under section 306(a)(5), the Attorney General need not wait for the alien to complete his or her sentence before taking such alien into custody;[180] in order to make a determination of excludability, the Attorney General is now required to take into custody any

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175 *See, e.g.*, Howard S. (Sam) Myers III, *Immigration Act of 1990 — Implementation Phase*, *in* FEDERAL IMMIGRATION REGULATIONS AND FORMS, VII n.3 (West 1992).

176 Various parties, including the staffs of the House and the Senate, the administration and constituents informed the House Subcommittee on International Law, Immigration, and Refugee Affairs that errors existed and plagued the 1990 Act. H.R. REP. No. 383, 102d Cong., 1st Sess. 2 (1991). The errors frustrated efforts by the Departments of State, Labor and Justice to effectively execute the 1990 Act. *Id.* Moreover, because of the confusion experienced by immigration lawyers, the errors resulted in both unintended harsh results as well as unintended windfalls. *Id.*

177 Since most of the district court decisions regarding the unconstitutionality of the no-bond provisions did not distinguish between the rights of permanent resident aliens and that of non-resident aliens, it appears Congress wanted to correct 1990 Act § 504(a)(5) before a court found the new provision unconstitutional. *See Major Provisions of the Senate-Passed Technical Corrections Bill*, IMMIGRATION L. REP. (Fragomen, Del Rey & Bernsen, Wash., D.C.), Oct. 1991, at 229, 235. *See also supra* notes 130-33 and accompanying text.

178 Corrections Act § 306(a)(4) (amending 1990 Act § 504(a)(5), INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) (Supp. II 1990)).

179 *See supra* note 131.

180 Corrections Act § 306(a)(5) (amending 1990 Act § 504(b), INA § 236(e)(1), 8 U.S.C. § 1226 (Supp II 1990)).

aggravated felon upon release.[181] This is regardless of whether such release is parole, supervised release or probation, and notwithstanding the potential for re-arrest or further confinement regarding the same offense.[182]

Continuing the trend to limit discretionary relief for aggravated felons, section 306(a)(10) changes the calculation of prison time for purposes of section 212(c) relief. The change aggregates any periods of time an alien has served in prison for an aggravated felony conviction.[183] Therefore, if the aggregate time served for convictions of one or more aggravated felonies is five years or more, an alien will be ineligible for section 212(c) relief.[184]

A number of the corrections involve changes in the effective dates of the 1990 Act provisions. Section 306(a)(7) mandates that a conviction of murder will be a bar to a finding of "good moral character," regardless of the date of conviction.[185] This is another illustration of Congress' efforts to apply present statutory language to crimes committed prior to the conception of the aggravated felony.[186] Furthermore, section 306(a)(11) provides, regardless of the date of conviction, that the INS is not required to stay a deportation of an aggravated felon who is awaiting an appeal (unless a court directs otherwise).[187]

Finally, whereas petitions for review of an in absentia order are required to be filed sixty days after the date of a final deportation order,[188] section 306(c)(6) imposes an exception for aggravated felons which further limits their right to appeal. Unlike

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181 *Id.*

182 *Id.*

183 *Id.* § 306(a)(10) (amending 1990 Act § 511, INA § 212(c), 8 U.S.C. § 1182(c) (Supp. II 1990)).

184 IMMIGRATION LAW AND PROCEDURE § 1.01[14], at 12 (The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, spec. ed., Matthew Bender 1992).

185 Corrections Act § 306(a)(7) (amending 1990 Act § 509(b), INA § 101(f)(8), 8 U.S.C. § 1101(f)(8) (Supp. II 1990)).

186 The Supreme Court has held that retroactive laws do not violate the Ex Post Facto Clause of the Constitution since deportation proceedings are civil rather than criminal in nature. Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 593-95 (1952).

