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## Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens

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*5:00 a.m., July 2010: Immigration agents arrive at the home of Farhan Ezad, a thirty-five-year-old Pakistani national who has been living in the United States since the age of five.<sup>1</sup> Agents place Ezad in handcuffs in front of his wife and three children, all U.S. citizens, and inform him that he is being deported based on a 1995 conviction for a fifteen-dollar drug sale in his college dorm room.<sup>2</sup> Despite having had no further brushes with the law since serving five years of probation for his offense, Ezad faces the prospect of separation from his family and forced return to a land that he barely knows.<sup>3</sup>*

In his 2011 State of the Union address, President Obama recognized immigrants' fear of deportation, noting how "[t]hey grew up as Americans and pledge allegiance to our flag, and yet they live every day with the threat of

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1. Bob Kalinowski, *Man Faces Deportation to Country He Does Not Know*, THE TIMES-TRIBUNE (Scranton, Pa.), Jan. 30, 2011, <http://thetimes-tribune.com/news/man-faces-deportation-to-country-he-does-not-knows-1.1097458#axzz1CfK85rs2>.

2. *Id.*

3. *Id.*

deportation.”<sup>4</sup> Although he was referring to undocumented college students seeking to legalize their status, his impassioned description could apply to other immigrants who are subject to our laws and claim membership in our society, particularly long-term lawful residents. Lawful permanent residents (LPRs)<sup>5</sup> who have been convicted of a crime, such as Farhan Ezad, face a much higher penalty than the average American citizen—often, permanent separation from their home, family, and friends. This Essay explores two recent Supreme Court decisions, *Padilla v. Kentucky*<sup>6</sup> and *Carachuri-Rosendo v. Holder*,<sup>7</sup> that grapple with the tragic consequences of criminal convictions for noncitizens. These cases provide an opening for giving noncitizens greater protections aligned with the values of fairness, dignity, and proportionality that underlie our legal system.

The laws that govern mandatory deportations do not distinguish between noncitizens who arrived yesterday and those who have lived here for many years.<sup>8</sup> These laws, which require the deportation of noncitizens (including LPRs) for a variety of criminal acts ranging from minor violations to serious felonies,<sup>9</sup> are being vigorously enforced by the Obama administration. In fact, Janet Napolitano, the Secretary of the Department of Homeland Security (DHS), recently touted the agency’s success in ridding the United States of 195,000 criminal aliens in 2010 alone.<sup>10</sup> Ironically, although DHS labels all noncitizens with criminal convictions as “*criminal aliens*,”<sup>11</sup> the system for enforcing deportation laws denies noncitizens fundamental protections that are provided to those within the criminal justice system. These protections include the right against cruel and unusual punishment, the right to appointed counsel, and the right to suppress evidence when it is obtained through unreasonable searches and seizures.<sup>12</sup> While deportation proceedings are considered part of

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4. Barack Obama, Remarks by the President in State of the Union Address (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

5. LPRs are commonly referred to as green card holders.

6. 130 S. Ct. 1473 (2010).

7. 130 S. Ct. 2577 (2010).

8. *Aggravated Felonies and Deportations*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC) (Jun. 9, 2006), <http://trac.syr.edu/immigration/reports/155>.

9. *Id.*

10. Press Release, U.S. Dep’t of Homeland Sec., Secretary Napolitano Announces Record-breaking Immigration Enforcement Statistics Achieved under the Obama Administration (Oct. 6, 2010), [http://www.dhs.gov/ynews/releases/pr\\_1286389936778.shtm](http://www.dhs.gov/ynews/releases/pr_1286389936778.shtm) [hereinafter DHS Press Release]. “Criminal alien” refers to any noncitizen convicted of any crime. *Id.* The government does not release a detailed breakdown of how many LPRs have been deported because of criminal convictions. See *How Often is the Aggravated Felony Statute Used?* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), <http://trac.syr.edu/immigration/reports/158> (last visited Mar. 15, 2011).

