

IIRIRA Twenty Years Later: Time for a Mandatory Access to Counsel

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Introduction

The network of laws and regulations that dictate how non-citizens can travel to, and settle in, the United States are so extraordinarily complex and convoluted as to earn the distinction of being once compared to King Minos' "labyrinth" on Crete by the U.S. Court of Appeals for the Second Circuit. In reference to the Immigration and Nationality Act, (INA), the Court further concluded that "Congress, pursuant to its virtually unfettered power to exclude or deport natives of other countries, and apparently confident of the aphorism that human skill, properly applied, can resolve any enigma that human inventiveness can create, has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle."¹ In the sixty plus years of the INA's history, however, few eras were more tumultuous than the mid-nineties. 1996 was a watershed year for immigration law, anchored by the passage of the most significant immigration reform bill since the vote on the INA in 1965.

Impacting both long term residents as well as newer arrivals, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) created harsh and confusing edicts that continue to be

¹ *Lok v. Immigration & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977).

challenged to this day. In turn, these changes make it hard, if not impossible, for immigrants to understand what conduct may put them at risk of deportation and often require expert legal intervention to ensure that their rights are not violated.

In October 2016, twenty years after IIRIRA became law, the New York State Bar Association's Committee on Immigration Representation held a conference examining the impact of the law on immigrant communities and immigration jurisprudence. This paper represents a summary of that conference, which focused on the devastating impact of IIRIRA, the challenges to the law that continue to this day, and the response in New York. Specifically, the conference addressed the criminalization of immigration in the wake of IIRIRA, the growth in the use of detention as an immigration enforcement tool, the transformation of legal immigration, and the jurisdiction of federal courts.

The Criminalization of Immigration

IIRIRA is probably best known for its dramatic changes to how immigration law approaches individuals with criminal histories. Born out of the tough on crime era, IIRIRA, with its clear intent to render deportable as many people as possible, was strategically punitive. Its broad language ultimately, and rapidly, strayed from the original intent of the bill to punish serious crime, while inextricably linking the criminal and immigration justice systems.

Changes to Aggravated Felonies

The concept of aggravated felonies as crimes with draconian immigration consequences was first introduced in 1988. At that time, it included three crimes: murder, drug trafficking, and weapons trafficking, as well as any criminal conviction where a sentence of five or more years was served. The 1996 law expanded that definition to 20 crimes, including crimes, conspiracies and attempts. In addition, the minimum sentence required to turn certain crimes into aggravated felonies was lowered from five years to one. To widen the net further, and in stark contrast to criminal law where retroactivity is deemed unconstitutional, the changes to the law were applied to past conduct as well. In practice, this meant that anyone convicted before 1996 could nonetheless find themselves deportable as aggravated felons once the law passed, regardless of the fact that they could not have been aware of those consequences at the time their case was being decided in the criminal system.

Consequences of convictions

In addition to substantially expanding the list of crimes, IIRIRA fundamentally altered both the definition and consequences of criminal convictions. Prior to 1996, there was no formal

definition of what constituted a conviction for immigration purposes. Instead, in *Matter of L-R*², the Board enunciated a three-pronged test to determine whether a conviction exists for immigration purposes. Accordingly, a conviction existed where all of the following elements were present: (1) there had been a judicial finding of guilt; (2) the court took action which removed the case from the category of those which are (actually, or in theory) pending for consideration by the court—the court ordered the defendant fined, or incarcerated or the court suspended sentence, or the court suspended the imposition of sentence; (3) the action of the court was considered a conviction by the state for at least some purpose. Since 1996, however, a conviction has been defined as (1) a formal judgment of guilt or, (2) if no finding of guilt was entered, there were enough facts to prove guilt admitted into the record and some form of penalty or restraint on liberty was imposed. To make matters worse, IIRIRA also ensured that a frequently relied-upon waiver, (under INA section 212(c)) for criminal conduct was all but eliminated.

This definition of what constitutes a conviction has been widely questioned in the twenty years since enactment of the legislation. The IIRIRA definition conflicted with state and local ordinances in many instances, and conduct that was not considered to be a crime by the adjudicating authorities suddenly turned into criminal convictions with immigration consequences once IIRIRA went into effect. For example, in *Castillo*³ the Third Circuit and the Board of Immigration Appeals (BIA or “the Board”) debated when a non-criminal offense became a criminal conviction for immigration purposes. Ultimately, no standard was ever set and the stringent definition of conviction remains, ensuring that anyone with a relevant criminal history will suffer immigration consequences regardless of vacatur, expungement, rehabilitation, or other mitigating circumstances.