187 Corrections Act § 306(a)(11) (amending 1990 Act § 513(b), INA § 106(a)(3), 8 U.S.C. § 1105(a) (Supp. II 1990)).

188 INA § 242B, 8 U.S.C. § 1252b(c)(4) (Supp. II 1990).

other criminal aliens, aggravated felons are now only imparted thirty days to submit a petition for review.[189]

### *VI. A Practitioner's Nightmare*

The combined impact of the 1990 Act and the Corrections Act produces an even more puzzling and paradoxical immigration law.[190] Most conspicuously, the new aggravated felony definition is susceptible to divergent interpretation.[191] First, the new definition cites five separate federal statutes, each with many distinct terms of art.[192] Thus, when determining if an offense is an aggravated felony, attorneys must "review and construe not only the offense in question in light of the definition itself, but each relevant citation and term of art that is found within the citation."[193] Such convoluted statutory language could prove to be troublesome to a general practitioner who has little background in immigration and or criminal law.[194]

In addition, the effective dates of provisions are equally baffling. Failure to prudently consider the effective date of each provision could seriously affect the alien's deportability, excludability, procedural rights or opportunities for relief.[195]

Another anxiety for practitioners involves collateral consequences in cases where an alien has entered a guilty plea, unaware that he or she may be subject to an INA provision.[196] To ensure that an alien is not vulnerable to a collateral effect, attorneys should avoid aggravated felony convictions for their clients.[197] If an attorney fails to apprise an alien client of possible collateral consequences, the attorney may be found liable for

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189 Corrections Act § 306(c)(6) (amending 1990 Act § 545(a), INA § 242B, 8 U.S.C. § 1252b(c)(4) (Supp. II 1990)).

190 *See* Sandron & Bingham, *supra* note 39, at 280 (law regarding criminal aliens is complex and contains many nuances, particularly with respect to definitions).

191 KESSELBRENNER & ROSENBERG, *supra* note 30, § 7.4(a), at 7-58.

192 *Id.*

193 *Id.*

194 *See* Robert C. Divine, *New Visas, Changed System*, TENN. B.J., Mar./Apr. 1991, at 25-26 (1990 Act preserves immigration law as a "confusing web of statutes, regulations, court cases, administrative decisions, policy statements, and 'grapevine' information — and therefore still a 'boutique' practice area.").

195 KESSELBRENNER & ROSENBERG, *supra* note 30, § 7.4(a), at 7-58.

196 When negotiating a plea or an amended charge, the attorney must be aware of the effects of the assorted provisions of the 1990 Act. *Id.* § 7.4(a), at 7-56.

197 *Id.*

providing ineffectual counsel.[198] Finally, because the 1990 Act either eliminated or diluted many forms of relief formerly available to the aggravated felon, little remains for the attorney to litigate.[199]

## *VII. Analysis*

The enactment of the 1990 Act codifies Congress' view that criminal aliens were afforded too many rights.[200] By limiting a criminal alien's rights, Congress expected to reduce the time required for deportation, which had become lengthy. Still, many commentators regard the aggravated felony provisions as far too severe.[201]

Perhaps the most unjust impact of the aggravated felony provisions befalls in the case of the permanent resident alien. For these individuals, deportation for first time offenses appears inequitable, where many are already in the process of applying

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198 *See* Sfasciotti, *supra* note 15, at 78 n.2 (citing People v. Correa, 485 N.E.2d 307, 312 (Ill. 1985) (holding that guilty plea was not intelligently and voluntarily entered where defendant specifically asked counsel about immigration consequences and received erroneous and misleading advice); People v. Padilla, 502 N.E.2d 1182, 1186 (Ill.App. 1986) (contending that counsel's failure to warn client of deportation consequences from entering a guilty plea constitutes ineffectual assistance of counsel)). The legislatures of California, Connecticut, Massachusetts, Oregon and Washington have all passed laws that require the courts to apprise defendants of deportation consequences of entering guilty pleas. *Padilla*, 502 N.E.2d at 1185.

199 *See* Prinz, *supra* note 98, at 292. "[Attorneys] become faceless bureaucrats stamping the aliens' papers with final deportation orders. Immigration lawyers are increasingly faced with hopeless cases. The only money to be made is working with the deportation section to accomplish a rapid deportation. When neither bond nor relief is available, it's impossible to justify legal fees." *Id.* "Congress has pulled virtually all the playing cards from the hand of the immigration attorney whose client has a felony conviction." McAlvanah & Adlerstein, *supra* note 13, at 55.

200 *See* 136 CONG. REC. S17,109 (daily ed. Oct. 26, 1990). Sen. Simpson explained: "The bill restructures our deportation procedures to bring them more in line with our Nation's rules of civil procedure. We were in a situation in deportation where the deportees had more due process than did an American citizen." *Id.* (statement of Sen. Simpson). *See also* 136 CONG. REC. S11,940 (daily ed. Aug. 2, 1990) (statement of Sen. D'Amato) (contending Congress must eliminate the outrageous claims used by criminal aliens to fight deportation since system tilts too far in their favor).