11. See, e.g., DHS Press Release, *supra* note 10 (emphasis added).

12. See e.g., *Burr v. INS*, 350 F.2d 87, 91 (9th Cir. 1965) (holding that deportation does not constitute cruel and unusual punishment); see also *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (finding that the exclusionary rule does not apply per se in civil deportation hearings); *Bassett v. INS*, 581 F.2d 1385, 1387–88 (10th Cir. 1978) (finding that deportation is a civil

the civil, administrative immigration system, they have increasingly become an arena for Immigration and Customs Enforcement (ICE) attorneys to re-litigate the underlying criminal conviction.<sup>13</sup>

The thorny question of which criminal acts will result in deportation is at the heart of many of the removal cases involving noncitizens. Legal counsel, ICE attorneys, and immigration judges must determine whether the criminal conviction, often a state crime, qualifies as a deportable offense under the federal Immigration and Nationality Act (INA).<sup>14</sup> For example, the Court has held that a driving under the influence of alcohol (DUI) conviction does not qualify as a “crime of violence” and therefore is not an aggravated felony that could trigger deportation.<sup>15</sup> However, in cases where the conviction qualifies as a deportable offense, the inquiry turns to whether the noncitizen is eligible to apply for a waiver of deportation.<sup>16</sup> This analysis often requires the mastery of both criminal and immigration law. Federal appellate judges are parsing state and federal criminal codes to determine whether, as Justice Ginsburg noted in *Carachuri-Rosendo*, noncitizens convicted of minor crimes should be made to leave and “never, ever darken our doors again.”<sup>17</sup>

In its past term, the Supreme Court decided two cases grappling with the complex issues raised by the intersection of criminal and immigration law. The Court’s rulings, one premised upon the Constitution and the other on statutory interpretation, significantly enhanced procedural protections for noncitizens facing deportation for criminal acts and placed some limits on executive discretion in interpreting mandatory deportation provisions. The first, *Padilla v. Kentucky*, addressed the protections due to criminal aliens under the Sixth Amendment right to effective assistance of counsel during criminal trials.<sup>18</sup> In *Padilla*, the Court found that criminal defense counsel have an affirmative duty

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procedure and does not constitute cruel and unusual punishment); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) (finding that “since deportation and removal proceedings are civil, they are not subject to the full panoply of procedural safeguards accompanying criminal trials” (quotation omitted)); *In re Abellana and Donovan*, 14 I. & N. Dec. 262, 265 (BIA 1973) (“Counsel contends that respondents’ Sixth Amendment right to confront witnesses and cross-examine evidence was violated. The Sixth Amendment applies to criminal cases. Deportation proceedings are civil in nature.”). *But see* *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005) (holding that “the Fifth Amendment’s Due Process Clause applies to all persons within the United States, including aliens, and requires that aliens be given a reasonable opportunity to confront and cross-examine witnesses” (citing *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001))).

13. *See* *Tokatly v. Ashcroft*, 371 F.3d 613, 621 (9th Cir. 2004).

14. The Immigration and Nationality Act is the primary source of statutory rules governing immigration in the United States. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.). A deportable offense is one listed under the INA category of crimes for which a noncitizen is deportable unless he qualifies for a waiver, which may be granted at the discretion of the Attorney General. 8 U.S.C. § 1227 (2006).

15. *Leocal v. Ashcroft*, 543 U.S. 1, 6 (2004).

16. 8 U.S.C. § 1229b (2006).

