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Panel Presentation on Immigration and Criminal Law. Sponsored by the Association of the Bar of the City of New York.

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**TRANSCRIPT OF PANEL PRESENTATION ON
IMMIGRATION AND CRIMINAL LAW. HOSTED
BY THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK.**

**(modified transcript prepared by
Neha Lall and Jen Murray)**

Mr. Chaumtoli

Huq: We have a system of laws after the 1996 laws where we have a system of justice for citizens and a system of justice for non-citizens. Clearly basic principles of civil rights and equal protection of the laws of due process are implicated. There is no question that this program addresses civil rights questions and highlights questions of concern for the civil rights community. On behalf of the Civil Rights Committee, I want to welcome everyone for coming tonight. Now I'd like to introduce Cyrus Metha.

Mr. Metha: Hi, I'm Cyrus Metha and I'm the chair of the Immigration and Nationality Committee. We're very pleased to co-host this program with the Civil Rights Committee; it's the first of its kind. Basically immigrants with criminal convictions have very few supporters, and it's our duty as lawyers to raise the issues addressed by this panel. Before I hand over the podium, I just want to introduce Nancy Morawetz, who is our moderator. She is professor of Clinical Law at New York University School of Law, and she has done a lot of work to roll back some of the crime related provisions of IIRIRA.¹ She has written a number of law review articles; the most recent is "Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms,"² in the Harvard Law Review. Now I'll hand over this program to Nancy to introduce the rest of the panelists.

Ms. Nancy

Morawetz: I want to thank the Immigration Committee and the Civil Rights Committee, particularly for thinking of this

¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 (IIRIRA).

² Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

presentation as one about civil rights, because the deportation of legal permanent residents is a civil rights issue. It's an issue about how we treat people who are in our communities, who have lived here a very long time, who may be married to citizens, who have children, who, for all intents and purposes, are indistinguishable from citizens, except that they do not actually have the paper that makes them citizens.

The 1996 laws have created a dual system of criminal law. In many situations a citizen gets a real second chance. In particular, people who have committed more minor offenses can be sentenced to probation or short prison terms. That can be the end of their problems with the criminal justice system; they can then go on and re-establish their lives. The system also provides somewhat of a safety valve for errors in our criminal justice system, in terms of giving people a second chance.

For the non-citizen, including legal permanent residents who have been here since they were a year old, it's a totally different system. In many cases for many convictions, including convictions which generally lead to a sentence of probation, the result is automatic deportation. The 19-year old, who might be a first time offender arrested on a minor drug charge or a shoplifting charge, can't put that past behind him. He will be deported—deported to a country he might not even know. This is happening all the time, and therefore I think it really is a civil rights issue.

Before 1996, the law was quite different. Many crimes made people deportable, which meant that you could be put into deportation proceedings. But if you were a legal permanent resident and you'd been here a long time, there were three things about the old system that made a real difference as compared to the new system. One difference was that you could go in front of an immigration judge and present the equities of your case. You could show that you were a taxpayer; that you were a veteran; that there were consequences for your children; that it would be difficult for you to return to your own country; that you were truly rehabilitated; or that there was some circumstance related to your case that the judge should consider. While you pursued those arguments, you could be free on bond (unless bond was denied because you were a

danger to society or at risk of flight). You could be with your family; you could be at your job; you could be in your school. You could go to the courts and you could have the courts review those issues. After 1996, if you commit a crime that is defined as an aggravated felony, and under Second Circuit law that includes misdemeanors³, you are subject in many cases to mandatory detention. This is hard to believe, but that's the way the law has been interpreted and applied. It covers low level crimes and it covers crimes, as I said, with sentences of probation; you can not present your equities to a judge. Even if you are eligible for relief under this post 1996 legislative regime and even if you don't fit that aggravated felony category, you can be subject to mandatory detention which could be thousands of miles away from your home. The only way to have a court look at the legal issues is to jump through all sorts of government arguments that there is no judicial review. In fact, the statute did restrict judicial review, but how much has been a hotly contested issue. So, a lot of money has been spent on lawyers, and a lot of time has been expended on when and how the courts can review any of these questions. However in the meantime, for most immigrants, the Immigration and Naturalization Service, [INS] has basically been a judge and jury of its own powers, and most of the new laws have been applied retroactively to past convictions.⁴

We are now at a certain crossroads with these laws. First of all, through the work of Congressman Frank⁵ there has been a bill passed by the House of Representatives, H.R. 5062⁶, which is a partial fix to the retroactivity provisions of IIRIRA. It's not a complete fix to retroactivity, and it doesn't address the ongoing unfairness of the law, but it is a heroic achievement to have a bill passed that addresses these issues, especially given the structure of Congress right now. In that sense, I think it has importance beyond the actual

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

⁴ Since these remarks were made, the Supreme Court has rejected the government's arguments that the 1996 laws strip the federal courts of jurisdiction to review habeas corpus application. *INS v. St. Cyr*, 533 U.S. 289, 314 (2001).

⁵ Congressman Barney Frank of the 4th District of Massachusetts.

⁶ Act to establish the eligibility of certain aliens lawfully admitted for permanent residence for cancellation of removal under section 240A of the Immigration and Nationality Act, H.R. 5062, 106th Cong. (2000).

terms of the bill; it shows that it's possible to get a bill through. It shows that representatives on both sides of the aisle can see problems with this statute, and it has mobilized others to call for greater reform.

At the same time in the courts, we have widespread rejection of at least some forms of retroactivity. We also have an ongoing stream of issues presenting in the courts, such as what is an aggravated felony.

It's been interesting to watch the courts. The Fourth Circuit, which is considered one of the most conservative courts in the country, has actually issued one of the decisions that is most critical of retroactivity.⁷ In doing so, it reversed its own past precedent and said that the denial of discretionary relief on a retroactive basis is problematic. That's quite remarkable for a court to do. Even the Seventh Circuit, which issued one of the first decisions on retroactivity suggesting there could be no kind of real reliance on the past law, reversed that in a recent decision.⁸

At the same time, the executive branch is facing lots of questions. How should it respond to all of this litigation and how should it respond to what is going on legislatively? The litigation has created opportunities; in some situations the administration has reformed some of its policies in light of court decisions and some of those questions are pending before the agency [Immigration and Naturalization Service] now. The agency also faces questions on an ongoing basis about how it interprets the law. There continue to be lots of unanswered questions about the scope of the aggravated felony definition, about exactly what is a conviction. We can look also to the agency [INS] about how it will see its own responsibilities.

The hope is that on this panel we can get a view of all of that. We're going to start with Chung Wha Hong, who will try to place these issues in the broader context of what has been going on with immigration issues generally. Manny Vargas will then speak about the law as it applies to new convictions and what kinds of problems criminal defense lawyers are facing. Margaret Abraham will then speak to specific issues that arise in domestic violence cases. Then we will turn to Bo

⁷ *Tasios v. Reno*, 204 F.3d 544 (4th Cir. 2000).

⁸ *Jideonwo v. I.N.S.*, 224 F.3d 692 (7th Cir. 2000).

Cooper, General Counsel of the INS, and Congressman Barney Frank to give us a perspective from the Administration and from Congress. Finally, there are some family members of legal permanent residents facing deportation.

Let me begin now with Chung Wha Hong who is the vice-chair and executive director of the National Korean American Service and Education Consortium. She is a leading advocate on the rights of immigrants and, as I said, we have asked her to place the issue of this law in the broader context of immigrant rights issues.

Ms. Hong:

I would also like to thank the Civil Rights Committee and Immigration and Nationality Committee for putting together this very impressive panel here. I've been involved in the immigration debate since 1994, and I feel like I've lived through the whole cycle of anti-immigrant attacks. As you might recall, in 1994 Proposition 187⁹ in California really highlighted the potential of anti-immigrant attacks. The actual substance of Proposition 187, which was passed in California, was to deny undocumented immigrants any and all government benefits, but it went way beyond that in whipping up anti-immigrant sentiments. When the proposition was passed in 1994, it coincided with the Republican takeover of Congress; that's when you started to see a lot of the anti-immigrant bills flooding out of Congress. A lot of those proposals that existed previous to 1994 either died in committees or just never made it to actually becoming legislation. After 1994, and in 1995 and 1996, we saw probably what advocates call the worst anti-immigrant attacks in Congress in the last 70 years of this country. This culminated in the anti-immigrant laws of 1996, which are the tripartite laws of the anti-terrorism bill, the immigration reform bill and the welfare laws of 1996.¹⁰ The bad thing is that the laws that were passed in 1996 were much better than some of the earlier provisions that were proposed in 1995. For instance, one of the laws that was actually passed in the Senate

⁹ Proposition 187 was approved by the electors of California on Nov. 8, 1994, as an initiative statute. See 1994 Cal. Legis. Serv., Prop. 187 (Westlaw).

¹⁰ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (AEDPA); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 (IIRIRA); and Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. No. 104-193.

differentiated between naturalized citizens and U.S. born citizens by denying some benefits or rights if you became a citizen after you immigrated here. Fortunately some of those differences were knocked off, but what we ended up with was a huge bright red line differentiating how this country was going to treat legal immigrants, non-citizens, and citizens. The people who actually were attacked the most were the undocumented immigrants. So a lot of the immigrants' groups were busy warding off these laws. We call that period up to 1996 the "stop the tide" period. There were things coming out of Congress we couldn't keep track of. There were so many anti-immigrant bills; basically every bill that came out of Congress had an anti-immigrant attachment to it that was either passed or not.

Then in 1997 and 1998, immigrant communities really started to react more proactively. Immigrants came out and voted in large numbers in the 1996 elections. We started to see a restoration period in 1997 and 1998, which culminated in what we call the Fix '96 Campaign of 1999. In that campaign, immigrant rights advocates called for reversing or fixing all of the anti-immigrant legislation that was passed in 1996. In addition to the criminal provisions that this forum is dedicated to, there are a lot of government benefits issues that started to see a little bit of progress in terms of getting restoration of government benefits for some low income non-citizens. Today what we are seeing, aside from the kind of the end of the session flurry of activities in Congress in which we hope to see a lot of progress, is that immigrants are becoming more proactive. One example is our organization was able to develop a campaign called the Full Participation of Immigrants, as part of the Fix '96 Campaign calling for all of those changes in the 1996 immigration laws. Second, a lot of undocumented immigrants have become legal. Finally, we see proactive programs to support full participation of immigrants such as language programs, ESL programs, and bilingual ballots. We hope to make progress so that we are not just defending immigrant rights, but we are trying to expand the rights of immigrants. I think all the issues should be viewed in that light; we're not only trying to reverse, but trying to change the definition and the scope of immigrant rights.

