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ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK SYMPOSIUM ON IMMIGRATION AND CRIMINAL LAW

INTRODUCTION

by Nancy Morawetz*

It is now six years since Congress drastically changed the rules governing lawful permanent residents convicted of crime and established an extreme dual system of criminal law under which immigrants raised legally in this country from childhood can be deported summarily for crimes that did not even lead to a single day in jail.¹ In the space of the last six years, thousands of lawful permanent residents have been deported without any opportunity to prove that they are rehabilitated, that their deportation would work an extreme hardship on their families, or even that their honorable service in the United States armed forces warrants the exercise of mercy.

This Symposium, held in the Fall on 2000, provided an unusual opportunity to examine both the harshness of the laws and the multiple advocacy efforts at work to correct that harshness. At the time of this symposium, Congress was poised to make modest corrections to aspects of the 1996 laws. After years of criticism in the press and scholarly journals, the House had fast-tracked a bill, H.R. 5062,² to cure some of the retroactive aspects of the law. The bill went straight from the back rooms of the Judiciary Committee to the full floor of the House and passed unanimously. It seemed well on its way to being signed into law. At the Symposium, speakers examined these legislative efforts and looked to the future when further reforms could be made.

At the same time, litigation efforts to ameliorate the 1996 laws seemed not to be so promising. Only one circuit court had ruled that the main 1996 law could not be applied retroactively, and that decision was accompanied by a dissent.³ Litigators faced the very

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¹ For a general description of the effects of these laws, see Nancy Morawetz, *Understanding the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-43 (2000).

² H. R. 5062, 106th Cong. 2d Sess. (2000).

³ *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), *aff'd* 533 U.S. 289 (2001). Although there was a good deal of case law limiting the retroactive reach of the first of the two

real possibility of an appeal to the Supreme Court and a nationwide ruling endorsing retroactive deportation laws.

Looking back, it seems that everyone was wrong in some way. Those who belittled what could be done in the courts were proved wrong the following June when the Supreme Court ruled that the 1996 deportation laws could not retroactively impose mandatory deportation based on pleas entered before the laws went into effect.⁴ The naysayers discovered that courts could work some genuine protection for immigrants.

Meanwhile, there was a widespread failure to appreciate how difficult it is to pass ameliorative legislation and how easy it is for a good idea to lose-out based on the staunch opposition of a single legislator. Representative Barney Frank, who urged the audience at the Symposium to call their representatives if they wanted legislative reform, understood how easy it would be for a bipartisan bill — even one that has passed the House unanimously — to be scrapped as it wound its way through the Senate. Shortly after the Symposium, H.R. 5062 died in the Senate, reportedly due to the opposition of Senator Phil Gramm of Texas.⁵

At the time of this writing, there are renewed efforts to pass corrective legislation and renewed efforts to seek change through the courts.⁶ In the political arena, the principal players have changed, and the legislative landscape provides new opportunities and challenges for reform. But whatever might happen with these initiatives, the story of the 1996 law and reform efforts through the date of the Symposium, tells a tale that is instructive for those trying to understand the process of legislative change, it is a story that is at once sobering about the difficulty of legislative change, and inspirational about the way that the dogged efforts of those affected by unfair laws can make a real difference.

Chung Wha Hong, Founder and Executive Director of the National Korean American Service and Education Consortium, set the stage for the Symposium by explaining the political climate

1996 laws, *St Cyr* was the only circuit court case finding that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 should not be applied retroactively.

⁴ *INS v. St. Cyr*, 533 U.S. 289 (2001).

⁵ See Randall Richard, Frank: *Immigrant Law Fight To Resume*, THE PROVIDENCE JOURNAL (Dec. 19, 2000).

