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ARTICLES

IMMIGRATION POLICY AND THE RHETORIC OF REFORM: “DEPORT FELONS NOT FAMILIES,”* MONCRIEFFE V. HOLDER, CHILDREN AT THE BORDER, AND IDLE PROMISES

TERRI R. DAY† AND LETICIA M. DIAZ‡

I. INTRODUCTION

Eight years ago, when then Senator Obama was campaigning for the presidency, he promised comprehensive immigration reform.1 During the campaign, Obama attacked the Bush administration’s stepped up efforts to crackdown on illegal immigrants.2

When communities are terrorized by ICE3 immigration raids, when nursing mothers are torn from their babies, when children come home from school to find their parents missing, when people are detained

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without access to legal counsel, when all that’s happening, the system just isn’t working.\(^4\)

Once in office, President Obama found those promises difficult, if not impossible, to keep.\(^5\)

Like the previous administration, President Obama believed that his administration had to enforce existing laws and secure borders before opponents would agree to immigration reform.\(^6\) In fact, the President’s strategies for achieving legislative support for immigration reform have worsened the plight of illegal immigrants.\(^7\) Dubbed the “Deporter-in-Chief,” President Obama’s commitment to rigorously enforce immigration laws has resulted in the deportation of illegal immigrants at unprecedented numbers.\(^8\) Based on government records over a ten year period, the largest increase of deportations involved people charged with minor crimes, including traffic violations, and those convicted of entering or re-entering the country illegally.\(^9\) Additionally, President Obama’s administration has ensured that deported illegal immigrants are prohibited from returning to the United States for at least five years or else face a prison sentence, creating greater obstacles for families who are torn apart by immigration policies.\(^10\)

Notwithstanding this large-scale surge in deportations under this administration, in an announcement to Americans on November 20, 2014, regarding immigration, President Obama claimed that mass deportation is both “impossible and contrary to [the American] character.”\(^11\)

The administration blames Congress for the escalation of deportations.\(^12\) In passing stricter immigration laws, providing more resources for enforcement, and blocking efforts to pave a pathway to citizenship for millions of productive, law-abiding illegal immigrants, President Obama places responsibility on Congress for his failed promises on immigration reform.\(^13\)

\(^4\) See Thompson, supra note 2.

\(^5\) See id.

\(^6\) Id.

\(^7\) Id.


\(^9\) See Thompson, supra note 2. Deportations for illegal entry tripled and those for minor crimes quadrupled from the last five years of President Bush’s administration to the first five years of President Obama’s administration. Id.

\(^10\) Id. In the later part of Bush’s administration, illegal immigrants without criminal records were deported without formal charges. Id. In contrast, this administration has filed formal charges against more than 90% of those deported, ensuring at least a five-year period before immigrants can return or face prison time. Id.


\(^12\) See Skrentny, supra note 1, at 66.

\(^13\) See Thompson, supra note 2.
there is plenty of blame for both Congress and the President to share in refusing to fix our broken immigration system, there are some shameful consequences of this failure to act.

In recent months, headline news has shed light on the surge of immigrant children illegally migrating to the United States.\textsuperscript{14} The administration attributes the sudden influx of children to U.S. borders to the instability in Central America.\textsuperscript{15} However, others claim the motivation for this mass migration of unaccompanied women and children to the United States is “not to escape violence, crime or poverty, but to be reunited with family.”\textsuperscript{16} Regardless of the motivation, the increased pace of deportations has torn families apart and had the unintended consequences of an “urgent humanitarian situation.”\textsuperscript{17}

Faced with the reality that the schism between the President and Congress is so great as to make comprehensive immigration reform impossible, President Obama took the initiative to salvage his broken promises and give hope to the millions of illegal immigrants living in the shadows of American life. For months, President Obama threatened, or promised, depending on which side of the political spectrum one falls, that he would exercise his executive powers regarding the immigration crisis. One week before Thanksgiving, President Obama outlined a three-step action plan for making the immigration system more “fair and just.”\textsuperscript{18} To quote directly from the President:

First, we’ll build on our progress at the border with additional resources for our law enforcement personnel so that they can stem the flow of illegal crossings and speed the return of those who do cross over. Second, I’ll make it easier and faster for high-skilled immigrants, graduates and entrepreneurs to stay and contribute to our economy, as so many business leaders proposed. Third, we’ll take steps to deal responsibly with the millions of undocumented immigrants who already live in our country.\textsuperscript{19}

President Obama’s announcement—praised as momentous and timely by immigration action groups and disparaged by critics as executive overreach—only touches the tip of our country’s immigration crisis; yet, it may affect the

\begin{itemize}
  \item \textsuperscript{14} See, e.g., Richard Fausset & Ken Belson, \textit{Faces of an Immigration System Overwhelmed by Women and Children}, N.Y. TIMES (June 5, 2014), http://nyti.ms/lpMwGZ.
  \item \textsuperscript{17} Migration to the United States: Underage and on the Move, supra note 15.
  \item \textsuperscript{18} Obama’s November 20th Speech, supra note *.
  \item \textsuperscript{19} Id.
\end{itemize}
This paper explores the symbiotic relationship between the criminal justice system and immigration law. The recent Supreme Court decision of *Moncrieffe v. Holder* illustrates the possible consequences of a state conviction for possession of a small amount of marijuana with intent to distribute on the removal of a noncitizen, who had legally resided in the United States for over twenty years. While the possibility of minor crimes can result in non-reviewable deportation orders, children at the borders have also faced an uncertain future. Part II will discuss the reasons behind the influx of unaccompanied alien children (UAC) and the legal issues involved in their presence and pending deportation proceedings. Part III will discuss the facts, issues, and lower court decisions in the *Moncrieffe* case. Part IV will review the various approaches courts have applied in determining whether a state law criminal conviction results in removal without relief and how the *Moncrieffe* decision affects previous precedent. Part V will discuss issues and developments in deportation policies under the Immigration and Nationality Act (INA) and the Obama Administration. Given President Obama’s newly announced plan affecting deportation policy, this paper will conclude with a consideration of whether illegal immigrants’ plight is improved at all with the latest Supreme Court decision and Executive Order.