I think the criminal immigrant provisions in the 1996 law were a tremendous blow; they were the pinnacle of the criminalization of the immigrant community. A couple of the specific problems, which I'm sure will be addressed at length later, include indefinite detention of over 4,000-5,000 immigrants, who are basically in jail for life because they are not accepted by their home countries.¹¹ Another problem is not letting immigrants know the consequences of their plea at the time of plea. If they plead for a year sentence or if they plead guilty and accept some sort of a settlement, they don't know the immigration consequences, such as deportation. Also, detention standards are not covered by the law. Although final standards are supposed to be in place this week, we haven't seen much consistency with respect to how detainees are treated. Another problem is language access. A lot of the detainees are subject to the AT&T contract¹², where only the deportation officers can initiate translation services. In addition, there are problems with illegal entry after removal. A lot of people are given deportation orders and when they get caught again, they are jailed for two to three years. So we're talking about 20,000 people on any given day being in detention, most of whom are in there because of the criminal provisions.

I wanted to end this by saying that I think there's a lot of work to do in the future. First, we must challenge the whole enforcement mentality that spans across all areas of immigrant related issues, whether it's government benefits or the criminal justice system or treatment of immigrants at United States borders. Second, I think that accepting this low standard of treatment for non-citizen immigrants is something we have to try to fix right away because it has ramifications across all sectors. Third, is redefining civil rights so violations of immigrants' rights are seen as civil rights issues. It's no longer based on segregation; it's based on language and it's based on status. The final point is that we need to encourage and be connected with

¹¹ A recent Supreme Court decision, *Zadvydas v. Davis*, 533 U.S. 678 (2001), has held that 8 U.S.C.S. § 1231(a)(6), authorizing the Attorney General to detain a removable alien indefinitely beyond the 90 day removal period, contains an implicit "reasonable time" limitation of six months.

¹² AT&T is the phone company that contracts with detention facilities.

grassroots activities. I was at a rally at Wackenhut¹³ last year, and there were only thirty people there. There needs to be more interaction between grassroots activities and policy, advocacy, and legal work.

Ms.

Morawetz: Our next speaker is Manny Vargas who is Director of the Criminal Defense Immigration Project of the New York State Defender's Association. He provides training for criminal defense lawyers and also runs a hotline for criminal defense lawyers who are trying to figure out how to navigate this law with their clients.

Mr. Vargas: I'm an immigration lawyer, but for the last four years, ever since IIRIRA became law, I've worked primarily with criminal lawyers who represent immigrants in criminal proceedings and with immigrants themselves accused of crimes and placed in criminal proceedings. So today I want to offer the perspective of how IIRIRA has impacted on immigrants in the criminal justice system. As you've heard, most of the attention in the courts, the media, Congress, and the agency has been on the retroactivity issue - the applicability of some of the harsh provisions of IIRIRA and AEDPA to those whose criminal cases were completed before the new laws, in some cases years or decades before enactment of these new laws. Concerns over such retroactive application of AEDPA and IIRIRA has been the primary focus of court litigation and advocacy efforts in Washington thus far. However, those of us who are involved in the criminal justice system and in current criminal cases have been seeing the prospective impact of these IIRIRA provisions, that is, how IIRIRA has been affecting immigrants charged with crimes in the three years since IIRIRA became effective. What I'm going to try to do today is give you some examples of IIRIRA's impact on immigrants in the criminal justice system today. I'm going to focus on three thrusts of the criminal provisions of the 1996 IIRIRA provisions: (1) IIRIRA mandatory deportation for certain criminal offenses including some relatively minor ones; (2) IIRIRA's broad definition of conviction for immigration

¹³ Wackenhut Corporation provides contract services to major corporations, government agencies, and a wide range of industrial and commercial customers. The company's security related services include uniform security offices, investigations, background checks, emergency protection and security audits and assessments. Wackenhut has an INS detention facility in Jamaica, New York.

purposes; and (3) IIRIRA retroactivity, not in the sense of application of these new provisions to people with past convictions, but in the sense of how IIRIRA affects people who are making choices in criminal proceedings now and in the future, knowing that the rules may be changed at some point in the future again.

(1) IIRIRA MANDATORY DEPORTATION — There are many provisions in IIRIRA, either alone or working together, that make certain criminal offenses, including pretty minor ones, into what are now called mandatory deportation offenses. The aggravated felony bar to lawful permanent resident relief from deportation¹⁴ is a primary example. It's also a bar to political asylum. This wouldn't be so bad if aggravated felonies were indeed aggravated felonies, but what the courts have been finding is that, not only doesn't the offense have to be aggravated, it doesn't even have to be a felony in many cases. The new definition of aggravated felony may include even a misdemeanor petty larceny offense or misdemeanor drug offense whether or not the criminal justice system deems the offense serious enough to even impose a day in jail. Now some of you out there who are immigration lawyers will be saying, "Well no, doesn't the definition require that there be at least a one year prison sentence for a theft offense to be an aggravated felony?" However, as was previously mentioned, even a suspended sentence of imprisonment where the criminal court is giving you very lenient treatment counts for that prison sentence requirement. So even if you don't get a day in jail, your petty larceny offense can be an aggravated felony. In fact, just a few weeks ago the U.S. Court of Appeals for the Second Circuit, the governing federal court of appeals for us here in New York, issued a decision in which it found that a Rhode Island conviction for theft of a small video game valued at ten dollars, for which the person received a one-year suspended prison sentence (not a day in jail), was an aggravated felony.¹⁵ This is a misdemeanor involving ten dollars. In addition, even with an offense that is not an aggravated felony there's what's called the "clock stop" rule. This involves the interaction of different provisions that IIRIRA put into law. There is a seven-year residency

¹⁴ I.N.A. §240A(a)(3) [IIRIRA 304].

¹⁵ 225 F. 3d 148.

requirement.¹⁶ If you commit an offense, even if it isn't an aggravated felony, within that seven years of required residence, that stops the clock so that you can't meet the seven year residence requirement.¹⁷ So even an offense that is not an aggravated felony can lead to mandatory deportation. How does this affect people in criminal cases today or in the future? There are many cases where immigrants and their lawyers are aware of the harsh immigration consequences now; these often disproportionate immigration consequences distort the factors that go into the choices a non-citizen defendant must make in criminal proceedings. Thus, even in cases where the prosecution's evidence is weak, where the non-citizen defendant insists on his or her innocence, the criminal lawyer may counsel and the immigrant may decide that pleading guilty is the way to go where he or she can plead to an offense that doesn't have the mandatory deportation consequence. That is, even if taking a case to trial may not risk much of a greater criminal penalty, if it may trigger mandatory deportation, some immigrants are discouraged from exercising their right to a trial to prove their innocence.

Take the example of a permanent resident who is in the house of a friend or family member when a drug raid occurs, who doesn't live in the house and may not have been found with any drugs on him, who may, in fact, be completely or at least partly innocent of the charges that have been lodged against him. However, he decides to plead guilty to simple possession to avoid the risk of going to trial and being convicted of a sale offense that would be considered an aggravated felony. This is how some of these immigration consequences can distort what happens in the criminal proceedings. In other cases, an immigrant facing mandatory deportation whether or not he or she goes to trial may decide to go to trial where they otherwise might not have done so. The point here is that the mandatory nature of deportation in many cases after IIRIRA means that there's no longer a safety valve - the possibility of a waiver of deportation to prevent miscarriages of justice

¹⁶ Eligibility for cancellation of deportation requires that the lawful permanent resident have accrued seven years of continuous residence in the U.S., I.N.A. § 240A(d)(1).

¹⁷ See I.N.A. § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (Supp. II 1996).

in these cases in the later immigration proceedings. The result is that the disproportionate immigration consequences are distorting the proper working of the criminal justice system. These consequences potentially lead to the innocent being pressured to plead guilty and to others going to trial where they would not otherwise have done so, thus leading to unjust and irrational results.

(2) **IIRIRA DEFINITION OF CONVICTION FOR IMMIGRATION PURPOSES** — IIRIRA includes an expanded definition of what constitutes a conviction, which extends beyond formal judgments of guilt to cases where a judgment of guilt is withheld but there is some finding or admission of guilt plus some penalty imposed by the criminal court.¹⁸ The broad interpretation of this definition by the agency includes even dispositions where the state courts have decided to vacate or expunge the conviction, perhaps for some rehabilitative purpose, with the intent to allow the person to reintegrate into society and not have a conviction on his or her record. The fact that the agency has interpreted this broad definition of conviction to include even such dispositions thwarts the states' goal of trying to promote the reintegration of ex-offenders back into society. One example of this are drug diversion programs - the drug treatment programs that are now becoming popular in the criminal justice system as an alternative to incarceration for individuals who may have engaged in criminal conduct due to a drug addiction. Under the IIRIRA expanded definition, a disposition involving an individual who agrees to a plea plus a drug diversion program with the possibility of having the plea vacated later upon successful completion of a drug program is now being considered a conviction for immigration purposes. This could lead to that person being pulled out of that drug treatment program, as I've heard has happened in a few instances, and being deported. This is a case where the federal immigration policy is thwarting the efforts of the states, as well as the federal government, to support these drug treatment programs as an alternative to incarceration.

(3) **IIRIRA RETROACTIVITY** — In IIRIRA, Congress made expressly retroactive several provisions, thus imposing new consequences for criminal convictions or

¹⁸ I.N.A. §101(a)(48) [IRRIRA 322(c)]

conduct.¹⁹ For example, Congress made the expanded definition of aggravated felony expressly retroactive to past convictions. What Congress has done in IIRIRA in expressly making it retroactive has led to problems in counseling criminal defense lawyers who represent immigrants and in counseling immigrants themselves on what the consequences of a particular disposition might be under current law. Well, how do we know that two years from now Congress isn't going to change the rules again? How do we know that two years from now the agency, the Immigration and Naturalization Service, isn't going to choose to interpret some new law in a way that maximizes its retroactive impact? It's made it very difficult for criminal lawyers and their non-citizen clients to make informed choices during criminal proceedings. This is, I feel, one of the most negative influences or effects that have come out of what IIRIRA did in 1996. The result is unfairness for immigrants in the criminal justice system who are unable to make fully informed choices during criminal proceedings with regard to the potential immigration consequences of criminal convictions because Congress or the INS may later change the rules on them.

