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Criminal Aliens: Expanded Detention, Restricted Relief from Removal

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Summary

Congress began targeting criminal aliens as a deportation priority in the 1980s, and the 104th Congress furthered this effort in two major laws: the Antiterrorism and Effective Death Penalty Act (AEDPA) (P.L. 104-132) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (Division C of P.L. 104-208). Together, these laws require the continued detention of most criminal aliens until their removal from the U.S. These laws also tightly restrict the opportunity for aliens who commit crimes to obtain relief from being sent abroad. Even resident aliens with longstanding community and family ties may face mandatory detention and removal (with little prospect of early reentry) as a consequence of past criminal activity.

Classes of removable criminal aliens. The Immigration and Nationality Act (INA) makes deportable any alien who is convicted of a crime in any of the following overlapping categories: (1) a single *crime involving moral turpitude* committed within 5 years of entry (10 years in the case of certain former informants), if the crime is punishable by imprisonment of at least 1 year; (2) two or more *crimes involving moral turpitude* not arising out of a single scheme; (3) *aggravated felonies*; (4) controlled substances offenses; (5) specified firearms offenses; and (6) miscellaneous national security, selective service, and immigration offenses.

There is no statutory list of *crimes involving moral turpitude*, but *aggravated felonies*, to which the most severe immigration consequences attach, are listed in the INA. At first limited to murder and trafficking in drugs or firearms, the term *aggravated felonies* now, after AEDPA and IIRIRA, includes 19 types of federal, state, or foreign offenses. Among these are all thefts or crimes of violence for which the term of imprisonment is at least a year (including any term of imprisonment that is suspended). The present listing of *aggravated felonies* applies in current enforcement proceedings, even if the crime at issue was not an *aggravated felony* when committed.

Detention of deportable criminal aliens. Before its amendment by AEDPA and IIRIRA, the INA had required the Immigration and Naturalization Service (INS) to detain aliens convicted of aggravated felonies upon their release from criminal confinement and not release them prior to deportation, but exceptions were made for legal permanent residents (LPRs) who were not poor bail risks or dangers to the community. Except for flight risks and dangers to the community, all aliens convicted of other deportable offenses generally could be released pending completion of deportation proceedings. Now, however, mandatory detention applies to almost all classes of deportable criminal aliens, and the exceptions to mandatory detention are tightly restricted to certain witnesses and informants. (IIRIRA had allowed for a 2-year transition period, during which new mandatory detention rules were eased. This period ended in October 1998.)

Relief from removal. The INA provides otherwise removable aliens with various forms of relief. Access to this relief from removal has been narrowed for criminal aliens, primarily through expansion of *aggravated felonies*.

Among the relief that is available under the INA are: (1) cancellation of removal for long-term LPRs (formerly “§ 212(c)” relief); (2) cancellation of removal for non-LPRs based on hardship (formerly “suspension of deportation”); and (3) asylum (including the related, but separate remedy of withholding of removal) for aliens facing persecution.

Cancellation of removal for LPRs permits an LPR who has resided here at least 7 years to have an immigration judge balance equities favoring the alien’s continued presence against the seriousness of the alien’s conduct in deciding whether the alien should be removed. However, an LPR convicted at any time of an aggravated felony, as that class has been expanded, is now ineligible for relief (previously, disqualification was limited to aliens who had served at least 5 years for an aggravated felony). Also, IIRIRA stops the time counted toward the 7-year minimum presence requirement when the alien commits *any* offense that makes the alien inadmissible or removable, and this “time-stop” rule applies retroactively to the commission of pre-IIRIRA offenses. Separately, an alien who is not a LPR is ineligible for cancellation of removal based on hardship to citizen or LPR relatives here if the alien has committed any offense that makes the alien inadmissible or removable (previously, criminal aliens were eligible for relief, albeit under heightened hardship and presence standards).

The expansion of *aggravated felonies* also narrows eligibility for a discretionary grant of asylum. Additionally, the Attorney General may designate other disqualifying crimes. To a somewhat lesser extent, the expansion of *aggravated felonies* affects eligibility for withholding of removal, a mandatory remedy for otherwise qualified aliens who can show that they would be persecuted on removal. Only those aliens who have been sentenced for an aggravated felony (or felonies) to an aggregate term of at least 5 years imprisonment are barred, though, as with asylum, the Attorney General may designate additional disqualifying crimes.

Bar to subsequent admission and adjustment. A removed alien who has been convicted of an aggravated felony is permanently inadmissible unless permission is given by the Attorney General. Separately, a waiver of the criminal grounds of inadmissibility is unavailable to an alien who commits an aggravated felony after having been previously admitted as an LPR.

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