⁶ Reform efforts are concentrated around H.R. 1452, 107th Cong., 1st Sess., which was introduced by Congressman Frank and has 32 co-sponsors as of April 27, 2002. Meanwhile, on the litigation side, there are various habeas actions seeking to remedy retroactivity that remains after *St Cyr*. See e.g., *Rankine v. Reno*, WL 55720 (SDNY 2001) (presenting issue whether *St Cyr* extends to a person who was found guilty after a trial).

leading to the 1996 deportation laws. As she describes, the years leading up to the 1996 were bad years for immigrant advocates as the immigrant community faced a wide array of punitive legislation. Despite successes in fending off some of these changes in the laws, many provisions were passed that compromised the rights of noncitizens.

As Representative Barney Frank explains in his remarks, the specific provisions on deportation proved to be even harsher than anything that was publicly debated and adopted by congressional committees. Both the House and the Senate passed legislation that would have barred relief from deportation for those sentenced to a five year term of imprisonment for a crime designated as an "aggravated felony." This was a big change from prior law, which barred relief for those who served a five year sentence. But when the bill got to conference, all references to the time served or the length of the sentence were removed.⁷ At the same time, the "aggravated felony" definition was expanded so that it now can cover crimes that are as minor as misdemeanor theft.⁸ When the bill emerged from the conference committee (after a "conference" that was so controversial that only one member of the Democratic party signed the report) it was untouchable. Since this measure was combined with the Omnibus Budget bill, it was guaranteed a swift victory in both houses.

Almost immediately, the problems with the 1996 laws became apparent. Story after story appeared in newspapers recounting the plight of persons facing deportation for misdemeanors they had committed many years in the past, or who were being deported to countries from which they were adopted, or who had other extremely compelling stories.⁹ But at that stage, the legislative solution required undoing a law that had been recently passed, and there was little appetite in Congress to take on the issue. Furthermore, taking on the issue legislatively required owning up to the idea that Congress had made a mistake. And Congress was reluctant to admit to its error.

The committee line-up in Congress also made reform difficult. The House subcommittee was chaired by Rep. Lamar Smith. He did not appear to be responsible for the harshness of the deporta-

⁷ See Nancy Morawetz, *Understanding the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1955 n. 106 (2000).

⁸ See *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000).

⁹ One of the most well-reported stories was that of Jesus Collado, who faced deportation for a 1974 misdemeanor. See, e.g., Mirta Ojito, *Old Crime Returns to Haunt an Immigrant*, N.Y. TIMES, Oct. 15, 1997, at B1.

tion provisions, as the provisions had come from the Senate side. But Rep. Smith was reluctant to take up reform. As Chair of the committee, he simply refused to schedule a hearing on any proposed reform measure, including those that had been co-sponsored by a wide range of representatives.

In the Senate, the prospects were no better. Senator Abraham, the chair of the subcommittee in 1997, proved to be a particularly difficult obstacle. Senator Abraham was generally the most pro-immigrant politician on the Republican side in the Senate. But he also appears to have been the Senator most interested in ensuring that there were very tough rules for immigrants convicted of crimes. This was where he has drawn the line, and he was unlikely to take on the task of changing what he had designed.¹⁰

One issue that created a cover for legislative inaction was the idea of "prosecutorial discretion." In response to horror stories about the impact of the 1996 laws, Senator Abraham suggested that the INS was simply failing to apply the law properly.¹¹ In a sense, it was an easy partisan claim. If there was unfairness, blame the Democratic administration and not the Republican-controlled Congress.

Democrats joined Republicans to make sure that what could be done through prosecutorial discretion was accomplished. As Representative Frank explained at the Symposium, a group of legislators wrote to the Attorney General asking for guidelines on discretion. The guidelines have now been issued. But prosecutorial discretion was never a real solution since there is little incentive for line bureaucrats to avoid bringing sure-win cases, especially when the law has eliminated the systems for evaluating evidence relevant to discretion. So the heart-rending cases continued to come forward as new families brought their stories to the press and their representatives.