So, there you have my three examples of the changes wrought by IIRIRA, all of which I think have negatively affected the criminal justice system and which need to be reformed.

Ms.

Morawetz:

Our next speaker is Dr. Margaret Abraham who is Associate Professor and Chair of the Department of Sociology and Anthropology at Hofstra University. She specializes in issues regarding ethnicity, migration, and gender. She has written about issues of domestic violence and been an activist on domestic violence issues in the South Asian community. She is going to speak to us about the specific problems that the 1996 laws create as a criminal justice matter in protecting the rights of victims of domestic violence.

Dr. Margaret

Abraham:

In my presentation I am going to focus on some of the negative consequences of the 1996 laws as they play out in domestic violence cases. In 1996 Congress established a new criterion, or ground, for deportability

¹⁹ I.N.A. §101(a)(48) [IRRIRA 321(b)].

of aliens who are convicted after entry into the United States of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect or abandonment.²⁰ This statute also makes deportable any alien who is enjoined by protection order and engages in behavior that is determined by the court as violating a protection order. This includes “credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.”²¹ This ground of deportability applies to convictions or violations of court orders after September 1996. This provision was part of the policy to protect battered immigrant spouses and their children, but momentarily I will show how this criterion is very problematic. The statute states, “. . . [T]he term ‘crime of domestic violence’ means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic violence or family laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government. . . the term ‘protection order’ means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.”²² Having said that, let me show the different ways in which this law is problematic.

One may mistakenly think that deporting an alien or an LPR²³ who is convicted of a crime of domestic violence may be a positive outcome as it would protect the victim or victims from future violence by the

²⁰ I.N.A. § 237(a)(2)(E) was added by § 350 of IIRIRA, effective for “convictions, or violations of court orders, occurring after the date of enactment of [IIRIRA].”

²¹ I.N.A. § 237(a)(2)(E)(ii).

²² I.N.A. § 237(a)(2)(E)(i).

²³ Lawful Permanent Resident.

perpetrator. However, simply putting distance between people is a very limited understanding and response to the so-called trend toward protecting the battered spouse and children. Let me begin by giving you two examples to illustrate how this law is problematic; it is clearly related to the context of the criminal courts.

The first is a case of a West Indian woman who was in a long-term relationship. I learned about the following case from Laura Fernandez at Steps to End Family Violence; she works solely with women who have been arrested and prosecuted for domestic violence crimes. This West Indian woman initially called the police, but when the police came she too was arrested as she had inadvertently caused her abuser an injury while fighting back against him. She pled guilty to this charge because her lawyer suggested that this was better than going to trial. Her plea to a lower charge resulted in having to partake in a mandated program at Steps to End Family Violence rather than going to jail. In this case, however, she could have gone to trial because there were a couple of witnesses. We notice that, in general, lawyers put pressure on their clients to avoid trials and the courts on their part want to dispose of cases quickly. As this woman is undocumented, she could be deported.

The second case is of a Chinese woman; I was told about this case by Julie Dinnerstein, staff attorney and Director of the Immigration Intervention Project at the Center for Battered Women's Legal Services. This Chinese woman was beaten by her husband and called 911 in the middle of the night. An officer came to the scene. She spoke primarily Cantonese, while her husband was bilingual. The police officer spoke English and communicated with her husband. The wife did not want the husband arrested, but he was arrested. He was arraigned within 24 hours, and, unknown to her, he filed a complaint against her. In the meantime, she'd fled to a shelter, but had called her husband for insurance information for a child who was sick. This phone call allowed the police to track her, and she was arrested and put in jail overnight. Sanctuary for Families took up her case. Although this Chinese woman explained her situation to the ADA, the ADA said her story did not make sense. He proceeded to prosecute both the husband and the wife. However,

the case against her was finally dropped as it did not occur within the allotted time framework under the speedy trial criteria. She was fortunate that she had good lawyers that prevented her from pleading guilty. She was a conditional lawful resident and, had the case not been dropped, she would have been deportable. This woman felt a great sense of shame for having gone to jail. She felt isolated by her community, which looked down upon her, and she told her lawyer that she wished she would have died rather than called the police.

Often victims of domestic violence are very vulnerable to the power and control not only of the abuser, but also of the police and the courts. The Illegal Immigration Reform and Immigration Reform and Responsibility Act of 1996 [IIRIRA] does not take into account cultural and structural factors and the complex ways in which the criminal justice system and the INS play out in experiences for aliens in the United States. It does not take into account how class, race, ethnicity, and gender all play out in the context of the criminal justice system or in the day-to-day lives of immigrants. As we understand the full negative ramifications of the criminal provisions of the 1996 immigration law amendments, differences in power, privilege, and control must be viewed as constructed around the multiple axes of citizenship, ethnicity, language, religion, race, class, and gender.

First, there is a problem when victims of domestic violence are arrested with the batterer in a dual arrest situation. A report prepared for the Connecticut Coalition Against Domestic Violence lists four typical situations: (1) both parties have committed family offense; (2) the victim has justifiably used force in self defense; (3) the defender files a false cross-complaint; and (4) there is, in fact, a wrongful arrest without probable cause. The possibility that a victim will be arrested is problematic on several grounds. First, it prevents the victim or other victims who hear of these situations, like the case of this Chinese woman, from calling the police again. In a way, it exacerbates the situation of domestic violence because when people hear this is what happens there will be more reluctance within communities to address issues of domestic violence in the first place. Second, it puts the victim,

who may have a language barrier, in the dangerous position of not being able to communicate her situation and of getting arrested. We know from reports of the problem of dual arrests. We also have to take into account the attitudes of the police in terms of race, ethnicity, class, and gender. We know that they influence the way they arrest the offender, victim, or both. Sometimes a victim is not able to communicate that she has used a weapon in self-defense or the offender, as we have seen, files a cross-complaint. Often victims don't have adequate information about the criminal justice system, are intimidated by the legal system, or are ill-advised to plead guilty to a lesser charge rather than go to trial. These are really important issues because often the victims don't know that if they do plea to a charge and they are convicted, they could be deported. Aliens who plead guilty frequently do not know that the criminal justice courts and the INS are two different bodies, or that once they have pled guilty a conviction for a crime will not only result in criminal punishment, but also deportation and separation from their family. Thus, the 1996 law is very punitive, and abused immigrant women are faced with double jeopardy both in terms of the criminal courts and the INS courts. We also have to ask ourselves what it means to deport non-citizen family members who are convicted of domestic violence in a country where an important part of immigration policies has been based on the principal of family reunification. What does it mean to their families in terms of economic support and social consequences for the lives of those relatives that remain here? Thus, we need to address the issue of what happens during arrest cases. Does this mean that if the lawful permanent resident pleads guilty and is convicted in the criminal courts that he or she should be subject to deportation by the INS while there is no such parallel process for citizens convicted of such crimes? Does this not demonstrate unequal power at the interpersonal level as well as in terms of the justice system. Is this not a double standard - one for citizens and another for the rest? Clearly, this is criminal injustice. I'll just end by saying that if we really want to bring about change we have to have more coordination in terms of the kinds of laws and the kind of information that is provided to domestic violence victims. They should not be encouraged to just plead

guilty knowing these kinds of punitive immigration laws.

Ms.

Morawetz: We will now turn to two of the central players in Washington - Bo Cooper, General Counsel of INS, and Congressman Barney Frank from Massachusetts. As general counsel for the INS, Mr. Cooper is responsible for issuing authoritative interpretations of the law for application by the INS. He's also an important player in determining the positions that the agency [INS] and the justice department take in litigation and in rule making and the positions they take with respect to legislative proposals.

Mr. Cooper: There's been such an astonishing flurry of activity on immigration issues on Capitol Hill lately that it's certainly kept us moving as quickly as we can trying frantically to keep up with it. Just in the last few days there have been bills passed on issues dealing with H1B Visas²⁴, and the requirements for the administration of oath for naturalization applicants and when that requirement might be waived.²⁵ Legislation dealing with trafficking and with violence in re-authorizing the Violence Against Women Act includes some changes that I think touch on some of the issues previously discussed by creating a new non-immigrant visa category [U visa] for people who have assisted in criminal enforcement against perpetrators of domestic violence.²⁶ There's also been a host of legislative proposals that are under quite live consideration. Of course, there's H.R. 5062, and the Latino and Immigrant Fairness Act (LIFA)²⁷, which proposed to enact what we call "parity provisions" that would extend to persons of many other nationalities the treatment that was accorded to Cubans and Nicaraguans under

²⁴ American Competitiveness in the Twenty-First Century Act, Pub. L. No. 106-313, increases the number of H-1 B visas available to bring in highly skilled foreign temporary workers.

²⁵ Disability Oath Waiver, Pub. L. No. 106-448, provides a waiver of the oath of allegiance, normally required for naturalization, for those applicants whose disability prevents them from understanding the oath.

²⁶ Subpar. (U) added to § 101 (a)(15) of the Immigration and Nationality Act (INA) by Sec. 1513(b), title V [Battered Immigrant Women Protection Act of 2000], div. B [Violence Against Women Act of 2000], Pub. L. No. 106-386 [Victims of Trafficking and Violence Protection Act of 2000], Act of Oct. 28, 2000, 114 Stat. 1464.

²⁷ Latino and Immigrant Fairness Act (LIFA), S. 2912, 106th Cong. (2000).

NACARA.²⁸ LIFA also would restore 245-I²⁹, permitting adjustment to local permanent residents of people in this country without requiring them to go outside the country, and move the registry date forward from 1972 to 1986. At least that was its original form, but that's under fairly active discussion on Capitol Hill right now. There's also been legislation that would alter our authority to use classified evidence to secure someone's removal under circumstances where the person whose interests were at stake wouldn't have the opportunity to see or respond to that evidence³⁰; that is a process that has struck many people as fundamentally unfair and has been the subject of a great deal of discussion. There's been legislation dealing with the Convention against Torture³¹ and our laws implementing it, and the way in which the immigration laws permit the removal of people who may have committed human rights violations abroad and are now in the U.S. I can't predict whether there's going to be any final action on these provisions or even if there will be a proposal for a hearing.

At this time of uncertainty, it probably makes sense for me to first give the administration's basic views on the 1996 laws. In many respects, the changes that were made to the Immigration Act in 1996 were from our perspective important and beneficial ones from the standpoint of better being able to enforce the immigration rules. I agree very much with the general points previously made on enforcement mentality, but it seems to me that the question of enforcement mentality can be addressed in a more nuanced way. It seems to us that there's got to be the ability to enforce, with some measure of discipline, the immigration rules, if at the end of the day the person that's been through the process has been found. . .³² However, it seems clear that the 1996 laws, in many ways, went too far and

²⁸ District of Columbia Appropriations act, Pub. L. No. 105-100, Title II (Nicaraguan Adjustment and Central American Relief Act), 11 Stat. 2160, 2193 (1997) (amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997)).