17. Transcript of Oral Argument at 31, *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (No. 09-60).

18. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

under the Sixth Amendment to advise a noncitizen client of the immigration consequences of a plea.<sup>19</sup> The second, *Carachuri-Rosendo v. Holder*, examined whether the executive branch has the authority to broadly interpret “aggravated felonies,” a statutory category of crimes that results in mandatory deportation.<sup>20</sup> Here, the Court held that, contrary to the government’s assertion, two misdemeanor state charges of simple possession did not amount to a federal felony that requires mandatory removal.<sup>21</sup>

Together, *Padilla* and *Carachuri-Rosendo* reach a high-water mark in the Court’s recent jurisprudence on immigration issues by signaling that our deportation laws are unduly harsh. The Court’s rulings should stem efforts by the political branches of government to further limit the rights of noncitizens. Ideally, Congress would eliminate mandatory deportation in favor of an individualized inquiry that examines factors such as the noncitizen’s length of residence, family ties, likelihood of rehabilitation, and conditions in the receiving country in order to determine whether removal is warranted. However, given the political reality of stalled immigration reform, criminal defense counsel will bear a heavy responsibility in understanding and communicating the immigration consequences of a plea to their noncitizen clients. Taking into account the Court’s opinions, the Obama Administration should re-examine its enforcement and prosecutorial priorities, particularly with regard to long-term lawful permanent residents.

Part I of this Essay provides a brief overview of the legislation and case law that has led to the current system of mandatory deportations for noncitizens facing criminal conviction. Part II discusses how the *Padilla* and *Carachuri-Rosendo* decisions recognize the substantive nature of deportation and create a necessary layer of procedural protections for noncitizens. Finally, Part III argues that although the Court’s recent jurisprudence makes important gains in recognizing the rights of noncitizens, true reform of the inequities in the immigration system will not be possible without action from the executive and legislative branches.

## I.

### THE ORIGIN OF DEPORTATION AS A CONSEQUENCE OF CRIMINAL CONVICTIONS

For noncitizens convicted of a crime, the immigration consequence of the conviction (deportation) is often a far harsher punishment than the criminal sentence imposed for the underlying crime. There is a wide array of crimes that can land an immigrant in removal proceedings, including non-violent theft offenses and most drug offenses (even as minor as possession of a controlled substance without a prescription).<sup>22</sup> Furthermore, the government does not

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19. *Id.*

20. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580 (2010).

21. *Id.*

22. 8 U.S.C. § 1227(a) (2006).

appoint counsel to noncitizens in removal proceedings,<sup>23</sup> and even those with counsel find it difficult to collaterally attack the underlying criminal conviction that triggers the deportation penalty.<sup>24</sup> If a noncitizen successfully challenges the criminal conviction, then he may be able to escape removal. Under these circumstances, the resolution of the criminal case becomes of utmost importance for an immigrant who faces separation from family, friends, and home.

The use of immigration policy to regulate the presence of disfavored groups within U.S. borders has a long history.<sup>25</sup> The Alien and Sedition Acts of 1798 allowed the President to “order all such aliens as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory of the United States.”<sup>26</sup> Successive laws barred the entry of prostitutes, convicts, and anarchists.<sup>27</sup> Immigration laws in the late 1800s through 1965 also contained many race-based restrictions; for example, Chinese immigrants were excluded from becoming citizens under an 1882 law.<sup>28</sup> Differential treatment based on race was not limited to eligibility for citizenship. Mexican and Asian immigrants were disproportionately deported for the crime of unlawful entry while avenues for relief were created for European immigrants.<sup>29</sup>

The original INA, also known as the McCarran-Walter Act, established much of today’s immigration law framework in 1952, including deportation procedures, a nationality-based quota system, and detailed exclusions on political grounds.<sup>30</sup> Notably, it was the Anti-Drug Abuse Act (ADAA) of 1988, a crime-control bill intended to combat narcotics trafficking, rather than an immigration bill that expanded the categories of removal by creating an

23. Executive Office for Immigration Review (EOIR), U.S. Dep’t of Justice, EOIR’s Legal Orientation and Pro Bono Program Fact Sheet (Jan. 27, 2010), <http://www.justice.gov/eoir/press/2010/LegalOrientProBonoFactSheet012710.pdf>. Fewer than half of the individuals who appeared in immigration courts over the last five years were represented. EOIR, U.S. DEP’T OF JUSTICE, FY 2009 STATISTICAL YEAR BOOK G1 (2010), <http://www.justice.gov/eoir/statspub/fy09syb.pdf>.