201 *See* Myers & Thompson, *supra* note 3, at xxxviii (arguing 1990 Act's enforcement provisions are overly harsh and will deny due process protections); GORDON & MAILMAN, *supra* note 68, at 7 (contending criminal and deportation provisions seem excessively severe).

for naturalization.[202] In economic terms, many permanent resident aliens have been longtime taxpayers and invaluable contributors to American society. In those communities densely populated with aliens, these economic consequences may be difficult to bear.

The austere provisions of the 1990 Act may evidence an attempt to blame criminal aliens for our nation's current difficulties in dealing with rising crime. While convicted burglars are released from jails, aliens who have served sentences for minor drug violations are detained pending a determination of deportability.[203] As crime continues to proliferate, aliens seem to shoulder a unbalanced share of the responsibility by losing a disproportionate share of remedies.

A preferable solution may exist in rehabilitation. Congress appropriates the resources to rehabilitate citizens who commit crimes, but aliens are not furnished the same opportunity.[204] Instead of providing the resources for rehabilitation, Congress ever-increasingly subjects aliens to summary-like deportation procedures. Congress either presumes aliens are incapable of rehabilitation or it has concluded that the aliens themselves are just not worth the time and money.

There is no question that Americans must regard citizenship as a venerable honor, and must safeguard those rights which citizenship confers. Nevertheless, those who arrive at our shores and who have made productive lives in our country, should be afforded the right of a second chance. If not, we as a nation will be proclaiming to the world to "give me your tired, your poor, your huddled masses yearning to be free . . .,"[205] "but do not

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202 Sfasciotti, *supra* note 15, at 89 (maintaining that because permanent residents have family and attachments in the United States, deportation for one conviction illustrates the effects of the harshest immigration law ever enacted). In 1991, 13,215 lawfully admitted aliens were deportable because of convictions of aggravated felonies. INS CRIMINAL ALIEN REPORT, *supra* note 5, at 14.

203 Elizabeth Moore, *Jail Releases Felons, Hold Illegal Aliens*, THE OREGONIAN, Sept. 12, 1990, at E1.

204 *See* McAlvanah & Adlerstein, *supra* note 13, at 55. "The same Congress that showed leniency with the Crime Control Act of 1990 — authorizing home confinement and extending the availability of substance abuse treatment, literacy courses and English as a second language programs for inmates — appears to have given up on the idea that aliens who have committed crimes can be rehabilitated." *Id.*

205 EMMA LAZARUS, THE NEW COLOSSUS, *reprinted in* FAVORITE POEMS OLD AND NEW 448 (Helen Ferris ed., 1957). The poem provides in relevant part: "Give me

commit a crime or you will be deported." As a nation, we must evaluate if this is the message we wish to convey.

## *VIII. Conclusion*

The future is bleak for the aggravated felon and will probably only worsen. The 1990 Act appears to be assisting the INS in enforcing the immigration laws.[206] Therefore, one can only speculate as to what lengths Congress will persist in its pursuit to aggravate the criminal alien. Currently, the INS continues to propose additional restrictive laws for aggravated felons.[207] Given time, Congress is likely to adopt these restrictive proposals.

***Craig H. Feldman***

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your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!" *Id.*

206 In Fiscal Year 1991, INS deported over 13,000 criminal aliens, a 57% increase over the previous year. INS CRIMINAL ALIEN REPORT, *supra* note 5, at 5.

207 The INS continues to propose that Congress deny INA § 212(c) discretionary relief to an aggravated felon sentenced to a term of five or more years as opposed to serving a term of imprisonment of at least five years. INS CRIMINAL ALIEN REPORT, *supra* note 5, at 13. In addition, the INS recommends that an aggravated felon should be ineligible for discretionary relief under INA § 244(a). The section suspends deportation of those aggravated felons who have been physically present in the United States for 10 years and for whom deportation would cause hardship to family members who are United States citizens. *Id.* Third, INS advocates denying INA § 212(h)(1)(B) discretionary relief to aggravated felons. Section 212(h) waives particular criminal grounds if it is concluded that the alien's exclusion would result in severe hardship to family members who are U.S. citizens or lawful permanent resident. *Id.* Finally, INS proposes that aggravated felons should be ineligible for adjustment of status under INA §§ 245 and 249. Thus, aggravated felons would be barred from adjusting their status from a non-immigrant alien to permanent resident alien. *Id.*