²⁹ 8 CFR § 245 (2002).

³⁰ Act ensures that no alien is removed, denied a benefit under the Immigration and Nationality Act, or otherwise deprived of liberty, based on evidence that is kept secret from the alien, H.R. 1266, Secret Evidence Repeal Act of 2001.

³¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, entered into force 28 June 1987, G.A. Res. 39/46, 39 UN GAOR, Supp. (No. 51), UN Doc. A/36/51, at 171 (1981).

³² Dialogue lost.

have created a number of situations in which there are apparent excesses where enforcing them in the way that they are written would bring about results that seem to be unjust. And so H.R. 5062 seems a very important piece of legislation as a means of ameliorating, to some extent, the effect of those 1996 laws. The administration is very supportive of the motivations behind H.R. 5062 and strongly supports the bill. In my own personal view, it seems problematic that that provision wouldn't deal with a lot of the things that seem to be the catalyst for the particular kinds of unjust results that you can see under the 1996 laws. It wouldn't, for example, alter the definition of aggravated felony to get at the excessive nature of the current legal definition. It wouldn't alter the rules on detention to give the immigration service greater flexibility in making decisions about when someone can be released and when they must remain in custody. Nor would it restore for the future the ability of an immigration judge to consider the equities of a particular case and absolve someone of the immigration consequences of a criminal act when that seems to be the appropriate result. So it seems to me that even if H.R. 5062 were to pass, although we strongly support the bill, it would leave unfixed a lot of the things that one might want to alter about the immigration terrain under the 1996 laws. That brings up the question of whether the administration and the executive branch are doing an intelligent job of implementing the legal regime that's in place. So I wanted to discuss some of the ways in which we are trying to figure out what can be done as an administrative matter to more intelligently implement the 1996 laws.

First, I should just mention that it was quite interesting when the 1996 laws began to take effect, and there began to emerge these spectacular examples of removal orders of people - someone who may have come here at a very young age, who may not even speak the language or have any other significant links with the country of nationality, who may be a lawful permanent resident, who may have developed all kinds of ties in the community. That person commits a crime, or maybe long ago committed a crime, that doesn't strike you as the most serious kind of crime, but falls clearly within the bounds of what is defined under the immigration laws now as an aggravated felony and

brings about very serious immigration consequences, even for lawful permanent residents. There'd be people interviewed on the news who none of us watching would think of as the kind of person that's subject to removal - the criminal alien. So many in Congress began to say, "Well, it's not that the laws are too harsh, it's just that the INS is not making careful decisions about how to enforce them." In many respects, that seems to me to be an inadequate argument. First of all, there's just the basic fact that when Congress writes a law, our job in the executive branch is to, as faithfully as we can, carry out the statutory instructions that are passed in the legislative branch. All of these cases that we're talking about are all cases where there's no question that the law that Congress wrote is the one that's being enforced. It's a fairly dramatic statement to say that the INS should, quite broadly, begin to make decisions about when to enforce those rules and when not to, and even if you accept that that's the right way for the executive branch to act, there are certain things that the Immigration Service couldn't do in its discretion. It can't admit someone who is inadmissible, it can't grant an immigration benefit to someone who's not entitled under the rules that set out the criteria for eligibility of whatever remedy you're talking about, and it can't release from detention certain kinds of persons. So, certainly not everything that seemed excessive in certain cases about the way the 1996 laws operated could be dealt with by the administration.

Nevertheless, it is quite true that the INS does have, just like any law enforcement authority, prosecutorial discretion - the ability to decide for almost any reason (if it isn't unconstitutional) when to enforce the laws in a particular situation. It would make sense for the agency [INS] to try to be as careful as it could in making those kinds of decisions, but there didn't seem to be either (a) a clear understanding that there does exist this prosecutorial discretion, or (b) any set of rules or guidelines about how those sorts of decisions ought to be made. So we've done two things in the INS. First, our office tried to make a definitive statement about what prosecutorial discretion means and what its boundaries are. Second and more importantly, the agency [INS] is now in the very final stages of putting together some guidelines that will help

guide the decision-making process of INS officers around the country who are making the decisions about when to enforce the immigration laws and when we ought to have, perhaps, a lighter touch. Those guidelines will, I hope, be issued in public in the next four to eight weeks, although it's often difficult to precisely control these kinds of things. These guidelines are obviously not going to lead to uniformity, nor would you want them to, because these sorts of decisions are so very fact-bound, but I think they'll draw, in large part, from the sort of guidelines that exist for US attorneys in making their own decisions about when to enforce the criminal laws and when not to. They will certainly take into account things such as when the person whose case is at issue is a lawful permanent resident, that ought to trigger a certain set of thoughts about whether it's appropriate to go forward in those kinds of cases or not. So that's an administrative development that I think you ought to look forward to in the next few weeks. Evaluate it and decide whether or not you think that we've accomplished something with the issuance of those guidelines.

Ms.

Morawetz: Congressman Frank has been a central player in all the efforts in Congress in the last two years to do something about these provisions. I think anybody who's watched the legislative process knows that nothing happens in Congress unless there is some person there who really cares about the issue; on this issue, he has been that person. Two years ago, he introduced H.R. 1485, which was a bipartisan piece of legislation that gained many co-sponsors, and this year he helped craft the compromise legislation, H.R. 5062, which was voted on by a unanimous voice vote in the House of Representatives. I think this is quite a remarkable achievement given the sub-committee structure for immigration issues that we have right now.

Congressman

Frank: I'm going to proceed chronologically; I have some disagreements with some of what's been said and the best way to do that is to put it in a chronological context. Let me just begin though with the point that I will then get back to - it's a lousy law and the problem that we have confronted, frankly, is that we've had too

much lawyering and not enough politics in trying to get rid of it. It is very easy to talk about how stupid this law is (because it is a really stupid law) and writing articles about how stupid a stupid law is satisfying, but it does not advance the political cause. Frankly, I am critical of the community of people who care about immigration because they have been better at critiquing the law than in helping us get the votes to change it. If, in fact, it was possible to criticize the law to death, there'd be a lot of dead, dumb laws. It is not, and what we need is the kind of political participation that people are too often unwilling to give us.

Here's what happened. In 1994, the Republicans took over Congress. They had been arguing that white, working class and lower-middle class and middle class men were being disadvantaged by three factors: (1) affirmative action, which meant that women and Blacks and Hispanics were taking all the good jobs; (2) welfare, because they said all the poor people were getting so much government money that there was none left for them - that's why taxes were too high; and (3) immigrants who were also taking all the good jobs that, presumably, the women and Blacks didn't get. All three of those arguments were demonstrably false. My favorite was the argument about welfare - the notion that the government was in trouble and taxes were too high because we were giving too much money to poor people. I would point out to people that, by definition, you couldn't be a poor person if anyone had given you any significant amount of money. Taking away all the money from all the poor people didn't do anything, and that's why welfare recipients and immigrants got whacked in the 1996 welfare law. When they went after welfare recipients in 1996, unless they were prepared to be even crueller than they were, there was no way to save money on welfare. Unless you were prepared to starve innocent children, you couldn't save money on welfare. So the AFDC parts of the welfare bill, according to the Congressional Budget Office, produced zero savings; that was the official result. The only way they got any savings in the welfare bill was by adding provisions that denied benefits to lawful permanent residents, who were not citizens, and that was terribly cruel. They got rid of that provision partly, but not entirely; we still have a food stamp problem. Then, of course, you have the affirmative action

silliness. We finally were able to persuade people that the reason auto workers and steel workers had lost their jobs was not because there were factories hidden away in the Midwest in which women and Blacks were now making cars. And then you got to immigrants. In 1995 and 1996, they passed a whole bunch of very bad legislation dealing with immigrants, and it was partisan. One of the fashionable things we get from some of the people on the left is, "Oh, there's no difference between the parties anymore." There is, in fact, a greater difference between the two political parties in most important issues today than there has ever been in American history. I just would caution you that the next time you hear people lament with regard to politics that things aren't as good as they used to be, remember that they never were. In fact, the legislation that so penalizes immigrants passed because the Republicans took control of Congress on a platform which included anti-immigrant legislation. Now, as it was pointed out, immigrants fought back. In 1996, Bill Clinton carried Florida and Arizona, for the first time for a Democrat in many years, because of the anti-immigrant reaction. Bill Clinton himself pointed out that he's the first Democratic candidate for president, since we've been doing ethnic statistics, to get a majority of the Asian-American vote. The Asian-American vote has been, mostly Republican, but in 1996, they voted more Democratic in self-defense. So we began to try and undo the 1996 horrors; we're talking significantly about the deportation part. At the time of the committee vote in 1996, we were able to defeat these provisions (changing the definition of aggravated felony and making them retroactive). However, the Republicans went into a conference, which never met. The rules, by the way, of the House and the Senate say that if the House has passed a bill and the Senate has passed a bill and conferees are appointed, the conference committee never actually has to have to a meeting. The only procedural requirement is that a majority in each house of those appointed to be conferees sign a report. That's what happened. We made them have a meeting; no amendments were allowed. They changed all the obnoxious provisions we were talking about previously in secret, without votes. They were then added to an overall omnibus bill that the president had to sign because they had all the

appropriations. Part of the problem was that, in 1996, what attracted the attention of a lot of immigrant advocates was something called the Gallegly Amendment, which would have implemented the California proposition denying public education to the children of people who were not here legally (a totally outrageous idea). The cops helped us defeat that by saying, "What the hell do you think? We want more kids out in the streets that aren't in school?" So the Gallegly Amendment was dropped at the President's insistence, but unfortunately he spent so much energy on the amendment that he got this other crap.

One of the difficulties I have with some of my colleagues is that they don't conceptualize well. You tell them that things are going to have terrible consequences and they can't conceptualize that. You have to wait until the terrible consequences happen. Then when they happen, they are ready to undo some of them. We told them, for instance, that if you cut off benefits to lawful immigrants, particularly elderly people, it would be terrible; some of them would probably die, either through suicide or through adverse circumstances. That, in fact, happened and after some people died, they changed the law to begin to restore benefits. We also told them they would be splitting apart families; they would be deporting guys who got into a bar fight at the age of twenty, who came here from Portugal when they were two and don't know anybody in Portugal and don't speak Portuguese, and who have now straightened out their lives, stopped drinking and had a couple of kids.