Ultimately, the practical impact of the changes brought on by IIRIRA were devastating. Individuals with aggravated felonies became ineligible for many benefits including citizenship and asylum, and it became much harder to establish good moral character, a prerequisite for many applications for immigration benefits. Despite keeping immigration as a civil system, punitive, criminal consequences also attached to convictions. For instance, IIRIRA created the concept of mandatory detention, codified in Section 236(c) of the Immigration and Nationality Act (“INA” or “the Act”), whereby immigrants with certain criminal or immigration histories would be required to be detained indefinitely, with no possibility of bail/bond, even after the completion of any criminal sentence that may have been imposed. In addition, if any individual re-entered without permission after having been previously deported, they were now subject to criminal prosecution and a potential penalty of a minimum of 15 years in federal prison.

² *Matter of L-R*, 8 I&N Dec. 269 031A 1959

³ *Castillo v. Attorney Gen. U.S.*, 729 F.3d 296 (2013)

Federal Courts Limitations on Interpretations

There was recognition early on that the 1996 laws may have gone too far, but twenty years in, there has been no meaningful legislation passed to reverse some of the more draconian changes. Consequently, advocates and attorneys began turning early on to the Courts, developing a body of case law through the Board and Federal Circuit Courts that centered around what was not expressly addressed by Congress. Several of the earlier court decisions, seeking clarification and strict interpretation of the IIRIRA, found in favor of those seeking to minimize the impact of IIRIRA's reach.

The Supreme Court had several decisions early on limiting the impact of IIRIRA. In 2004, the Court unanimously declined to label DUIs and other negligence offenses as uses of force or crimes of violence in *Leocal v. Ashcroft*⁴. In 2006, they similarly struck down the government's interpretation that a drug possession offense constituted trafficking for purposes of immigration law in a near-unanimous decision, *Lopez v. Gonzalez*⁵. In 2013, the Court in *Moncrieffe v. Holder*⁶ used the categorical approach to find that a marijuana-related possession charge did not automatically lead to a finding of an intent to distribute, chiding the government for their continued attempts to use an overly-broad interpretation of the Aggravated Felony definitions. Circuit courts similarly narrowed the scope of IIRIRA's aggravated felony language: In *Chrzanoski v. Ashcroft*⁷, for example, assault with intent to cause injury was ruled to not be a crime of force under the new law. In 2008 in *Martinez v. Mukasey*⁸, the New York Crime of sale of marijuana in the fourth degree was also not found to be an aggravated felony because it did not require that money be exchanged. It is important to note, though, that this trend has seemingly slowed at the Supreme Court, at least, with decisions such as *Voisine v. US*⁹, which potentially opens the door to labeling crimes of recklessness as aggravated felonies.¹⁰

Response in New York

These changes to the law marked a turning point in how providers and local governments in New York responded to the legal needs of immigrant communities. Before IIRIRA, there had been a

⁴ *Leocal v. Ashcroft*, 543 U.S. 1 (2004)

⁵ *Lopez v. Gonzalez*, 549 U.S. 47 (2006)

⁶ *Moncrieffe v. Holder*, 569 U.S. 184, 133 S. Ct. 1678. (2013)

⁷ *Chrzanoski v. Ashcroft*, 327 F.3d 188, (2d Cir. 2003)

⁸ *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008)

⁹ *Voisine v. US*, 579 U.S. ___, 136 S. Ct. 2272 (2016)

¹⁰ Since the time of the conference, the Supreme Court decided *Sessions v. Dimaya*, striking down the "crime of violence" language in the definition of aggravated felony as being unconstitutionally vague. This is a clear example of how, twenty years after enactment of IIRIRA, litigation continues to make its way to the Supreme Court challenging the language of the bill.

clear separation between the immigration and criminal legal systems, with immigration enforcement being introduced into the criminal justice system at the end of a criminal matter (i.e., including sentencing) and criminal lawyers often unintentionally and unknowingly avoiding the discussion regarding immigration consequences caused by a conviction by failing to screen clients as to immigration status. With the passage of IIRIRA, and the call for a more collaborative pipeline between the criminal justice system and immigration enforcement systems (i.e., in demand, particularly in the wake of the 9/11 terror attacks), that separation was no longer feasible. With immigration consequences more inevitable following a conviction, an effort was undertaken to educate criminal defense practitioners, particularly those assigned to represent individuals who could not afford a private attorney in criminal matters (i.e., such as public defenders and legal aid lawyers). After initial caution from the criminal defense community, the Supreme Court decision in *Padilla v. Kentucky*¹¹ recognized removal from the United States no longer as a “collateral consequence” but as the equivalent to a penalty. This, in turn, imposed a duty to advise noncitizens of immigration consequences of a decision to ensure protection of a client’s 6th Amendment rights to effective representation of counsel. The result was a shattering of the divide between criminal and immigration law.