24. *Padilla*, 130 S. Ct. at 1485–86 (“Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea.”).

25. See DANIEL KANSTROOM, DEPORTATION NATION 91–130 (2007) (describing the early formation of the modern deportation system). See generally HIROSHI MOTOMURA, AMERICANS IN WAITING, THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006).

26. Act of June 25, 1798, ch. 58, 1 Stat. 570 (authorizing the President to deport those deemed threats to national security).

27. Act of Mar. 3, 1903, ch. 1012, §§ 2, 38, 32 Stat. 1213, 1214, 1221 (excluding anarchists from entry); Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084 (barring the entry of convicts); Act of Mar. 3, 1875, ch. 141, § 3, 18 Stat. 477 (stating that “the importation into the United States of women for the purposes of prostitution is hereby forbidden”).

28. Act of May 6, 1882, ch. 126, § 14, 22 Stat. 58, 61 (excluding all Chinese from citizenship); see also Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 73 (2003).

29. Ngai, *supra* note 28, at 84–89, 92.

30. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.); see also TRAC, *supra* note 8.

“aggravated felony” ground.<sup>31</sup> Despite its name, “aggravated felony” is a term of art used in the immigration code that encompasses a broad category of offenses that frequently are neither “aggravated” nor “felonies” under federal and state criminal law.<sup>32</sup>

While the original aggravated felony provision was limited to high-level offenses such as murder or drug and weapons trafficking,<sup>33</sup> Congress broadly expanded the grounds for removal in subsequent pieces of legislation.<sup>34</sup> In doing so, it created a draconian system of laws that now ensnare even minor lawbreakers.<sup>35</sup> The Immigration Act of 1990, a bill that expanded family and employment visas, shortened the time for criminal aliens to seek judicial review of deportation orders and eliminated the ability of criminal judges to issue orders to the government to prevent certain of those deportations.<sup>36</sup> In praising the 1990 bill for making it easier to deport immigrants, Senator Alan Simpson asserted that in the past, noncitizens with criminal convictions had more due process protections than Americans.<sup>37</sup>

It appears that the dual specters of the drug kingpin and terrorist helped to justify lawmakers in removing the protections of due process and judicial discretion for all noncitizens. The ADAA, which created the “aggravated felony” grounds for the deportation of noncitizens, was also known as the Drug Kingpin Act.<sup>38</sup> During the 1996 debate on the Anti-Terrorism and Effective Death Penalty Act, which expanded the aggravated felony category to include crimes such as gambling and bribery,<sup>39</sup> some members of Congress equated noncitizens with terrorist aliens.<sup>40</sup>

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31. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342–44, 102 Stat. 4181, 4469–71.

32. See *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2581 (2010) (noting that the term “aggravated felony” is only referred to in the immigration provisions (Title 8) in the United States Code); see also 8 U.S.C. § 1101(a)(43) (2006) (some categories of aggravated felonies include a crime of violence in which the term of imprisonment is at least one year and a crime of theft in which the term of imprisonment is at least one year.)

33. See Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 7342, 102 Stat. 4181.

34. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009, 3009-627; Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 401, 110 Stat. 1214, 1258–81; Immigration Act of 1990, Pub. L. No. 100-649, § 501, 104 Stat. 4978, 5048 (all codified in scattered sections of 8, 18 U.S.C.).

35. See, e.g., *supra* notes 2–4 and accompanying text.

36. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010). The Immigration Act of 1990 created express terrorism-related grounds for exclusion. CONG. RESEARCH SERV., RL 32564, IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION AND REMOVAL OF ALIENS 3 (2010).

37. 136 CONG. REC. 35,612 (1990) (statement of Sen. Simpson) (“We were in a situation in deportation where the deportees had more due process than did an American citizen.”).