Now let me express my partial difference with the INS here. What happened was this. The INS was terrified. Understandably, but unfortunately, they should not have reacted as they did. What Congress said was, "We are going to take away all of your discretion." The bill as passed purported to take away prosecutorial discretion. The purpose of the bill was to say to the INS, "Deport them all." It is none of your business to say, "Stay here, or not stay here. Get rid of all of them." The INS should have said, "You can't make us do that." The INS should have said, "We always have prosecutorial discretion." No law enforcement body in the history of the world has ever enforced every law against everybody. But in the early stages, the INS was

terrified and they did go and scoop up some people whom no rational person would have scooped up, because they were afraid of Congress yelling at them. Next, the horror stories came out. The first reaction, as Mr. Cooper said, was that some of the members of Congress who supported a bill which had the very purpose of telling the INS not to use any discretion, then criticized the INS for not using the discretion which they had taken away. I went and said, "We've got to pass the bill." The first response of the Republicans who passed the bill, Lamar Smith of Texas³³ in particular, was, "Oh no, it's the INS's fault. They should have exercised discretion." So we negotiated out. We drafted a letter back and forth, because I was glad to have them affirm the principle of prosecutorial discretion, even though it should not have been available for them to get themselves off the hook. But we now have many of the Republican leaders in the Congress on the letter that we all signed, which reaffirmed prosecutorial discretion. So in the future, the INS now has a mandate from Congress to use some common sense prospectively. Retroactivity is a little bit more of a problem than prospective cases because it is hard to use common sense retroactively. Those people are already out of here. However you can prevent prospective injustices because the INS is now able to not go after people who should not rationally be gone after. But as Mr. Cooper also pointed out, that is not good enough because you still have the inadequacies of the law. I must say I was particularly astonished to hear Mr. Cooper on behalf of the INS say that 5062 hasn't gone far enough, because frankly, if it was up to the INS, there wouldn't have been a 5062. We wouldn't have anything. The INS was ready to write up and tell us not to pass it because they didn't like the part about letting people come back home, and they had to negotiate that out. If the INS thinks it should be changed further, where in the hell is your bill? What have you done about it? Nothing. Frankly, it is political grandstanding by the INS. I agree that 5062 is inadequate. It is only the best we can get given the Republican control of Congress. Frankly, having worked very hard to get it that far with no help from the INS, I do not take it with good grace when the INS

³³ Lamar Smith of the 21st District of Texas.

says that it is not good enough. Why didn't you do something better? Where the hell were you when I was trying to do something better, and where are you now? So yes, 5062 is clearly less than many of us would like. I filed the bill that went far beyond this. John Conyers³⁴ said, "Nobody that I know of thinks 5062 is the best," but the Republicans still control Congress. And the fact is, with not a lot of political support generated by people, this is the best we can get. We got it partly because Henry Hyde³⁵ agreed to override his sub-committee chairman, probably because Mr. Hyde has very close relations with the Catholic Conference through their joint interest on dealing with abortion. He was responsive because so many of the people whose families have been split apart have become the responsibility of the Catholic Church. But, sure this is not a great bill. It is better than what we have on several grounds. If we get this bill passed, it is better than what we have for these reasons.

First of all, as Nancy correctly said, it is an acknowledgment of error, and that is very important. Members of Congress don't like to acknowledge error any more than anyone else does. So if we can get it passed, it is an acknowledgment of error, and in particular, it is an acknowledgment that the principal of retroactivity was wrong. I think if we get this bill through, and even if we don't, people have been horrified to know that you can do these things retroactively. That is helpful.

Secondly, now that it is established that the INS has prosecutorial discretion and it is willing to use it, I am prepared to argue to the INS that they must use that discretion, even if we don't get this bill passed. It is paramount that the INS use their prosecutorial discretion, even in those cases that aren't covered by the bill. For instance, minor drug possession cases are not covered at all because the Republicans wouldn't have let the bill through, and we didn't have any way to force their hand. In the House, you can't bring a bill up if the leadership doesn't want to. If we had gotten to vote on this we might have been available to win, but under the rules of the House of Representatives, there is no way to force votes on issues that the congressional

³⁴ Congressman John Conyers of the 14th District of Michigan

³⁵ Congressman Henry Hyde of the 6th District of Illinois

leadership doesn't want. So we had no option but to negotiate those sections of the bill out. So I am hoping the INS will, as they said, enforce this in the future with that understanding. But let me get back now to the most important point. This bill hasn't passed yet. It passed the House, but it has not yet passed the Senate, and it won't pass the Senate unless we get some more political help. In particular, anybody who has any ability to talk to Republican senators needs to try to help. Senator Kennedy³⁶ is doing what he can to get it through, but he has got other things on the agenda: the NACARA Equity - the changing of registry date for amnesty.³⁷ Those are very important to the Latino community in particular, and what we have encountered is some opposition on the part of some of the Republican leaders in the Senate. So we have a two-track situation, and I appeal to anybody who can do anything about this. First of all, the Administration has to be persuaded to put this on the "must-list." That is something that must be done before we adjourn. It is probably okay for them to do that. The general rule is that two out of three should win in this situation. The House did pass it. If the President gets behind it, even if there is some opposition in the Senate, it's of a small enough group, so he ought to be able to get it on his must-list. The Appropriation Bill that funds the Justice Department and, therefore the INS, hasn't yet passed. So this could be appended to the Appropriation Bill, as legislation is often appended to the Appropriation Bill. Senators, particularly but not exclusively Republican senators, should be persuaded to talk to Senator Hatch³⁸, the Chairman of the Senate Judiciary Committee, and Senator Abraham³⁹, the Chairman of the Senate Judiciary Sub-committee, to get them to move this forward. I have had to work very hard on this bill and I have appreciated the expertise I have gotten from the community of people who know about immigration, but with some exceptions. The Catholic Conference has been very helpful on this, because they were well positioned to be. The political following, though, hasn't really been there. There has been a tendency for people to sit back and wait. I must say I

³⁶ Senator Edward Kennedy of Massachusetts.

³⁷ See I.N.A. §245A.

³⁸ Senator Orrin Hatch of Utah.

³⁹ Senator Spencer Abraham of Michigan.

really regret this. I was told by some people, "Well, we can't start mobilizing in support of the bill until we see what it looks like." But the problem is you can't tell what it looks like until you get the support, because a bill that is drafted up before the support isn't going to be as good as a bill that comes with the support. It should be an ongoing complementary situation. Part of the problem here has been that this bill is so terrible and people's unhappiness with it was so understandably great that we didn't get the kind of political support we could have gotten. As inadequate as 5062 is by any rational measure, it still may be more than we can get and I think getting it is an important first step.

Lastly, people have asked me what can we do for the future. I am going to give you an answer I increasingly give people today. One of the most misunderstood arms of social action in America today is the importance of partisanship. I will tell you, on this issue, as on other issues, if the Democrats take over the House we will fix the damn thing. If the Republicans keep the House, we almost certainly won't be able to. And if the Democrats take over the House and the Senate we will very easily fix it. But if the Republicans keep control we may get 5062, and we may not. We may not even get that much. It has unfortunately become a kind of partisan issue. Part of the problem is that some of my Republican friends think that the more immigrants that are here, the more that will become citizens. And the more that immigrants become citizens, the fewer votes they will get. They are not terribly interested in increasing that risk. But the single biggest influence over what will happen to immigration legislation next year is going to be partisan control of Congress in November. Thank you.

Ms.

Morawetz:

Before we turn to the affected family members who are going to speak, I just want to ask one follow up question to Mr. Cooper and Mr. Frank. The issue of prosecutorial discretion has come up, and I want to ask you how you see prosecutorial discretion working with people traveling? Many immigrants, for one reason or another, will travel at some point. They will go to the Canadian side of Niagara Falls, or they will go to a family funeral, or they will go to visit a sick parent, or they will go on business, on a trip. I heard the

Administration has taken the position that when somebody returns from such a trip it is an admissibility decision, and therefore it's not the kind of thing over which you have prosecutorial discretion. In my clinic we represent somebody who went on a trip to see a sick mother, and he wasn't even deportable before he left. But he was inadmissible when he came back, and then spent several months in detention even though he is eligible for relief from removal. Now that person was not even deportable. You take somebody else who is deportable, but gets the benefit of prosecutorial discretion, and it strikes me they are also in a very bad situation. So, to me, that suggests that prosecutorial discretion really can't fix anything really, except in the very short term.

Congressman
Frank:

Well, let me refine that. I agree with you in part, but I disagree with what your point stresses. You say prosecutorial discretion can't fix anything in the short term. Yes it can, because it keeps some people here, and that fixes something. You have to stop over-arguing and stop denigrating real advantages because they are not everything. I represent a lot of people who don't travel, or may even want to travel. I can say to them, here's the deal, you can't go back to the Azores for the Santo Christo festival and you can't go back for the christening of one of the kids, but at least you are not going to be deported. They would not consider that a little thing, and it is not good to denigrate that. So, there will still be a problem with admissibility, and that's one of the reasons why I want to get the law passed. But please don't say that it is not important that these other people are not picked up. This is a mind-set that makes it harder for us to get anywhere. If you tell people that this isn't good enough and that it is not a big deal, then it is kind of hard to get them to go to the barricades and fight for it. That is part of what I think has happened. We haven't got a lot of people fighting as they should because they were told it really wasn't a big deal.

Mr. Cooper:

Yes, I agree with you entirely that those are serious limitations on the ability of prosecutorial discretion to be the whole fix. However, it does seem quite important to decide not to remove someone who is otherwise removable. But yes, there are clear

limitations. I don't see how you could read the law other than to say it is an admissibility issue when someone appears at the port of entry seeking admission. Even if they are a lawful permanent resident, in which case the most that the Administration could do as a matter of prosecutorial discretion is simply to parole a man. Then someone will trade a very steady immigration status for something that is essentially nothing, except official sufferance of the person's physical presence here. So yes, I can't underscore enough that there are limits to what can be done solely through the exercise of prosecutorial discretion.

Ms.

Morawetz:

We have three people who are from families that are affected by the law who are here to speak with us. I first invite up Aarti Shahani, who emigrated here with her family from Morocco when she was a baby, is now a citizen and recently completed her third year at the University of Chicago where she is majoring in Anthropology and Political Science. This year she is back in New York to help her family handle the legal, emotional and financial stress of her father's expected deportation to India, which was the country of his birth.