II. UNACCOMPANIED ALIEN CHILDREN (UAC) AND THE NEED FOR IMMIGRATION REFORM

The 2014 humanitarian crisis of the influx of unaccompanied children arriving at the border has placed an international spotlight on the United States immigration system, making its flaws and injustices all the more apparent and further highlighting the urgent need for reform. The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) defines an unaccompanied alien child (UAC) as a child who “has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom—there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody.” The number of UAC arrivals increased from 2013 to 2014 by 88% (from 35,209 to 66,127).
The reasons for the sharp increase in UAC arrivals are complex, but certain “push” and “pull” factors have been identified as catalysts. The “push” factors originate in the home countries of the UAC and include gangs, cartels, domestic violence, endemic poverty, insecurity, impunity, and corruption. “Pull” factors, incentives within the United States, include employment, reunification with family, and education.

Recently, there have been a greater number of UAC from Central America than from Mexico. In the first eight months of 2014, 75% of the UAC came from Honduras, Guatemala, and El Salvador. These three countries have among the highest poverty and homicide rates in the world. In Honduras, for example, the poverty rate is 62-67% and on average, eighty-eight people per month are murdered, which is the highest homicide rate in the world.

Behind the children crossing the border are stories that relate to violence, poverty, oppression, and such deep hopelessness that they are willing to risk their lives in the hope of a better life. The collateral risk they face is an encounter with the United States immigration system. This risk might appear to be mitigated with the perception of more lenient policies on aliens that enter the country as children. Smugglers spread stories about Deferred Action of Childhood Arrivals (DACA) or other programs for leniency, which may encourage more UAC to make the trip. The tales of leniency offer false hope for many UAC. Recently arrived UAC are not eligible for deportation relief under DACA because the program requires continuous residency for five years in the United States between 2007 and 2012. Additionally, the Obama administration’s reform plan does not readily account for the recently arrived UAC. Furthermore, the promises regarding jobs, freedom from crime, and education are not available to all UAC.

26. UAC Removal Overview, supra note 24, at 5.
27. Id.
30. Id. at 7-8. The poverty rate is 45% in El Salvador, 55% in Guatemala, and 67% in Honduras. Id. at 7.
31. Id.; see also UAC Removal Overview, supra note 24, at 6 (as reported by Casa Alianza, showing a 62% poverty rate in Honduras).
32. Kandel, supra note 29, at 17.
33. Id.
Conservative immigration reform advocates are concerned with expediting the immigration deportation proceedings for the UAC. Under the TVPRA, UAC from the contiguous countries (Mexico and Canada) are subject to an expedited removal process and can be returned almost immediately after “a cursory screening by a uniformed Border Patrol agent.” For children from other countries, the Trafficking Act’s provisions provide that the UAC must be placed in formal removal proceedings to appear before an immigration judge and have the opportunity to apply for relief. Multiple conservative legislators have proposed that the provisions permitting expedited returns for UAC by Border Patrol should be extended to children from other countries as well. The American Bar Association Commission for Integration, advocating for humanitarian treatment in the UAC crisis, has expressed that permitting returns without adequate process for more children would violate long-standing ABA policies.

For the UAC that have been permitted to stay, about ninety percent are reunited with family members in the country as they await deportation proceedings. However, this is nowhere near the end of the journey for the UAC. News reports reveal that many recently arrived UAC are being denied access to schools. Despite legal guidance to the contrary, local schools and school boards have imposed registration requirements that UAC cannot fulfill in order to attend school. Although many rights afforded to illegal immigrants in criminal proceedings are not available to protect UAC in immigration proceedings, the Supreme Court has consistently upheld the right to an education for legal and illegal alien children. In Plyler v. Doe, the Supreme Court did not recognize a fundamental right to a public education or apply a heightened judicial scrutiny to classifications affecting

38. Id.
40. ABA CALL TO ACTION, supra note 37, at 2.
41. UAC Removal Overview, supra note 24, at 15.
42. Benjamin Mueller, Requirements Keep Young Immigrants Out of Long Island Classrooms, N.Y. Times (Oct. 21, 2014), http://nyti.ms/ZEFubE.
Instead, the Court said that there was no rational basis for a state to treat UACs differently from citizens and legal alien children for purposes of providing a public education. Nonetheless, there are risks to enrolling UAC children in schools, such as exposing those living in the shadows to deportation. Also, state and local governments are unable or unwilling to provide for the surge of alien children enrollments, and citizens oppose allocating scarce resources to educate alien children.

Enforcing the established right of the children to attend school is especially important considering that their length of stay and ultimate disposition of removal proceedings is largely indeterminate. Despite a push from legislators, and policy changes to expedite the removal proceedings for the UAC, the reality is that there is a backlog of approximately 357,000 cases in the immigration courts. Further, almost half of formal removal proceedings with the assistance of counsel do not result in deportation.

If the children are to become an integral part of the future of the American economy and culture, what will they face in the future as they navigate through the U.S. immigration system? When will the legislature finally agree upon a comprehensive immigration reform bill? When will the executive branch effectively execute immigration policies which humanely prioritize prosecutorial decisions? Will noncitizens, including legal residents, ever gain real due process rights in this country? Even if the UAC gain legal residency status, their socioeconomic circumstances often place them at a greater risk of facing the injustices in the immigration system again as adults. Although President Obama’s recent executive order to provide “amnesty” and, ultimately, it is hoped a “pathway to citizenship” for children and families who have lived responsibly in the United States for a period of years, critics of his plan claim that these questions have not yet been answered.