It was only after these efforts, and many additional deportations, that the stage was set for the introduction of H.R. 5062. This bill was drafted by legislators from both sides of the aisle and went straight to the floor of the House. On September 19, 2000, it passed unanimously. There was widespread expectation that the bill would move swiftly in the Senate by being attached to a spend-

¹⁰ See Lisa Zagaroli, *Senators Use Rank to Set Pet Priorities: Achievements of Immigrants Get Hearing From Senator Abraham*, DETROIT NEWS, Mar. 23, 1997, at B5 (quoting Senator Abraham as saying "You don't shut down the borders. What you do is say we are going to apply the criminal laws more harshly.")

¹¹ See, e.g., Mirta Ojito, *U.S. Frees Immigrant Jailed For 1974 Misdemeanor*, N.Y. TIMES, Oct. 25, 1977 at B1.

ing bill. But when Senator Gramm announced strong opposition to the measure, it was pulled.

Meanwhile the hardships of the law have continued. At the Symposium, three family members spoke movingly about how the laws had affected their families. Beverly Taffe described her son's ordeal in enduring two years of detention following his prison sentence of a few months, all to vindicate his right to a meaningful hearing about the equities of his case before he would be deported. Aarti Shahani spoke about her father and uncle. The two men were convicted as first time offenders in connection with their business. They were sentenced to serve consecutively. When the uncle was deported, Aarti left the University of Chicago to come to New York and assist her family in preventing her father from suffering the same fate. Lily Carreras spoke about how her mother was detained following her return from a brief trip abroad, all as a result of an old plea that she had not understood at the time. Each of these stories showed the deep pain caused by each day that the laws fail to be remedied.

Other speakers at the Symposium showed that the deportation laws actually impede effective enforcement of criminal laws. Dr. Margaret Abraham, Chair of the Department of Sociology and Anthropology at Hofstra University addressed the specific problems that the 1996 laws create for enforcement of laws against domestic violence. As she explained, the deportation laws inhibit victims of domestic violence from reporting the abuses they suffer because of the very real possibility that they will be placed in removal proceedings or that their abuser, upon whom they are dependent, will be deported and they will be left destitute. Manny Vargas, Director of the Criminal Defense Immigration Project of the New York State Defender Association, proceeded to explain the concrete problems that the 1996 laws create for criminal defendants and criminal defense lawyers in this State. Because of the enormous differences between the way the immigration laws and the criminal laws treat crime, the 1996 laws have led to an enormous need for education of the defense bar to the counter-intuitive nature of immigration consequences and impede sensible plea agreements.

The central issue posed for discussion at the Symposium was when and how the laws could be changed. Bo Cooper, General Counsel of the INS, shared the view of many panelists that the laws are too harsh and he voiced support for changes that would go beyond H.R. 5062, which was pending in Congress at the time. At the same time, he supported many of the principal motivations be-

hind the 1996 laws in speeding the deportation of noncitizens convicted of crimes.

Representative Barney Frank, who at the time of the Symposium was monitoring carefully the progress of H.R. 5062, spoke to the need for advocates to help advance efforts at legislative reform. Representative Frank noted that solutions were ultimately about politics and that much needs to be done to advance a political change. He suggested that the then-upcoming Presidential election would make a huge difference in the prospects for reform. He counseled the audience (and the moderator) against seeking a perfect solution. The greatest fireworks came in the interchange between Representative Frank and General Counsel Cooper. Representative Frank chastised the INS for being a reluctant supporter of H.R. 5062. Similarly, he chastised the lawyers in the room for not doing enough to help to move legislative reform.

Of course, since the Symposium we have seen major political changes. A Republican is in the White House and the Democrats control the Senate (if just barely). Since the fall of 2001, immigration reform has become tied up in efforts to cope with the aftermath of 9/11 and to combat terrorism. At the time of this writing, it seems very likely that the INS will be restructured. And once again, there is hope that reform of the 1996 deportation laws will make its way through the House Judiciary Committee. It is hard to predict what will happen by the time this Symposium is published. But whatever actually happens, the story of the ongoing harm of the 1996 laws and the lessons about efforts to reform those laws, will have enduring value.