Aarti

Shahani:

My father and uncle used to run a wholesale electronics store. In the summer of 1996, the State of New York brought a case against both men for improper cash transactions. For two years my family tried to fight the charges, but in May 1998 both men pled guilty after consideration of the costs. They could not afford their attorney's trial fees. In exchange for their plea, they would spend a relatively short time in jail and then return to us, their families.

The court agreed to sentence my uncle and father consecutively rather than simultaneously, on the assumption that one man would go to jail only after the other one was out and running our family business. No one treated seriously the possibility of deportation. My uncle was incarcerated first. On the day of his release from New York state jail he was taken directly into INS custody. My uncle did not contest deportation despite his desire to live in the United States because the INS

would not grant him bond, and he was afraid of the conditions under which he would have to fight removal.

Unlike all other U.S. courts, the INS does not provide public defenders. After only a few days in custody my uncle was moved from New York to Baltimore, as the INS can move a detainee from one coast to the other without notification. My uncle had to sleep on the floor of an overcrowded Baltimore cell, and received no treatment for the medical problems about which he informed INS officials. He cried to us on the phone because of the pain. Even after submitting to removal, he remained imprisoned for two months, as the INS took time to process his case. My uncle spent an extra few days in jail because when he was supposed to take his international flight to India, a country in which he hasn't lived since 1970, the INS officers were a bit tardy and made him miss the flight. His removal should have come as no surprise. Mohawk Correctional Facility alerted the INS to my uncle's deportability at the beginning of his state incarceration, but for some reason my family was not forewarned. Perhaps with a few more months notice we could find a competent immigration attorney, or even made proper living arrangements for him to live abroad. Instead, his wife and son hurriedly sold their house and followed him to India.

My father is now at Riker's Island⁴⁰ and awaits the same deportation process. He spent the last few weeks before his sentencing in our backyard admiring the house that he worked ceaselessly to buy for my brother, sister, mother and I, and also playing with the dog that he might never see again. My father has been a permanent resident since 1984, having no criminal charges against him until his arrest in 1996.

When we first came to this country, he and my mother skipped meals and worked seven days a week, including Christmas and New Year's to save some money for us. My brother, who is sitting right over there, was then twelve years old, and he contributed to the family income by delivering newspapers every morning before school. We made the Dream despite our rough start.

⁴⁰ Riker's Island Correctional Facility in New York City. Note that my father was released from Riker's in May, after serving eight months of his sentence. He went into INS custody, but has since been released from mandatory detention. He is currently the subject of removal proceedings.

In Flushing, Queens, our first home in America, my mother was the president of 160-family tenant association and also the board member of an American Friend Service Committee associated Community Conciliation Center. My father eventually gained the confidence of enough local business people to open our store. Roopa Enterprises Incorporated survived for eleven years in a highly competitive electronics wholesale market, where the profit margin was about four percent. The family business enabled my siblings and me to not only be comfortable, but also ambitious.

My brother received his Bachelor of Science degree from Boston University in 1994. He is now a Computer Programmer. Last May, my sister graduated from Mt. Holyoke College with a degree in Political Science and Economics. She now works for the law firm Skadden, Arps. I have completed my third year at the University of Chicago, where I study Anthropology and Political Science, but because of my family's immigration problems and associated financial difficulties, I cannot return to school this year. So I am taking a year off and working at the Coalition for the Homeless in New York.⁴¹

Although the rest of us are U.S. citizens, my father never naturalized. He was too busy working to bother with the bureaucratic run-around of the INS, a hassle to which any immigrant can testify. Dad would not have pled guilty in 1998 had he known the real cost of his conviction. His attorney explained to us that dad stood a very good chance in trial. Dad is clearly no threat to society. He is sixty-one years old, depressed and getting older rapidly. He has lost an extraordinary amount of weight since the beginning of his legal problems. A while back he was hospitalized for several weeks with a fever of over one hundred and three degrees. Every so often he will say something unintelligible or forget something like our zip code. We cannot help but wonder whether these slips are signs of something more severe than stress. We also worry that he may suffer a stroke or heart attack while he is away from us. The

⁴¹ My internship at the Coalition for the Homeless ended in February 2001. I am a Coalition volunteer, but now have three different jobs: I am the New York area organizer of Citizens and Immigrants for Equal Justice (CIEJ), an intern at the Immigrant Defense Project of the New York State Defenders Association, and a Software Support Specialist at a NYC law firm.

possibility is not altogether outrageous. Even the judge in my father's case recognizes that dad has been by and large a good and law-abiding man. The judge did not want dad to go to jail and said about him and my uncle during sentencing "[Namdev] and [Ratan Shahani] have paid an exorbitant price in the infinite scheme of things for a nonviolent crime committed by men in their late fifty's or early sixty's as their first offense." Even after dad pled guilty in 1998, the judge postponed his sentencing four times over the course of two years. The past spring we asked that the judge postpone sentencing because my uncle was being deported. Dad had to quickly liquidate the family business and therefore could not make it to jail. More recently we asked for an extension because dad had to have all of his teeth extracted and dentures put in.

All these details about my father's poor health and admirable personal history and my family's active community-oriented life in the United States remain irrelevant. Because dad was too preoccupied with work to file some INS papers and too ignorant of U.S. immigration laws to worry about deportation back in 1998, my family must face a punishment that no U.S. passport holder would have to face for the exact same criminal conviction.

While the retroactive application of IIRIRA is a glaring example of injustice, 1996 is not a magical date. Deportation is a cruel and unusual punishment for thousands of non-citizens and their citizen family members. Most legal residents facing permanent expulsion from America cannot even present their cases before an Immigration Judge. I learned in elementary school that a day in court is not a pardon for criminals. It is a basic right. I hope that our nation of immigrants will one day restore this right for families in removal. Thank you.

Ms.

Morawetz:

Beverly Taffe, our next speaker, immigrated to this country from England in 1981. She is a citizen, lives on Long Island and teaches third grade here in New York City. She also teaches young adults in a GED program. Her son has been ordered deported. His case is currently on appeal in the Second Circuit.

Beverly
Taffe:

Good evening. Thank you for inviting me. I feel very

honored to be here and I am a little nervous, but I would like to tell my story. It has been almost five long years. As Nancy mentioned before, we came to this country in 1981. When I came my son came with me. He was three years old at the time. I was very excited to be here. I was very excited at the opportunities that would be open to me and I took advantage of those opportunities. I became a New York City public school teacher. My son Earl, like I said, came here when he was three years old. He is a good student. He was always a good student. He is a very talented writer. When he became a teenager, of course, he went through the turbulent years. He was not a trouble-maker and he never got into any fights at school. However, I always said to him, be careful what you do. Be careful who you hang with. Anyway, one night I got the phone call that my son had been arrested. I said there must be some mistake. They said no, you need to come down to the Precinct. Anyway, when I went there I found out that my son was apparently arrested for sale of a controlled substance. When I saw him I said, "What's the matter with you? What's going through your mind?" He said, "Mom, I didn't do it." I said, "What are you talking about?" He said, "They said I had marked money." My response to him was, "What the hell is marked money?" Excuse me, but I never had any dealings with the police, the courts, anything before in my life. Our family has never had anyone arrested for generations. This is the first generation thing, so I couldn't understand what was going on. Anyway, he said, "They said I had marked money." And I said, "What's that?" He said, "\$5 marked money. I made a sale to an undercover cop." He said, "Mom the only money I had on me was the money that you gave me." I said, "What happened?" He said, "They took us all." I said, "Who's all?" He said, "All of us, my friends. We were hanging out and they just took us all in this van and then they told me that I had marked money on me." Anyway, we had to go to court of course. We were appointed a court attorney and the options that we had were that we could go to trial or we could take a plea. If we took a plea, the lawyer told us he would probably get a light sentence, and if we went to trial and lost the case, it could be a very long sentence. So my son opted for the plea. He was sentenced to four months in Rikers. He did his four months. At the time

my son was seventeen going on eighteen. While he was there he got his GED.

Four months. It was the first time that he and I and his younger brother had ever been separated, so we were really looking forward to him coming home. On the day that he was due to come home, I was getting ready to go and pick up my son. He called me and said, "Mom, I am not coming home." I said, "Well, what's the matter? What did you do? What's going on?" He said, "Immigration is here to take me." I said, "Take you? Take you where?" He said, "They are going to deport me." I said, "Deport you for what?" I said, "There must be some mistake. I am coming down to the jail." Anyway, when I got there I found out that he was taken by the INS. The whole time I am saying there must be a mistake. He is a legal resident. He has been here since he is three years old. This must be a mistake. Well, I didn't know anything about the laws, and then I found out about the 1996 laws.

My son was convicted in late 1995. When he came out in '96, these laws had been passed. We were looking forward to him coming home, but he was taken into INS custody. He was in New York for a few days, and then he was sent to Louisiana, Oakdale. He was there for about ten months, and with the help of very good immigration lawyers we were able to get him home on bond. He was home for about four months when we received a letter about some change in the law. They said that he had to go back. It was very hard for us but he went back. I think what sticks out most in my mind is the day we had to take him to the airport for him to go back to Louisiana. I know he didn't want to go, but he was brave. I said, "Go, because all of this will be straightened out and you will be back home." So he went back. What sticks out in my mind is that his younger brother and him are very, very close. He cried himself to sleep that night. My son was in Louisiana for about another two years. We have been fighting the case ever since. With the help of some very, very good lawyers, he is now home again. But it is not over, and we still live constantly, every day, in fear wondering if he is going to get another letter saying that he has to go back. When will this end? He is currently home. He is doing very well. He is working. He recently tried

to get into college, however, because of the immigration issue, he was not able to get into college.

The only thing that keeps me going each day and keeps our family going each day is that every day I pray that this will end. I hear a lot of talk. A lot of legal talk. A lot of legalities that I don't really understand, but the only thing I understand is the human side of things. I understand what other families like myself has been through. When all of this happened I became a member of an organization called "CIEJ:" Citizens of Immigrants for Equal Justice. That organization is a support group, and I have met people from all over this country that are affected by these laws. Thousands of people. Some that actually got deported. Citizens, American born citizens, that actually left the country to be with their loved one that was deported. I have met families that parents, mothers and fathers have been deported, or are in detention and have been there for three, four, five years, whatever, and all of this time it's the children of those people that are being affected.⁴² She needed medical attention. For some reason she didn't receive that medical attention. Her children and her husband are here. She died of whatever medical problem that she had while she was there, and my heart goes out to that family. I feel fortunate because right now my son is with me. I don't know for how long. I'm hoping it's forever. And I pray, like I say, I pray everyday that the people that can make a difference and can make amends, that they will look into their heart and look at it as a human side of things, not a legal side of things. Not all this legal talk. Just look at it on the humanistic side of what it's doing to families and individuals, and find it in their heart to make the change. I would also like to say that I believe that in this great country that there will be a change and that my family will be able to stay together. Thank you very much.