46. Id. at 223.
47. Id. at 226.
48. Id.
49. Mueller, supra note 42.
51. Id. at 4-5. The increase in the number of immigration proceedings that do not result in deportation is partly attributed to an increase in representation by counsel for noncitizens. Id. at 4. “Meanwhile, the share of immigrants with legal representation increased rapidly between 2006 and 2012, from 35 percent to 56 percent.” Id. at 10.
III. FACTS AND ISSUES IN THE MONCRIEFFE V. HOLDER CASE

UACs are not the only group of immigrants that face inequality under U.S. laws. Illegal immigrants facing criminal charges, even for minor crimes, have found that the deportation consequences of their brush with the criminal justice system varies depending on the jurisdiction. Adrian Moncrieffe was only three years old when his family immigrated to the United States in 1984 from Jamaica.\(^{54}\) Although Moncrieffe entered the country legally, he had never attained citizenship.\(^{55}\) In 2007, Moncrieffe was arrested in Georgia for possession of the equivalent of two or three marijuana cigarettes.\(^{56}\) Moncrieffe entered a guilty plea and was convicted under a Georgia statute for possession of marijuana with intent to distribute, a felony offense under state law.\(^{57}\) He was sentenced to five years of probation and escaped incarceration because he was treated with leniency under Georgia’s first-time offender statute, which is intended to promote rehabilitation.\(^{58}\)

The Immigration and Nationality Act (INA) provides that noncitizens convicted of certain crimes, including drug related crimes, are subject to deportation.\(^{59}\) There is no distinction in the applicability of this INA provision to a long-term permanent resident like Moncrieffe, who had been in the United States over twenty years, and other noncitizen immigrants as ICE’s policy is to focus on recidivist criminals for removal purposes.\(^{60}\) However, a noncitizen may request discretionary relief from the Attorney General such as asylum or cancellation of removal in order to avoid deportation.\(^{61}\) The factors considered to decide whether discretionary relief should be granted include the length of stay in the United States, legal status, family relationships, level of education attained, and mental and physical health, among others.\(^{62}\) Discretionary relief is not available, however, to noncitizens that are convicted of specific crimes classified as aggravated felonies, which include drug trafficking crimes under the Controlled Substances Act (CSA).\(^{63}\)

\(^{54}\) Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013).
\(^{55}\) See id.
\(^{56}\) Id.
\(^{58}\) Moncrieffe v. Holder, 133 S. Ct. at 1683.
\(^{59}\) Immigration and Nationality Act (INA), 86 Stat. 163, 8 U.S.C. § 1101, 1227(a)(2)(B), et seq.
\(^{60}\) INA, § 1227(a)(2)(B).
\(^{61}\) INA, §§ 1158, 1229(b).
The government argued that Moncrieffe’s drug trafficking offense was an aggravated felony under the CSA because possession with intent to distribute is subject to punishment of up to five years of incarceration.\textsuperscript{64} Moncrieffe argued that under § 841(b)(4), the CSA provides an exception which treats distributing a small amount of marijuana for no remuneration as a misdemeanor offense.\textsuperscript{65} The immigration judge agreed that Moncrieffe’s offense was an aggravated felony, and ordered his removal.\textsuperscript{66} The order was affirmed on appeal with the Board of Immigration Appeals (BIA).\textsuperscript{67}

The issue addressed by the Supreme Court in Moncrieffe focused on what test to apply when determining whether an offense categorized as a felony under state, but not federal, law should trigger the consequences of mandatory deportation. The circuit courts of appeals have applied three different approaches: the categorical approach, the state felony approach, and the hypothetical federal felony approach.

\textbf{IV. CATEGORICAL, STATE FELONY APPROACH, AND HYPOTHETICAL FEDERAL FELONY APPROACH}

Prior to Moncrieffe, courts had been inconsistent in determining what constitutes an aggravated felony for deportation and immigration purposes.\textsuperscript{68} The Supreme Court has held that “in order to be an ‘aggravated felony’ for immigration law purposes, a state drug conviction must be punishable as a felony under federal law.”\textsuperscript{69} The Third Circuit Court of Appeals reasoned that the determination of whether a crime is an aggravated felony should be based on federal law. “We believe that this conclusion properly reflects the policy favoring uniformity in construction of the INA because it subjects aliens to the same treatment regardless of how different states might categorize similar drug crimes.”\textsuperscript{70}

In 2006, the Supreme Court adopted the categorical approach to determine whether a state crime constitutes an aggravated felony for immigration purposes.\textsuperscript{71} The categorical approach does not consider the subjective and personal singular circumstances of an individual petitioner’s crimes and instead considers the objective minimum criminal conduct necessary to sustain a conviction under a given statute.\textsuperscript{72} The Court stated that the standard requires “look[ing] to the elements and the nature of the offense of

\textsuperscript{64} 21 U.S.C. § 841(b)(1)(D).
\textsuperscript{65} § 841(b)(4).
\textsuperscript{66} Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013).
\textsuperscript{67} Id.
\textsuperscript{68} See, e.g., Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010).
\textsuperscript{69} Id. at 569 (citing Lopez v. Gonzalez, 549 U.S. 47, 56 (2006)) (emphasis in original).
\textsuperscript{71} Lopez, 549 U.S. 47; Carachuri-Rosendo, 560 U.S. 563 (reaffirming the categorical approach).
\textsuperscript{72} Martinez v. Mukasey, 551 F.3d 113, 118 (2d Cir. 2008) (citing Gertsenshtein v. Mukasey, 544 F.3d 137, 143 (2d Cir. 2008)).
In adopting this approach, the Supreme Court instructed that these objective elements should be used to determine “if [the crime were] prosecuted pursuant to federal criminal law, would [it] necessarily be punishable as a felony.” The Supreme Court reaffirmed this approach in 2010. The Court eliminated the possibility of additional conjecture while making a determination, as the hypothetical federal felony approach allows, and found that simple drug possession does not rise to the level of an aggravated felony. Despite the United States Supreme Court’s adoption of the categorical approach, courts have not applied this approach consistently. Some courts have interpreted the INA aggravated felony provision differently, creating the state felony approach and the hypothetical felony approach.

Under the state felony approach, multiple courts conclude that if a drug crime is punishable as a felony under state law, it qualifies as an aggravated felony even if it is only a misdemeanor under federal criminal law. The explanation given for this interpretation is based on the language of the provision of the federal criminal statute describing penalties, which states that the offense must be punishable as a felony under the CSA. This interpretation is applied by those courts that follow the state felony approach. Further, the CSA defines a felony to be “any Federal or State offense classified by applicable Federal or State law as a felony.” Thus, under the state felony approach, misdemeanor crimes under federal law could be considered an aggravated felony and require mandatory deportation.