38. See Davan Maharaj, *Stage is Set for Federal Death Penalty Trail*, L.A. TIMES, Sept. 18, 1995, [http://articles.latimes.com/1995-09-18/news/mn-47302\\_1\\_federal-death-penalty](http://articles.latimes.com/1995-09-18/news/mn-47302_1_federal-death-penalty).

39. Crimes such as bribery and gambling rendered a noncitizen deportable under the Anti-Terrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, § 401, 110 Stat. 1214, 1277–78.

40. See, e.g., 142 CONG. REC. 7972 (1996) (statement of Rep. Smith) (“Americans should not have to tolerate the presence of those who abuse both our immigration and criminal laws. S. 735 ensures that the forgotten Americans—the citizens who obey the law, pay their taxes, and

In another 1996 law, the Illegal Immigrant Reform and Immigrant Responsibility Act, Congress further broadened the definition of aggravated felony to include drug offenses, thefts, burglaries, and crimes of violence.<sup>41</sup> Meanwhile, past and present administrations have readily enforced these laws by placing thousands of immigrants in removal proceedings precisely because they have been labeled “criminal aliens,” without regard for the seriousness of their underlying offenses.<sup>42</sup>

The Court has traditionally bowed to the will of the political branches regarding immigration, rationalizing that an elected body should have broad control over the rules that govern who is permitted to enter and remain and who must be expelled, no matter how harsh and unjust those rules are.<sup>43</sup> This judicially created principle, known as the plenary power doctrine, has led the Court to allow legislative and executive actions against aliens that would violate constitutional principles if applied to citizens.<sup>44</sup>

In particular, the Court’s deference to the legislative branch in concluding that deportation is not a form of punishment, and therefore immigrants are not entitled to many procedural protections in removal proceedings, has left its mark on over a century of jurisprudence. In *Fong Yue Ting v. United States*, an 1893 Chinese Exclusion Act case, the Court upheld the deportation of a laborer who failed to obtain a residency permit despite having lived in New York for fourteen years.<sup>45</sup> The Court stated that deportation is not punishment for a crime nor is it

banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend.<sup>46</sup>

The *Fong Yue Ting* Court continued on to hold that if deportation is not punishment, then it does not constitute a deprivation of life, liberty, or property

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seek to raise their children in safety—will be protected from the criminals and terrorists who want to prey on them.”); *id.* at 7960–61 (statement of Rep. Hyde) (alternating discussions of the domestically-orchestrated Oklahoma City terrorist attack and “alien terrorists”).

41. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009, 3009–627.

42. 136,714 criminal aliens were deported in the first nine months of FY 2010 alone and 782,896 criminal aliens have been removed since 2005. *Current ICE Removals of Noncitizens Exceed Numbers Under Bush Administration*, TRAC (Aug. 2, 2010), <http://trac.syr.edu/immigration/reports/234>.

43. Under the plenary power doctrine, the Court has long held the view that Congress has broad powers over immigration. *Chae Chan Ping v. United States*, 130 U.S. 581, 603–10 (1889); see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 277; Louis H. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 858 (1987).

44. See Henkin, *supra* note 43, at 858.

45. 149 U.S. 698, 732 (1893).

46. *Id.* at 730.

giving rise to certain constitutional protections in immigration proceedings.<sup>47</sup> The Court concluded that immigrants facing deportation are not entitled to request a trial by jury nor the suppression of evidence based on unlawful searches and seizures, nor may they invoke the prohibition on cruel and unusual punishment.<sup>48</sup> Moreover, the Court re-affirmed the plenary power principle established in an earlier Chinese Exclusion Act case that Congress has the right, “as it may see fit, to expel aliens of a particular class, or to permit them to remain.”<sup>49</sup>