Ms.

Morawetz:

Lilly Carreras is an immigrant from the Dominican Republic. She's completed three years at John Jay College of Criminal Justice and has taken this semester off to help her family through this situation.

⁴² Dialogue lost.

Lily

Carreras:

Thank you. I don't have any prepared cards. This is very recent, so I can articulate and tell you what happened. It all started back in 1985, when this law wasn't effective. My mother was working in a factory like a lot of immigrants do, just to earn a living. She had a toothache and somebody gave her painkillers, a couple of penicillin and the like. There were five in total: a couple of penicillin and a couple of painkillers. She was walking down the street, got stopped. They searched her, found it, and found her in possession of a controlled substance because the prescription wasn't hers. This happened in New Jersey and it was considered a violation. She signed. She got a suspended sentence of thirty days, I believe. A suspended driver's license and paid a fine and she was on her way home. She didn't spend any time in jail, and from there on she traveled back to the Dominican Republic. She got scared. She was very embarrassed, very ashamed. She just took her stuff, took her children, my brother and I, and went back home. She traveled back and forth and in 1991 she got married. In 1995 she received her green card. She became a legal resident. She immediately started working, learned the language, and became a home health aide. Later on she got her New York State license and became a nurse's aide, and she is now at a hospital in the Bronx. In 1995 they granted her a green card. They requested some information about what had happened previously and the precinct sent the letter to INS explaining the problem, and she received her green card with no problem. In 1998 she traveled back to visit her mother, who happened to have lung disease and was very ill. She traveled to visit her mother. When she tried to come back into the country, that's when this whole nightmare started from the beginning. It was the questions. We were at the airport waiting for her. And what they kept saying was, "Don't worry, she'll be out in three hours. This is customary. This happens. This is a Friday night." This was a Friday night. Had we known she was going to be taken into custody, we could've found an attorney. But because they said don't worry about it, she'll be out in three hours, it was already 5 o'clock. She spent the night there. She was transferred to Brooklyn where I believe they keep them stationery. This went on. We tried to

find attorneys. She was ordered deported. The judge that ordered her deported said he felt very bad. He said that there's nothing he can really do, but she should become a poster child for change. He granted time to give the attorney time to find something to do, but unfortunately the attorney was inexperienced in criminal immigration, so that's where she got ordered deported. Finally, we got a really good attorney that knew what to do. He got a habeas corpus, but not until after my mother had spent three months incarcerated. They didn't want to grant her the bond. She came out. She's here with me. I'm sorry, this has been very hard in our family. She's a single mother with two kids, myself and my brother, who is eighteen years old and goes to Katherine Gibbs for computer programming. I have attended John Jay College of Criminal Justice for three years. This has put a financial strain on our family. But we can go ahead and work, so we can work hard to pay this attorney and prove that my mother is not a criminal. She has only come to this country to work ever since she can remember. And because of a toothache, because of painkillers, she is going to have to go back to her country. I have a three-month old son, her very first grandchild. She almost missed his birth because she was in there, incarcerated. I really don't think it's as hard on me as it has been on her. If you hear her side of the story, if you hear her explain it, what she has gone through does not compare. She's been strong throughout it, but I know inside this is destroying her. It has destroyed our family. Not only just the fact that she has been there, but the fact that she thinks her family does not believe that she hasn't done anything wrong. They actually think she has to have been involved in something. The government would never send you home if you haven't done anything wrong. I understand that there are laws, and laws have to be followed if you have killed somebody, if you have harmed somebody else, if you're a danger to the community. But a person that had painkillers for a toothache is going to be sent home. I believe that's a little too much. That's just gone far beyond the line. I think that if the 1996 laws can go back, and they can create a law that can go retroactively, what is to say they can't create a law that's going to affect even citizens, saying, "Oh, from this day on, anybody that ever ate hamburgers back in the days is going to jail." I just

feel, I just think it is outrageous. I apologize for getting in this nervous state. It's just recently happened. My mother's been out just a few months and we're glad to have her back. It's very hard to know that she's here today and we don't know about tomorrow. We tried to vacate the conviction, but since it's been fifteen years, there's a limit of only before five years. Since it's been fifteen years, they say, "Well, you have to prove this. You have to prove that." So they're putting them through the run-around. We also appealed the order of deportation, and we're just waiting. Waiting to see on HR6052. Waiting, to see on any new legislation. Waiting to see if people from INS can say and see that this is hard on certain people that are not here, that haven't been convicted of any other crime, that haven't had any problems with authorities, and just right the wrongs that 1996 has caused.

Ms.

Morawetz: As you could see we had a very full program. I wanted to ask the people here on the panel if they wanted to respond at all to some of the comments that have been made to other panelists.

Mr. Cooper: I'd like to take a moment to respond to some of the comments that Mr. Frank made a few moments ago. With respect to 5062, yes, it's entirely correct that when the administration was formulating its position on the bill, the INS expressed concerns about the portions that would call for bringing people back into the country. As you know, those discussions resulted in the administration giving support to that as well as other aspects of the bill. But that said, it seems to me that when you go and change immigration laws in the way that you think fixes some policy flaws that existed under the prior regime, that does not necessarily mean that the natural necessary part of that fix has to be going back and undoing the results that took place when that was in fact the legal regime. It seems to me, that to have raised those issues in the process of formulating a position is entirely legitimate, even if you come out in a different position. To say that it's grandstanding for having raised that issue but nevertheless supporting the bill and then nevertheless thinking it would make sense to have legislative adjustments of the earlier points that we're talking

about, doesn't seem to me at all to be grandstanding. I thought that was an unnecessarily severe comment.

Congressman
Frank:

I thought it was unnecessarily kind to you frankly. Let me make clear what Mr. Cooper just said. Part of the bill, which I thought was very important, was to retroactively get rid of retroactivity. We already have people who have been deported. Families have been broken up. One of the things I worked very hard for was to allow people who were unfairly deported to come back home. That's what you clinically describe as "wrongs under a prior regime," and you change the regime. The fact is that the INS did not want that to be part of the bill, and they were overruled by other parts of the administration. For the INS to have responded so bureaucratically was in fact outrageous, and you just reinforced that. People in the INS said, "Well, those wrongs happened in a prior legal regime. Why go through all the difficulty of undoing it?" Because human beings have been separated unfairly from their families. The statement of administration policy which came forward did raise some objections to that, and there were earlier versions that raised more objections, and so I am very critical of the INS position on that issue. I think it is grandstanding when on the one hand the INS has objections and internal administration discussions as to our ability to bring people back who were unfairly deported, and then on the other hand the INS says, "Oh! But the bill didn't go far enough," when they haven't lifted a finger to help us. That's what grandstanding is. I have been there. The INS didn't lobby for this. The INS didn't make any strong testimony for it. You told me the INS thinks we should go further. Where is the draft legislation within the administration? I haven't even been able to get the administration to put this on the must-list. Has the INS gone to the President? Has the justice department gone to the President and said, "Don't let them adjourn without this." I have no evidence of that. I have been trying to do that. I have been mobilizing as much as I can to get it. So, yes I agree that the bill should go further. That's easy. Everybody knows the bill should go further. What's hard is to get us at least this far. To this date, the INS gave us a grudging approval of the bill after having fought over the retroactivity. Maybe I don't know

something, but will you tell me what efforts the INS has made to get this bill passed.

Mr. Cooper: There is a load of technical work that the INS has done in support of all of the-

Congressman

Frank: I did not ask you about technical work. What have you done to help us to get this bill passed? The INS knows how to lobby. Have you told the administration to put it on the must-list? Have you lobbied members of Congress to do this? The INS can do that. I have not seen any effort on the part of the INS to get this bill passed. Have you told the administration that this is important and ought to be in the final package?

Mr. Cooper: The answer is no.

Audience

Member: I'd like to ask a question. I am a little confused. We talk about the election—that with the prospective election of a democratic Congress that things will change. We have a democratic president, and the INS and the justice department are under the democratic administration. Is there a conflict between the Democratic Party and the democratic elected officials of Congress? They are not on the same wave lengths. We arguing against ourselves. It's a house divided.

Congressman

Frank: Let me respond. In the first place, the fact remains unchanged that this happened because the Republicans took over. The President would not have signed this if it was a separate bill. In fairness to the President, here's what happened. The Immigration Bill, that this outrage is included in, never was voted on finally as a separate bill. In fact, when we voted on it, these obnoxious provisions weren't in it because we had defeated them in committees. What they did in 1996 was to have an omnibus bill which included many of the Appropriations bills, which were important to keep the government going. They added this to the overall bill. The President could have vetoed it only at the cost of vetoing the entire Appropriations Bill for many things. He did that year succeed in making a back down on an amendment that would have denied the right of children of people who were undocumented to get public education, so in that sense, the President was on our side but got overpowered. I am critical of the

INS's initial response to it. But in fairness to them, they were terrorized by a Congress that had said to them, "Don't you use any discretion." It is hypocritical for Congress later to say that they should have used discretion. But the other point is that at this point, if in fact we get a democratic Congress, we will be able to repeal this.

Ms.

Morawetz:

I would like to just ask a question having to do with another kind of initiative that is possible to the administration. There is a possibility of law of being passed in Congress, and there is the possibility of prosecutorial discretion, which is obviously some real relief. I didn't mean to say it was no relief at all, but there is also the question of how the INS interprets the statute. Do you interpret a youthful offender adjudication as a conviction as you did until the BIA⁴³ said no?⁴⁴ Do you interpret a vacated conviction as a conviction as you did until the BIA just said no, in a precedent decision?⁴⁵ Or do you interpret the laws to be fully retroactive? You will not observe the Landgraf presumption⁴⁶ against retroactivity even though the presumption reflects the thinking of many people in Congress.

Congressman

Frank:

You're letting Congress off the hook there. The House has said that, but the Senate hasn't. Don't let Congress off the hook. You press them, but we are the ones who put retroactivity into this, and the Senate hasn't yet gone along with taking it out.

Ms.