To help criminal defenders meet these obligations, campaigns were initiated throughout New York State to educate and train criminal defense attorneys, particularly those assigned to represent clients who could not afford private attorneys, to understand the immigration consequences of a conviction, particularly when the conviction resulted from a waiver of trial and plea of guilt. These efforts subsequently expanded to the development of regional immigration assistance centers that are responsible for supporting assigned attorneys providing mandated representation in both criminal and family court proceedings in advising noncitizen clients as to the immigration consequences related to outcomes in these proceedings.

Detention

As the pipeline between the criminal and immigration legal systems have grown and strengthened, immigration law has become increasingly a criminal-like system, albeit one lacking the fundamental constitutional protections afforded to those in criminal proceedings. Nowhere has this been more evident than in the use of incarceration of immigrants without criminal procedural safeguards.

In the wake of IIRIRA, and with the expansion of criminal grounds of inadmissibility or deportability as well as the creation of mandatory detention, detention has become a huge tool of immigration enforcement, and an incredibly lucrative investment in the expansion of the private prison system. At the same time, the human toll has been devastating. Often, those in immigration detention fall in two categories: (1) the most vulnerable, who were recent arrivals to

¹¹ *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

the United States seeking protection; or (2) individuals who have lived in this country for many years and who suddenly find themselves deportable and subject to mandatory detention for a decades-old crime. Many of those detained immigrants have never been incarcerated before. For those who have been in the United States a long time, immigration detention puts their jobs, their health, and their family's well-being at risk. Families often lose primary breadwinners and, in many instances, the family separation often left children parentless and/or traumatized by the sudden familial separation. For those who arrived recently, the detention compounds their trauma.

As happened with the criminal expansions of IIRIRA, the detention provisions have been subject to many legal challenges, with mixed results. Civil detention should not be a punishment, and in *Zadvydas v. Davis*¹², the Supreme Court held that the same limits that apply to other types of detention also apply in immigration, especially those concerning due process. That Court also found that indefinite detention violated due process. In 2003, however, the Court, in *Demore v. Kim*¹³, upheld IIRIRA's mandatory detention language for individuals in removal proceedings. Based on assertions by the Government, later admitted having been in error, that detention was usually brief and was largely of individuals who had conceded they were removable from the United States, the Supreme Court found INA 236(c) constitutional.

The decision in *Demore* came even as Circuit Courts increasingly pushed back on indefinite detention by the government under the auspices of mandatory detention. In the years since that decision, the fight has moved to litigation over detention issues when the underlying removal case is prolonged. There is a consensus from the lower courts that long-term detention is a problem, but there have been differences in how Circuits have approached the issues. In *Diop v. ICE*¹⁴, the Third Circuit held that each case must have a fact-based inquiry to determine whether the detention has been impermissibly long, but does not set a specific time by which a bond hearing must take place to examine the feasibility of release. On the other hand, both the Second and Ninth Circuits found in *Lora v. Shanahan*¹⁵ and *Rodriguez v. Robbins*¹⁶, respectively, that a bond hearing examining release must be provided after a six-month period of an individual's detention in federal immigration custody.¹⁷

While much attention has been placed on the mandatory detention language of IIRIRA, and the devastating consequences to individuals and families, there have also been alarming trends in

¹² *Zadvydas v. Davis*, 533 U.S. 678 (2001)

¹³ *Demore v. Kim*, 538 U.S. 510 (2003)

¹⁴ *Diop v. ICE*, 656 F.3d 221 (2011)

¹⁵ *Lora v. Shanahan*, 804 F. 3d 601

¹⁶ *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015)

¹⁷ In the time since the Conference, *Rodriguez* has been argued twice before the Supreme Court, which ultimately held that immigrants held in mandatory detention have no statutory right to a bond hearing, but remanded the case to the 9th Circuit to examine whether they have a constitutional right to such. *Jennings v. Rodriguez*, 583 U.S. ___ (2018). At the time of publishing these notes, the case remained pending at the Circuit Court.

non-mandatory detention. After IIRIRA, anyone in removal proceedings could be detained by ICE regardless of criminal history, age, whether they were seeking asylum, or any other qualifier. Since 2014, we have especially seen a sharp rise in family detention and detention of asylum seekers at the border who pass their credible fear interviews and intend to apply for asylum before an immigration judge. While ICE has discretion to set their own bond for many of these individuals, in recent years the agency has either set impossibly high bond amounts, or no bond at all, forcing detainees to litigate their bond requests before immigration judges.