The other alternative approach is the hypothetical federal felony approach. This hypothetical approach states that “if the conduct proscribed by [the] state offense could have been prosecuted as a felony” then the Defendant’s conviction qualifies as an aggravated felony. Previously, the Fifth Circuit Court of Appeals incorrectly interpreted the United States Supreme Court’s opinion in Lopez as adopting the hypothetical felony approach. The Third Circuit also adopted this approach prior to the 2006 and 2010 United States

73. Id. at 118 (quoting Dulal-Whiteway v. DHS, 501 F.3d 116, 121 (2d Cir. 2007)).
74. Id. at 120 (citing Lopez, 549 U.S. 47).
76. Id.
78. 18 U.S.C. § 924(c)(2).
82. Lopez, 549 U.S. 47. The Supreme Court held in Lopez that a “conduct made a felony under state law but a misdemeanor under the Controlled Substances Act is [not] a ‘felony punishable about the Controlled Substance Act.’” Id.
83. Carachuri-Rosendo, 570 F.3d at 267.
Supreme Court holdings. This approach differs from that of the categorical approach in that the court looks to the actual conduct of the Defendant in addition to the state statute under which the Defendant was convicted.

Ultimately, the Supreme Court in Moncrieffe utilized the categorical approach to determine whether the drug crime of which the defendant was convicted constituted a felony under federal law. The Court stated:

Moncrieffe’s conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not “necessarily” involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.

The Court in Moncrieffe reiterated the use of the categorical approach. Also, the Court in Moncrieffe reaffirmed the use of a modified categorical approach, which requires determining whether the state statute has divisible elements that may be excluded from the generic definition. In Moncrieffe’s case, “possession with intent to distribute” was the applicable portion of the Georgia statute. The latter portion of the statute considers the issue of trafficking to determine whether the crime constitutes an aggravated felony. The Court, in its decision, stated that “[s]haring a small amount of marijuana for no remuneration, let alone possession with intent to do so, ‘does not fit easily into the ‘everyday understanding’ of ‘trafficking,’ which ‘ordinarily . . . means some sort of commercial dealing.’”

In Moncrieffe’s case, the Court stated that to constitute drug trafficking, it must be established that the “offense involved either remuneration or more than a small amount of marijuana.” Thus, remuneration of a small amount of marijuana is still considered trafficking, and possession with intent to distribute is still trafficking if a large amount of marijuana is involved. This new definition for immigration law purposes abrogates past precedent.
In *Garcia v. Holder*, the Sixth Circuit found that an immigrant’s drug charge reached the federal felony threshold because the state law did not provide for a commercial transaction requirement and thus the intent to distribute sufficed.\(^{95}\) Further, the court stated, “[a]lthough the precise amount of marijuana involved in Garcia’s case is unknown, the attempt to possess with the intent to deliver any amount of marijuana less than 50 kilograms is punishable by up to five years in prison.”\(^{96}\) Similarly, the First Circuit dismissed the immigrant’s argument that “the government failed to put forth enough facts from the record of conviction to prove that his conviction involved more than a ‘small amount’ of marijuana and that he intended to distribute it for remuneration.”\(^ {97}\)

The approach adopted by the Court in *Moncrieffe* is a convoluted standard and may result in disparate outcomes for noncitizens convicted of the same crime in different states, based on the specific phrasing of each state statute.\(^ {98}\) Since the categorical approach looks only to the generic definition of the crime, and not the individual’s actual conduct, noncitizens found guilty of the minimum proscribed conduct in a state statute will likely be penalized the same as noncitizens guilty of the maximum proscribed conduct under the INA.\(^ {99}\) This is particularly troublesome when considered with the movement for legalizing marijuana in many states. There will be a great disparity in the immigration penalties for persons engaged in the same conduct considering that recreational and medical possession of marijuana is legalized in some states but prohibited in others.\(^ {100}\) The fundamental unfairness of the categorical approach due to the divergence of state laws also raises federalism questions for noncitizens subject to the harsh penalties of mandatory removal. Although Attorney General Holder announced that the Justice Department would no longer prosecute minor marijuana cases under the CSA, a new administration may reverse this prosecutorial discretion.\(^ {101}\) The fear by noncitizens of non-reviewable deportation for minor marijuana offenses will

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96. *Id.*


98. *Moncrieffe*, 133 S. Ct. at 1693, n.11. “Justice Alito’s dissent suggests that he disagrees with the first premises of the categorical approach. He says it is a “strange and disruptive resu[l]” that “defendants convicted in different States for committing the same criminal conduct” might suffer different collateral consequences depending upon how those States define their statutes of conviction. Yet that is the longstanding, natural result of the categorical approach.” *Id.* (internal citations omitted).

99. *Id.*


persist unless Congress amends the CSA with regard to the classification of marijuana and the statutory penalties involving marijuana possession.  

Nonetheless, some immigration law practitioners see an upside to the Moncrieffe decision in the sense that the convoluted standard can likely be used to remove the aggravated felony classification of some state statutes. The Court acknowledged the probability that “[some] offenders may avoid aggravated felony status by operation of the categorical approach,” but stated it preferred this degree of imperfection to the burden that would be imposed by re-litigating cases for immigration purposes under the other approaches. In fact, the Eleventh Circuit has applied Moncrieffe’s categorical approach to conclude that a conviction under Florida’s statute prohibiting the possession and distribution of marijuana cannot be qualified as an aggravated felony. At least fourteen other state statutes relating to marijuana offenses have been identified that may no longer be considered aggravated felonies under the categorical approach. Thus, the imperfection of the Moncrieffe approach will, in some instances, provide the possibility of discretionary relief from deportation for noncitizens.

V. REMOVAL AND DEPORTATION UNDER THE IMMIGRATION AND NATIONALITY ACT (INA)

The issues surrounding immigration extend beyond the courtroom and criminal activity. The humanitarian crisis of the influx of unaccompanied children at the border has placed a spotlight on the flaws and injustices of the U.S. immigration system. Furthermore, the detention centers overflowing with noncitizens awaiting deportation raise more humanitarian concerns.