Morawetz:

Well, that's right, but the idea of Landsgraf construction is that unless Congress is really, really clear that it wants to do something, you are supposed to presume that it is not retroactive. What we have instead is sort of the reverse. Not that it was intentional, but it is done in this conference and certain provisions are not clearly retroactive. The administration interprets everything as being fully retroactive, and then we have to undo it all through Congress. The presumption against retroactivity is a way of saying you don't have to

⁴³ Board of Immigration Appeals.

⁴⁴ See *Matter of Devison*, Interim Decision 3435 (BIA 2000-2001).

⁴⁵ In re *Rodriguez-Ruiz*, 2000 WL 1375514 (BIA 2000).

⁴⁶ *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

go back to Congress unless Congress really insists on retroactivity. The agency should assume that it is not retroactive. Well, so far the agency has been very, very adamant that it will not observe that presumption against retroactivity, even though you have courts like the Fourth Circuit reversing their past precedent on that.⁴⁷ And maybe you don't. I don't know if you want to comment on that one, but there are a lot of other things like youthful offender adjudication, the vacated convictions, and so on.

Mr. Cooper: If you go through '96 Act, it's replete with absolutely specific examples of Congress requiring that these rules operate retroactively.

Congressman

Frank: I agree with that.

Mr. Cooper: That's point number one. Point number two is that a lot of these things in which it is not so specific, they are hard legal questions and situations in which we have taken positions that have turned out not to have been endorsed judicially. An example is with respect to the mandatory custody provisions. Anyone who has tried to pour through and sort out the temporary transition period custody rules, I think will agree with me that's a hell of a difficult little piece of legislation to figure out what it means. But with respect to that, we had understood the rules to be that persons falling into the mandatory custody categories had to be detained and were subject to mandatory custody no matter when they served their criminal incarceration. But that turned out to be an interpretation that didn't get endorsed by the courts, and so we changed our interpretation of that and understood the rules to apply only to those people who were released from their criminal custody after October 19, 1998. That is the date in which the transition period custody rules went out of effect and the permanent mandatory custody rules took effect. So, yes, that's an example of a situation in which we have changed our position about how the rules are applied. Now there can be a debate about whether we were quick enough to do that, or whether we should have taken the position that we did in the first place, but that's an example of our changing our interpretation. Another example that will be done more formally has

⁴⁷ *Tasios v. Reno*, 204 F.3d 544.

to do with the remedy that people are referring to, 212(c) relief,⁴⁸ and what category of persons were cut out of access to that kind of remedy. We had taken the position that we understood the rule to be that for anybody who was seeking that relief after the effective date of the provision, then the 212(c) relief was not available. That's a position, by the way, that was taken by the Attorney General on certification from the Board of Immigration Appeals, essentially the highest level of Department of Justice decision making. It's a position that's the result of the most careful consideration by all kinds of offices throughout the Departments of Justice, office legal counsel, Assistant General's office and so forth. Now that turns out to be an interpretation that most of the appellate courts, all but one in fact of the courts that have addressed it in one form or another, have disagreed with. The Supreme Court declined to take on and resolve this split among the circuits. In the interests of uniformity around the country about how this rule was to work, as opposed to a sort of patchwork of legal regimes that was in place as a result of these appellate court decisions, the Department of Justice has proposed by regulation to essentially accede to the most common thread of judicial thinking. That will expand the category of people who are eligible to apply for 212(c) relief, and there will be a provision for motions to reopen for those people who have been deported. There is a debate going on between the commentators. A main subject of commentary was that that provision ought to permit those who had been removed under the earlier rules to come back into the country. We met with a group of representatives of the commentators and said, "You know, here are the reasons why we set the rule up in the way that we did. With those reasons in mind, give us your most intelligent thinking and help us around the problems that we see." We have been asked to extend the comment period in part so people could develop their thoughts on this issue. The Comment Period closes tomorrow, and that issue along with whatever else is raised in the commentary will be taken up and be put in together in the final rule. But those are other

⁴⁸ I.N.A. §212(c) (repealed by IIRIRA in 1996).

examples of ways in which the administration is altering its implementation of the laws.

Audience

Member:

I'd like to go back again, quickly if you could, to prosecutorial discretion. I don't mean to pick on you, but I read your memorandum and I would ask you to clarify how you could conclude you don't have discretion for arriving aliens, but you do have it for deportable aliens. And with all due respect to Congressman Frank, it's not good enough that we have it or we may have it for deportable aliens but not arriving aliens. The perfect example is the lady who spoke who has a 15 year-old conviction. It is the arriving aliens that are the category of people with whom the INS should be least prosecutorial in forcing actions on mostly stale convictions. I want you to consider one thing when you either clarify your position, or I would ask you to actually reconsider the position. In the summer of 1996, the INS in New York speculated correctly that those who are in exclusion proceedings would remain eligible for 212(c) but those who were deportable would not. They chose to admit numerous aliens who were inadmissible in the courtroom and placed them in deportation to bar them the opportunity to apply for 212(c) relief. This is a perfect example of INS exercising some kind of discretion, although not favorably, to deny somebody a benefit. So having read that memorandum and not really understanding how you conclude you have discretion for deportable but not for inadmissible aliens, I would ask that you either clarify it or reconsider it.

Congressman

Frank:

Before he does, I want to respond to your comment to me. Let me ask you a question. Have you written to Schumer⁴⁹ and Moynihan⁵⁰ on this? What did they have to say?

Audience

Member:

Um, have I written to them personally? No. I represent— I represent—

⁴⁹ Senator Charles Schumer, Democrat from New York.

⁵⁰ Senator Daniel Patrick Moynihan from New York.

Congressman

Frank: You haven't written to Schumer and Moynihan. You live in New York?

Audience

Member: I do live in New York—

Congressman

Frank: Okay, let me tell you what I resent.

Audience

Member: . . . but I've spoken to the liaison of both Schumer and Moynihan's offices, and I do almost on a weekly basis.

Congressman

Frank: About what?

Audience

Member: About numerous immigration issues.

Congressman

Frank: Have you lobbied them to change the law?

Audience

Member: No, I haven't.

Congressman

Frank: Okay, you think that I believe H.R. 5062 is good enough? When the hell did I say that? You people make me very angry. I'm busting my ass to get this law changed. I specifically said I didn't think what we were trying to do is good enough. I did say that denigrating what we're able to do unfairly will make it harder for us to do something. And there you are. You live in New York. You care about this. You haven't lifted a finger to help me get the bill changed and you're lecturing to me that what I'm saying, it's not good enough, and I'm very angry. I'm very angry at the kind of silliness that means that we may lose what we were trying to get because nobody's talked to the senators. They haven't been lobbied, and we haven't made this a priority. So first of all, this mind set that I said it was good enough. No. I specifically said it wasn't. I never said it was good enough. I want to get the thing changed. I do say that to denigrate not having people deported because we don't also allow them to come back in, is a terrible mistake and it's part of the mind-set that may cause you not to help us try to get the law changed. So help me get the law changed, and then I'll be willing to listen. But, I won't be willing to listen to inaccurate

descriptions of my position because I never suggested that it was good enough.

Audience

Member: I think you've done a tremendous job, and frankly I've given a copy of your bill to at least a thousand different people I work with.

Congressman

Frank: Are any of them members of Congress? Then you haven't done me any good. I'm sorry. Hey, it's too late in the evening for me to be polite. You people sit around and you want to – You think you're playing Moot Court here. You're in Court. I'm trying to get the goddamn law changed. You vote for these people and you don't talk to them so don't complain to me when we don't win.

Mr. Mehta: Mr. Frank, I just thought I'd let you know that our Immigration Committee has written to the entire New York Congressional Delegation to support your–

Congressman

Frank: Yeah, but I want individuals to write to the senators. That's what–

Audience

Member: Yeah, yeah . . .

Audience

Member: I personally have written to Senator Schumer and Senator Moynihan. We're going to Senator Schumer's office on Thursday morning –

Congressman

Frank: Excellent bring him with you.

Audience

Member: I was in Washington last week and spoke with four Senators that came out to talk about other bills, and kind of cornered them in front of the press to talk about–

Congressman

Frank: Only the two that represent you are going to listen.

Ms.

Morawetz: Okay, I think now that I should ask if you could respond to the question now.

Mr. Cooper: Sure. I don't see how you could legally reach the conclusion that prosecutorial discretion would permit the INS to admit an inadmissible person any more than

you've got the prosecutorial discretion to grant asylum to a non-refugee or to give cancellation to someone who hasn't been here the requisite number of years and so forth. Those aren't the kinds of things that you can do in the exercise of discretion. I think that's just not what prosecutorial discretion means. Prosecutorial discretion means you can decline to enforce the rules against someone that they're otherwise subject to, but that's the limit. That's it.

SPEAKER: I'd like us to thank Congressman Frank for. . .⁵¹

Audience

Member: ⁵² . . . seek relief. Why is it only limited to people in. . .⁵³. Why not do what's right and involve retroactivity in every crime that was committed before the passing of the act? Why is it we're limiting it only to people who were in proceedings who had asked us for 212(c) relief?

Mr. Cooper: I disagree with the position that it should apply to anyone who is not in proceedings.

Audience

Member: Mr.⁵⁴ we can't say it's ex post facto because deportation is a civil proceeding and not a criminal proceeding but. As far as humanity is concerned, why are we involving people who committed crimes before the act was passed? Why not say that everyone who had committed a crime before the passage of the act should be covered? Why should relief be limited to those in proceedings?

SPEAKER: By far the preponderance of the Circuit Courts that have disagreed with the AG's approach

SPEAKER: Yes. By far the majority of the Circuit Courts that have addressed the issue have taken the position that proceedings are what's at issue, it's a vast minority view that—

SPEAKER: Is Prosecutorial Discretion a good exercise?

Mr. Cooper: No— I think there's a fundamental misunderstanding about what Prosecutorial Discretion means. Prosecutorial Discretion just means that you can decide whom to enforce to the law against, or whom not to.

⁵¹ Inaudible.

⁵² Inaudible.

⁵³ Inaudible.

⁵⁴ Inaudible.

Now you might decide, "Look there's a person who ought not be in proceedings anyway because the crime is old; because the crime is in the scheme of things minor; because the person is a lawful permanent resident." That's Prosecutorial Discretion. But Prosecutorial Discretion wouldn't permit you, if the law didn't, to permit someone to apply for relief if that was not permitted by statute.

Ms.

Morawetz:

Okay. I think the best thing to do is to close the panel. To the extent that the speakers are able to stay and to answer questions, if people want to come up and ask questions, that would be terrific. I want to thank our speakers, this was a very full program and I think extremely interesting.