Added to this emotional and economic burden, it is difficult – and often impossible - to get adequate, affordable legal representation in a jailed setting. For the lucky few able to get a lawyer, it is equally difficult to meaningfully participate in their defense by gathering evidence or communicating with their legal team. In New York, funding by the New York City and State governments led to the creation of a criminal-defense like public defender system to represent low-income detained immigrants appearing in New York immigration courts. The New York Immigrant Family Unity Program (NYIFUP) began in 2013 as a pilot project funded by the New York City Council and was expanded the following year to provide full representation. A state-wide pilot was started in 2016 and fully-funded the following year as well. It is currently the only public-defender model for immigration representation in the country, though several other jurisdictions are looking at implementing similar programs.

The fight against the rise of immigration detention has been an extraordinarily complicated and difficult one for attorneys and advocates alike, largely because of the privatization of the jail industry in the United States. This industry fuels a large and powerful lobby that, despite national reduction in crime rates, continues to keep a multitude of jails open while also incentivizing Immigration and Customs Enforcement (ICE) from using previously established, reliable and less punitive methods of limiting immigrants' freedom. For example, ICE can place individuals on ankle bracelets that monitor their movements, or on voice check-in schedules. Despite the availability and often more cost-effectiveness of these methods, physical detention numbers continue at record highs. Moreover, while not being held in a jail cell, these alternatives remain punitive in nature. Ankle bracelets, for example, are bulky and embarrassing to wear publicly, confine the wearer to certain geographic boundaries, and require staying in one place for several hours each day to recharge the device. Even alternatives to detention measures, that remain part of an overall establishment designed for crime-control are largely operated by private companies that receive well-funded contracts with the federal government to engage in measures to deprive liberty within a civil legal system.

Ultimately, while the immigration system is part of the mass incarceration system in this country, it has largely been kept apart from the debate and pushes for reform on those issues. Immigration bonds, which are set at a minimum of \$1,500 and must be paid in full, have not been included in many conversations around bail reform. Despite a clear continuation of the

legacies of slavery and incarceration, the ever-increasing budgets passed by Congress to increase civil incarceration to support a federal immigration system that continues to be based on the principle of “detain first, ask later.” Even as attorneys fight for bonds for individual clients, adjudications of the request vary from court to court and judge to judge, making the system more unpredictable and harder to navigate. The norm, however, leans towards higher bond amounts for release from incarceration and longer periods of detention for immigrants, who would not normally be subject to detention, but for their inability to pay for their release from civil detention pending resolution of their administrative immigration matters. IIRIRA’s enactment has redefined the focus of migration control by moving towards a more punitive, restrictive and overly-burdened immigration reform model.

The Transformation of Legal Immigration

In addition to exponentially expanding the number of deportable or inadmissible immigrants to the United States, IIRIRA also imposed new and limiting restrictions on permissible pathways to immigrating here. These changes were even more harmful because in many instances, adjudicators (i.e., both administrative and judicial), lost the previously afforded discretion to consider mitigating factors in applications for benefits and /or relief from removal.

Changes to Asylum Law

The most significant change to asylum rules, which are governed by international law, was the imposition of a deadline. Asylum seekers became required to file their applications within one year of their arrival in the United States. The goal of the one-year deadline was ostensibly to reduce fraud but the practical impact has been that many legitimate individuals seeking protections have found themselves barred from qualifying for asylum.

Changes to Protection from Deportation

In the removal context, 212(c) waivers, mentioned above, were replaced by Cancellation of Removal for Lawful Permanent Residents (LPR)¹⁸, which requires 7 years of physical presence in the United States, including 5 years of permanent residency. Suspension of Deportation was replaced by Cancellation of Removal for Non-Lawful Permanent Residents¹⁹, and requires 10 years of physical presence, good moral character, and a qualifying relative who will suffer exceptional or extremely unusual hardship if the non-citizen is removed from the United States. As with Suspension, the qualifying relative can only be a US Citizen or Lawful Permanent Resident spouse, parent, or child, but the hardship threshold has been significantly increased. Voluntary Departure rules were also amended. Under IIRIRA, individuals who failed to comply

¹⁸ INA § 240A(a)

¹⁹ INA § 240A(b)

with an order of voluntary departure are barred for 10 years, up from the previous 5, from seeking certain benefits in the United States, including applying for LPR status through various means.