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102. President Obama’s November 20th address regarding immigration specifically spoke about the continued deportation of criminals. It is not clear if the definition of crimes will be expanded or contracted as a result of the new executive action plan. Obama’s November 20th Speech, supra note *.


104. Id. (quoting Moncrieffe, 133 S. Ct. at 1693-94).


106. Vargas, supra note 103, at 16.

107. Moncrieffe may also provide practitioners with additional arguments relating to overbroad and ambiguous state statutes, affirming the rule of lenity in favor of noncitizens. The Court concluded that the approach under Moncrieffe would “err on the side of under inclusiveness” and that “ambiguity in criminal statutes referenced by the INA must be construed in the noncitizens’ favor.” Id. at 14-15.

108. Fausset, supra note 14.

109. High detainee population density areas, like California, the Mid-Atlantic and Northeast states experience a shortage of space to hold detainees. Dr. Dora Schriro, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (2009), available at http://www.ice.gov/doclib/about/offices/odpp/pdf/detention-rpt.pdf. Further, Congress set a highly disputed quota in the budget appropriations, which mandates that 34,000 noncitizens must be held in ICE detention centers on a daily basis. An internal review revealed that only about 11% of detainees have committed crimes involving violence, which seriously calls into question the legitimacy of a mandate to spend $1.5 billion annually of taxpayer funds on detention centers. See Memorandum from John Roth, DHS Office of
These problems combined have created a heated political climate regarding the immigration reform debate. A major measure gauging the efficacy and flaws in the immigration system is the annual number of deportations.\textsuperscript{110} Humanitarian objectives to provide assistance to immigrants fleeing violence and seeking family reunification are undermined by policies resulting in a greater number of deportations for long-term residents.

The failure of the Obama administration to establish comprehensive immigration reform, despite his campaign promises, has generated great criticism.\textsuperscript{111} President Obama’s immigration policies face serious disparagement from both progressive and conservative groups.\textsuperscript{112} Major news sources have reported that President Obama is deporting people in unprecedented record numbers, illustrating that in addition to the failure to enact reforms, the plight of noncitizens has been exacerbated.\textsuperscript{113} On the other hand, “restrictionists” and other critics believe that President Obama is inflating the deportation numbers to show that he is tough on immigration in order to garner support for his promise to reform immigration and to reunite families.\textsuperscript{114}

There are several types of deportations and multiple ways that noncitizens can be expelled from the United States.\textsuperscript{115} They are mainly categorized into two groups, removals and returns.\textsuperscript{116} Removals occur when noncitizens are expelled from the country after being processed in one of the methods resulting in an official order of removal.\textsuperscript{117} Returns are expulsions from the country without an order, which often do not process the individual in a manner that requires personal information, fingerprints, purpose for entry, or marks personal immigration records.\textsuperscript{118} Compounding the confusion, removal is now considered the appropriate terminology for deportation but is

\textsuperscript{110} See, e.g., Thompson, supra note 2; Barack Obama, Deporter-in-Chief, supra note 8.

\textsuperscript{111} Id.


\textsuperscript{113} See Thompson, supra note 2; Mr. Boehner’s weak immigration excuses, WASH. POST (Feb. 8, 2014), http://www.washingtonpost.com/opinions/mr-boehners-weak-immigration-excuses/2014/02/08/6aae75fe-994a-11e3-b227-12a45d109e03_story.html; see also Barack Obama, Deporter-in-Chief, supra note 8.

\textsuperscript{114} Skrentny, supra note 2, at 68-69 (characterizing “restrictionists” as those who “oppose large-scale immigration and undocumented immigration.”); Andrew Stiles, Obama Administration Inflating Deportation Numbers, NATIONAL REVIEW (Feb. 10, 2014), http://www.nationalreview.com/article/370784/obama-administration-inflating-deportation-numbers-andrew-stiles (“Misleading classifications make it look like traditional deportations are up. They’re not.”).

\textsuperscript{115} Caplan-Bricker, supra note 112.


\textsuperscript{117} Id.

\textsuperscript{118} Id.; Caplan-Bricker, supra note 112.
still defined as limited to formal removals.\textsuperscript{119} Additionally, regarding the statistics is the fact that the statistical methodology has changed over the years, and ICE reports a different set of data than the Department of Homeland Security (DHS) and the Office of Immigration Statistics (OIS). In 2013, ICE reported 368,644 removals while the OIS reported approximately 438,000 removals.\textsuperscript{120}

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<th>Total</th>
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<td>418,397</td>
<td>230,386</td>
<td>648,783</td>
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<tr>
<td>2013</td>
<td>438,421</td>
<td>178,371</td>
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Removals are the compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal. An alien who is removed has administrative or criminal consequences placed on subsequent reentry owing to the fact of the removal. Returns are the confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal.

Figure 1. Total Number of Noncitizens Expelled from United States, 1993-2013. Data Source: DHS, Office of Immigration Statistics (OIS); ENFORCE Alien Removal Module (EARM), Jan. 2014, Enforcement Integrated Database (EID), Nov. 2013.

As seen in Figure 1,\textsuperscript{121} under the Obama administration, the number of annual removals has been greater; however, under the Bush administration


\textsuperscript{121} DHS OFFICE OF IMMIGRATION STATISTICS, ALIENS REMOVED OR RETURNED: FYs 1892 TO 2013, available at http://www.dhs.gov/yearbook-immigration-statistics-2013-enforcement-actions (compiled directly from OIS data) [hereinafter Figure 1].
there was a greater total number of combined removals and returns.\textsuperscript{122} Further, a look back at the Clinton administration reveals the greatest number of total expulsions of noncitizens from the country.\textsuperscript{123} Currently, the DHS definition of deportations only includes formal removals.\textsuperscript{124} Thus, it is accurate and not inconsistent to state that the greatest number of annual deportations has occurred under President Obama, and that the number of noncitizens expelled from the country during each of the previous administrations has been greater. What these numbers illustrate is that the relevant issue in the debate on immigration reform is not how many people have been deported, but what types of deportations have occurred and why.\textsuperscript{125}

Several notable distinctions have been made regarding the shift in the types of deportations occurring under the Obama administration. Interior deportations of noncitizens residing in the country are distinguished from deportations that occur at the border or shortly after entry into the country.\textsuperscript{126} Since 2008, the first year this category of statistics was reported, there has been a decrease in interior removals relative to the total number of removals.\textsuperscript{127} The most salient difference in the types of deportations under the Obama administration, however, is the drastic increase in the number of criminal conviction removals.

![Figure 2. Percent of Removals with Criminal Convictions, FY2001-FY2013. Data Source: Graph by Bipartisan Policy Center, Immigration Task Force from ICE criminal removal statistics.](image)

\textsuperscript{122. \textit{Id.}}

\textsuperscript{123. \textit{Id.}}

\textsuperscript{124. DHS, \textit{Publications, Definition of Terms} (July 24, 2012), http://www.dhs.gov/definition-terms#3 (“Deportation—The formal removal of an alien from the United States when the alien has been found removable for violating the immigration laws. Deportation is ordered by an immigration judge without any punishment being imposed or contemplated.”).}

\textsuperscript{125. See Caplan-Bricker, \textit{supra} note 112.}

\textsuperscript{126. \textit{Interior Immigration Enforcement by the Numbers}, \textit{supra} note 50, at 1.}

\textsuperscript{127. \textit{Id.}}
As seen in Figure 2, from 2008 to 2013, the amount of deportations due to criminal convictions has increased from 31% to 59%. The increase in criminal deportations is largely attributed to the discretionary prosecution policies that have been executed by the Obama administration. The policy directive that INS field officers prioritize deportations subsequent to criminal convictions highlights the importance of the judicial construction of the INS regulations and the rights of noncitizens under the Constitution.

Immigration proceedings are characterized as civil and thus can deny certain constitutional rights to noncitizens. The characterization of immigration proceedings as civil began in 1898 in Fong Yue Ting v. United States. The Fong Yue Ting case and following affirmations have permitted or facilitated the denial of most constitutional rights for noncitizens in immigration proceedings because they uphold the premise that “[t]he order of deportation is not a punishment for crime.” The rights that noncitizens may assert in deportation proceedings trace back to a 1903 Supreme Court case holding that aliens in the United States have rights under the Due Process Clause. However, by characterizing deportation proceedings as regulatory, rather than punitive, the due process rights afforded in this context are limited.

Despite the severe consequences, due process rights in immigration proceedings do not include the Sixth Amendment right to counsel. Some practitioners and immigration reform advocates are hopeful that more recent Supreme Court decisions have the potential to ameliorate the harsh consequences of not recognizing the right to representation for noncitizens in immigration proceedings. In Padilla v. Kentucky, the Supreme Court acknowledged that for noncitizens the possibility of deportation is an integral, and often the most important, part of criminal proceedings. The Court in Padilla held that noncitizens have the right to effective assistance of
counsel regarding the immigration consequences of a criminal conviction.\textsuperscript{138} Although this is a far cry from incorporating the holding in \textit{Gideon v. Wainwright}\textsuperscript{139} to immigration proceedings, the holding in \textit{Padilla} clearly recognizes that deportation is not merely a civil matter.\textsuperscript{140} The recent crisis regarding the influx of unaccompanied children at the border has placed the right to counsel for children in their deportation proceedings at issue. In June 2014, the federal government allocated $2 million for a special program to provide some of the children with legal counsel.\textsuperscript{141} Nonetheless, the majority of the children have not had counsel at their deportation proceedings.\textsuperscript{142} In July 2014, in \textit{J.E.F.M v. Holder}, eight noncitizen children filed suit against the federal government in the Western District of Washington in order to obtain legal counsel at their deportation proceedings and to seek class certification for other similarly situated UAC.\textsuperscript{143}

Ten-year old plaintiff J.E.F.M. and his siblings fled gang violence in El Salvador and are unable to obtain counsel for their deportation proceeding in Seattle.\textsuperscript{144} Their father was a former gang member who converted to Christianity, became a pastor, and started a rehabilitation center for former youth gang members.\textsuperscript{145} The gangs retaliated against J.E.F.M.’s father and murdered him in front of the family’s home with the children watching.\textsuperscript{146} Considering J.E.F.M.’s situation, he may be able to raise certain defenses at his removal proceeding. It is unlikely, however, that the ten-year old would be able to navigate the complex procedural immigration system without counsel, especially when facing an experienced ICE prosecutor. J.E.F.M. and the other children in similar situations have the burden of demonstrating the need for asylum or other affirmative defenses and must do so without the resources to obtain counsel.\textsuperscript{147} Furthermore, most UAC will also face a

\begin{itemize}
  \item \textsuperscript{138} Id. at 373.
  \item \textsuperscript{139} The United States Supreme Court held that "the Sixth Amendment requires appointment of counsel in all criminal prosecutions." 372 U.S. 335 (1963).
  \item \textsuperscript{140} Kanstroom, supra note 131, at 1499.
  \item \textsuperscript{142} Semple, supra note 141.
  \item \textsuperscript{143} Amended Class Action Complaint at 22, \textit{J.E.F.M v. Holder}, No. 2:14-cv-01026-TSZ (W.D. Wash. Sept. 3, 2014). The complaint alleges violation of the Due Process Clause and several INA statutes and regulations. Id. ("The INA and immigration regulations require that all persons in removal proceedings have ‘a reasonable opportunity’ to present, examine, and object to evidence. 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4). In addition, all persons in removal proceedings, whatever their age, have the right to be advised of the charges against them, 8 U.S.C. § 1229(a)(1)(D); 8 C.F.R. § 239.1, and ‘the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing,’ 8 U.S.C. § 1229(a)(4)(A); 8 C.F.R. §§ 238.1(b)(2), 1240.10(a)(1).")
  \item \textsuperscript{144} Id. at 16.
  \item \textsuperscript{145} Id.
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} Id. at 10.
\end{itemize}
language barrier, and some have other disabilities.  

In the criminal context, although due process requires legal representation for noncitizens, the fear of deportation for these noncitizens is not mitigated by providing the right to counsel.  