Changes to Expedited Removal

IIRIRA substantially expanded the use of Expedited Removal, a mechanism by which individuals arriving to the United States can be ordered removed without a hearing before an immigration judge, and which had previously been limited to ports of entry. Since 1996, Border Patrol has had the ability to also issue expedited removal orders between ports of entry, i.e. anywhere along any border. The Expedited Removal provisions currently apply to individuals classified as arriving aliens (i.e. an individual attempting to enter the United States) and individuals who were not admitted into the United States and cannot prove they have been physically present for more than 2 years.²⁰

The Creation of the Unlawful Presence Bars & Entry Without Inspection Bar

IIRIRA also increased the penalties (i.e., both civil and criminal) for any potential violation of immigration law that results in an individual remaining in the U.S. without authorization, despite whether the overstay was intentional or not. The so-called 3/10-year bars, whereby an individual who has accrued a certain amount of unlawful presence in the United States is barred from returning to the United States for a set period, were part of the more draconian sections of IIRIRA. Specifically, an individual with more than 180 days but less than a year's worth of aggregate unlawful presence now triggers a three-year bar to admission upon their departure from the United States. Unlawful presence of over one year triggers a 10-year bar from the United States. There are only very limited exceptions to these bars, including when the entry was under 18 years old or when the individual entered on a visa that permitted to stay for "duration of status". Combined with the new bar to applying for adjustment of status if an individual had originally entered without inspection, the impact of these collective bars has been to keep many eligible for lawful status in the United States unlawfully out of fear of triggering the bar if they leave to consular process. This is especially devastating for families, which represent the bulk of migrants to the United States.

Jurisdiction Stripping of Federal Courts

In a final blow to the rule of law in immigration proceedings, IIRIRA imposed strict limitations on the ability of Federal Courts to review agency decisions of immigration matters. Since 1996, most immigration appeals to Federal Courts bypass the District Courts, and instead must be heard directly by the Circuit Courts. In addition, procedures were changed to disfavor stays of

²⁰ INA § 235(a); 8 C.F.R. § 235.3

removal while cases are ongoing before Federal Courts, instead favoring a policy of deporting the individual and returning them to the United States only in the event they prevail on their case.

A Path Forward: Access to Counsel for All

Before looking forward, we must look back to understand the context in which IIRIRA arose. Two years before it passed, the main issue of the 1994 midterm elections were California voters' decision to approve Proposition 187, a controversial ballot measure that denied public services such as education and healthcare to undocumented immigrants. In the wake of those elections, Newt Gingrich, then-Speaker of the House, introduced the "Contract for America" bill. The Contract for America included a federal version of Prop. 187 and underscored conservatives' desire to make changes to the immigration system. Ultimately, a compromise was reached that removed the Prop. 187 language from the bill, but with the promise to address immigration separately. Those changes were introduced in the form of IIRIRA which, under immense pressure to tackle the issue in the run-up to his 1996 re-election, President Bill Clinton ultimately signed on September 30, 1996.

The mid-1990s also saw several rule changes in Congress, including the creation of the Hastert Rule, which requires that a majority of the ruling conference be in favor of a bill for it to be introduced. This rule, which effectively limits the ability of the minority party to introduce unfavorable legislation, was a significant factor in the dooming of the 2013 efforts at immigration reform.

Today, the future of immigration policy in the United States is more uncertain than ever. At the time of the conference, in the run up to the 2016 election, it was believed that the breadth of any immigration reform would likely be tied to the severity of the Republican defeat and that the outcome of Deferred Action for Parents (DAPA) and parole in place would depend on the 9th Justice of the Supreme Court is. With the election of Donald Trump in 2016, as well as Republicans' continued control of Congress, meaningful talks of reform have all but stalled.

Conclusion

Twenty years beyond the enactment of IIRIRA, this legislation continues to be a deeply divisive law. As its provisions have become cemented into immigration jurisprudence, its legacy is clear: an overly complex and opaque structure that operates as a quasi-criminal system and expects immigrants to abide by rules they have no hope of understanding nor addressing without the adequate assistance of a trained legal representative.

These past twenty years since the enactment of IIRIRA, it has become abundantly clear that the complexity of this law and the many legal uncertainties it has introduced into the immigration

legal system calls for a new response if it is to be properly addressed. That response requires the need to provide a mandated legal right to access to counsel, at minimum, to be designated within the immigration court context. If these laws and the way they are enacted continue to deprive those within its system of the fundamental rights to due process and equal access to justice, legal jurisprudence calls for a judicial system that ensures checks and balances on the fundamental protections afforded by the US Constitutions to all persons, regardless of citizenship.