When it comes to the impact of convictions for drug-based and other minor crimes, the distinction, or lack of distinction, between legal residents and noncitizens that entered the country illegally is one of the most problematic legal aspects of mandatory deportation.  

The effect of deportation on legal permanent residents can be the most devastating because they are more likely to have established ties in the country, as they are likely working or studying, and in many instances arrived in the United States in childhood and have formed families.  

The INA statutes and policies regarding prosecutorial discretion permit the Attorney General to consider cancellation of removal for deportable aliens, which could include consideration of the legal status of the noncitizen. While prosecutorial discretion includes the ability to cancel removal proceedings when certain rehabilitative factors are shown, when the noncitizen is convicted of an aggravated felony, those factors mean nothing.  

Since the 1986 Immigration Reform and Control Act (IRCA), Congress has not been able to agree on a major reform bill despite multiple proposals and a great impetus from groups around the nation. Some of the subsequent amendments to the INA, like the 1990 Violent Crime Control and Law Enforcement Act (VCCLEA) and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), have increased the number of crimes that are considered aggravated felonies and decreased the prosecutorial discretion of the Attorney General as well as the judicial discretion of immigration judges and the BIA. The number of annual deportations is attributed to both the budget Congress allocates for executing the INA and the specific policies of the President’s administration.  

The role of the executive branch in immigration matters has come under great scrutiny with the assertions that President Obama has exceeded the

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148. Id.  
149. U.S. CONST. amend. XIV (“nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”) (emphasis added); see also Scott v. Illinois, 440 U.S. 367 (1979) (extending right to counsel for noncitizen facing incarceration).  
151. See id. at 18-19.  
153. Id.
bounds of his executive power in immigration matters. The allegation that President Obama violated the separation of powers doctrine has only intensified. Days after President Obama’s immigration speech, Congressman Boehner announced his plan to sue President Obama for exceeding his executive powers. While the latest lawsuit involves executive action delaying some provisions of the Affordable Care Act, it is only a matter of time until the immigration plan will be judicially challenged.

In 2012, ICE officials formally filed suit against DHS alleging that the directives for prosecutorial discretion under DACA and operational instructions from ICE Director John Morton forced them to violate the INA statutes. The case was ultimately dismissed in July 2013, with the court stating that while the ICE officials had a strong case on the merits, the court lacked subject matter jurisdiction to hear the case. In July 2014, the House voted to file suit against President Obama claiming that he exceeded his presidential power in issuing his executive orders on immigration policies as well as on health care and climate change. It is anticipated the lawsuit will be dismissed based on the political question prudential standing rule. These conflicts reveal the discord between the branches of the government that continue to impede the development of more humane and effective methods of immigration enforcement and reform.

The policies implemented by the Obama administration through executive orders are one layer of the current immigration system, and the judicial interpretations of the INA are another. Whether or not Congress chooses to enact legislative changes, it also establishes pragmatic parameters for the functioning of the immigration system by setting the annual budget for

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156. Id.


161. Baker v. Carr, 369 U.S. 186 (1962). A question is considered a “political question” when there is not sufficient criteria for the judiciary to make a determination and thus the decision would be best left to the political process. “Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statements of the Government’s views.” Id. at 210-11; see also Ralph Benko, Faithful John Boehner to Faithless Barack Obama: Checkmate?, FORBES (July 25, 2014 10:00 AM), http://www.forbes.com/sites/ralphbenko/2014/07/25/faithful-john-boehner-to-faithless-barack-obama-checkmate/.

162. See id.
immigration enforcement.\textsuperscript{163} In recent years, it has been estimated that 400,000 deportations can be executed with the allocated budget and this figure has in turn been used to measure the performance of DHS, ICE, and Customs and Border Protection (CBP) in immigration enforcement.\textsuperscript{164} The drive to meet performance expectations under the Obama administration has, for various reasons, led to questionable ICE field strategies.\textsuperscript{165}

In 2010, an internal memorandum from the ICE director to field officers revealed that the agency was setting quotas in order to fulfill performance goals.\textsuperscript{166} Utilizing deportation quotas as a measure of the quality of INA performance is dehumanizing. The quotas have devastating consequences for the affected people and can lead to even more disparate immigration enforcement actions.\textsuperscript{167} In order to drastically increase the number of cases processed in the second half of the fiscal year, the field director called upon ICE agents to increase the average daily population of detainees by 3,000, sweep the prisons in the criminal alien program, expedite removals in progress, and increase non-criminal removals.\textsuperscript{168} Such a grading system can lead to field decisions such as choosing to focus on easier and quicker deportation such as mandatory removals for minor crimes like minimal drug offenses or criminal traffic offenses because more complex cases may take longer to process and could end in the cancellation of removal.\textsuperscript{169}

There was a public backlash against the removal quotas, followed by assurances from other ICE officials that the internal memos leaked in 2010 were not actually reflective of their policies.\textsuperscript{170} However, more internal emails released in 2012 revealed further attention to the ICE deportation numbers and disturbing tactics devised to increase the deportation perfor-

\begin{itemize}
\item \textsuperscript{163} "Congress provides enough money to deport a little less than 400,000 people," Morton said. "My perspective is those 400,000 people shouldn’t be the first 400,000 people in the door but rather 400,000 people who reflect some considered government enforcement policy based on a rational set of objectives and priorities." Marcus Stern, \textit{U.S. shifts approach to deporting illegal immigrants}, \textsc{USA Today} (Sept. 10, 2010), http://usatoday30.usatoday.com/news/washington/2010-09-10-immigration10-st_n.htm.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} See Skrentny, supra note 1, at 69 (asserting that the “unprecedented number” of deportations attributed the Obama’s policies was an attempt to appease the “restrictionists” and gather support for comprehensive immigration reform from opponents in Congress).
\item \textsuperscript{166} Spencer S. Hsu & Andrew Becker, \textit{ICE officials set quotas to deport more illegal immigrants}, \textsc{Wash. Post} (Mar. 27, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html?sid=3DST2010032700037.
\item \textsuperscript{167} See id.
\item \textsuperscript{168} Memorandum from James M. Chaparro, ICE-DRO Dir., to Field Office Dirs. & Deputy Field Office Dirs. (Feb. 22, 2010), \textit{available at} http://media.washingtonpost.com/wp-srv/politics/documents/ICEdocument032710.pdf.
\item \textsuperscript{169} See, e.g., Hsu, supra note 166.
\item \textsuperscript{170} See Andrew Becker, \textit{ICE responds to CIR/Washington Post story on deportation quotas}, \textsc{Center for Investigative Reporting} (Mar. 29, 2010), http://cironline.org/blog/post/ice-responds-cirwashington-post-story-deportation-quotas-648.
\end{itemize}
In April 2012, the Assistant of Field Operations sent an email stating, “ATL [Atlanta] is about 1200 criminal removals under when compared to last year. Please implement your initiatives and reallocate all available resources. The only performance measure that will count this fiscal year is the criminal alien removal target.” The tactics outlined in the 2012 leaked emails and memos to achieve the deportation numbers more easily included using biometrics, targeting probationers, and collaborating with sheriffs’ departments to set up two-part traffic checkpoints where:

[t]he locals would be the lead agency checking for DWIs, NOL, and other traffic/criminal offenses. When the vehicles get sent to the secondary location, we (ICE) would be set up there, waiting to interview all individuals that we deem necessary. This would include occupants in the vehicle if necessary. We would also have the mobile IDENT [identification] machines set up to take fingerprints to get an accurate account of all immigration and criminal history.

During confirmation hearings of the new DHS secretary and months after the release of these enforcement emails and memos, Jeh Johnson stated, “I do not believe that deportation quotas or numeric goals are a good idea.” Nonetheless, the number of formal removals continued to rise in 2013 and the proportion of criminal removals in the total of deportations increased from 19% in 2010 to 31% in 2013.

Despite contrary protestations, the numbers suggest criminal deportations continue to be a centerpiece of INA policy. In fact, in announcing his newest immigration order, President Obama reiterated his administration’s commitment to deport noncitizens who commit crimes. Therefore, the Moncrieffe decision will play a key role in this administration’s immigration policy. The United States’ immigration law and policy on aggravated felonies essentially creates a strict zero-tolerance approach. Noncitizens convicted of aggravated felonies are punished threefold for their crimes. First, they must

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173. Id.


176. Hing, supra note 52, at 165.

177. Id.
serve their criminal sentence. Second, their deportation is mandatory. Third, aggravated felons are barred from reentry into the United States. These severe penalties raise the issue of proportionality and undermine a commitment to treat noncitizens with dignity and to protect and reunite families.

The net effect of the zero-tolerance approach on many noncitizens is that they can be torn from their homes, lose their jobs, be separated from their families, and forced to start over, facing turbulent conditions in their countries of origin. The disproportionality of the consequences is particularly evident when the aggravated felony is a minor crime like a criminal traffic offense or the possession of marijuana, which is now legal in many states. Further, deportation as a punitive measure for noncitizens also imposes real hardships on their children, parents, and other loved ones who depend on them.

President Obama’s action plan based on executive authority focuses on extended protection that would affect millions of immigrants. However, it remains clear that deportation for “convicted criminals, foreigners who pose national security risks and recent border crossers” shall proceed. Thus, the Obama administration’s attention has not shifted. Additionally, the proposed plan appears to revolve around immigrants that have been in the United States and not those who have recently entered or will enter in the future, making the promise to reunite families illusory.

VI. CONCLUSION

Immigration policy and reform will remain a hot button issue for many years to come. Moncrieffe created a policy for criminal deportation intended to promote fairness, predictability, uniformity, and equity. Whether the Supreme Court has settled the waters in the courtrooms by adopting a uniform approach in deciding when criminal activity subjects a noncitizen to automatic deportation remains to be seen. States continue to apply differing views of what qualifies as an aggravated felony, which affects judicial outcomes. However, criminal deportation is only a piece of the puzzle.

While the Obama administration attempts to protect immigrants within our borders, these protections are primarily for those with family ties, education, and certain desirable job skills. A policy must be proposed that will account

178. Id.
179. Id.
180. Id.
181. The issue of proportionality is basically an examination of whether the punishment fits the crime. Id. at 166.
182. See id. at 164.
183. Id.
184. Id.
185. Id.
186. Id.
for the undocumented alien children and other immigrants who are flocking to our shores in record numbers. Many undocumented immigrants may see President Obama’s recent executive action as their life raft to a sinking ship. While an estimated five million undocumented immigrants will benefit from this executive order by escaping immediate deportation, the President’s action is only a band-aid. Cynics contend that the President’s newly articulated immigration plan serves only to quell political unrest among Latino voters.\textsuperscript{187} Indeed, politics aside, the President’s executive order may have further muddied the already murky immigration waters.

Any policy that has real promise to provide the type of security illegal immigrants need to come out of the shadows must include a pathway to citizenship. Only Congress can provide that security. Without congressional action, President Obama’s plan is limited. Polls indicate that the President’s action is unpopular and some in his party are hesitant to approve funding through Congress.\textsuperscript{188} However, congressional funding is not needed to carry out his Order since it can be funded through the Citizenship and Immigration Services (CIS) with application fees.\textsuperscript{189} Additionally, no Democrat has attempted to clarify what further steps should be taken to strengthen the President’s plan.\textsuperscript{190} On the other hand, Republicans are quick to repudiate the President’s so-called executive amnesty; yet, they too have failed to propose a plan to rectify this admittedly broken immigration system.\textsuperscript{191}

Both parties agree on one thing: the only chance to effect real and lasting immigration reform is to pass legislation.\textsuperscript{192} The President’s powers are limited, and the executive order can do no more than delay deportation. Without a pathway to citizenship, many undocumented immigrants will remain in limbo. The time for congressional action is now. The United States was built on the shoulders of immigrants. A failure to enact immigration reform will not change the past treatment of those who have suffered, but will alter the future, which depends on the contributions of immigrants living in the shadows. America was, is, and always will be, a nation of immigrants. It is time to ensure that the label illegal immigrant can be citizen for those who, like our ancestors, deserve the opportunity to contribute to society and improve their lives and our communities.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{187} See Nakamura, supra note 11.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id.
\end{itemize}
\end{footnotesize}