Despite its origins in a decision that sanctioned race-based exclusion and deportation, the *Fong Yue Ting* principle justifying deportation without fundamental procedural protections has limited the rights of noncitizens in immigration proceedings for more than a century. Subsequent courts have followed *Fong Yue Ting* to hold that deportation does not constitute cruel and unusual punishment.<sup>50</sup> Courts have also denied noncitizens a Sixth Amendment right to counsel in deportation proceedings,<sup>51</sup> and held that there is no right to bail while a noncitizen is in detention awaiting immigration proceedings.<sup>52</sup> The Fourth Amendment exclusionary rule is inapplicable to deportation proceedings, though the Court found that evidence may be suppressed if there is an egregious Fourth Amendment violation.<sup>53</sup> Recent cases have also held that the prohibition of the Ex Post Facto Clause does not apply to the retroactive application of deportation provisions.<sup>54</sup>

Although *Fong Yue Ting* suggested that noncitizens are not entitled to due process in deportation proceedings, the Court partially reversed course a few years later in *Yamataya v. Fisher*.<sup>55</sup> In *Yamataya*, a 1903 case involving a Japanese immigrant, the Court stated that noncitizens in removal proceedings are entitled to Fifth Amendment procedural due process rights.<sup>56</sup> Here, the Court found no procedural due process violation because the immigrant was provided a removal hearing in front of an executive officer and affirmed her deportation despite the lack of notice of removal and other irregularities.<sup>57</sup> Although courts recognized procedural due process rights for noncitizens, they

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47. *Id.*

48. *Id.* This case predates *Gideon v. Wainwright*, 372 U.S. 335 (1963), so the Court fails to mention the right to government appointed counsel.

49. *Id.* at 714.

50. *See, e.g.*, *Burr v. INS*, 350 F.2d 87, 91 (9th Cir. 1965) (holding that deportation does not constitute cruel and unusual punishment); *Bassett v. INS*, 581 F.2d 1385, 1387–88 (10th Cir. 1978) (finding that deportation is a civil procedure and does not constitute cruel and unusual punishment)

51. *See, e.g.*, *U.S. v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987).

52. *See, e.g.*, *U.S. ex rel. Carapa v. Curran*, 297 F. 946, 959 (2d Cir. 1924); *Demore v. Kim*, 538 U.S. 510, 531 (2003).

53. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984).

54. *U.S. v. Yacubian*, 24 F.3d 1, 10 (9th Cir. 1994) (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952)).

55. 189 U.S. 86, 101 (1903).

56. *Id.* at 99–101.

57. *Id.*

rarely used it to overturn government decisions in the first fifty years after *Yamataya*.<sup>58</sup>

## II.

### RECENT SUPREME COURT DECISIONS RECOGNIZING THE HARSH PENALTY OF DEPORTATION FOR NONCITIZENS

Recently, the Court took the dramatic step of rejecting the longstanding principles of *Fong Yue Ting* limiting immigrants' rights, and recognized the substantive nature of deportation to expand the procedural rights of noncitizens.<sup>59</sup> In *Padilla*, the Court reasoned that the Sixth Amendment right to effective assistance of counsel requires criminal defense counsel to advise noncitizens on the immigration consequences of a plea in criminal proceedings.<sup>60</sup> In *Carachuri-Rosendo* the Court declined to allow the executive branch to expansively interpret a statutory category of offenses that require mandatory deportation.<sup>61</sup>

#### A. *Padilla v. Kentucky*

In the eyes of the immigration code, Jose Padilla was an alien<sup>62</sup>—a lawful permanent resident with a tenuous status despite living in the United States for more than forty years and serving honorably in the U.S. military during the Vietnam War.<sup>63</sup> Padilla was charged with transporting a large amount of marijuana in his tractor-trailer in Kentucky.<sup>64</sup> On the advice of his counsel, he pled guilty instead of going to trial on the drug charge.<sup>65</sup> Padilla alleged that when questioned about immigration consequences, his counsel affirmatively told him that he “did not have to worry about immigration status since he had been in the country so long.”<sup>66</sup> His counsel’s advice soon proved to be wrong: ICE agents placed Padilla in removal proceedings after he served his criminal sentence because his drug conviction qualified as an aggravated felony, which requires mandatory deportation under the immigration code.<sup>67</sup> Padilla challenged his plea in post-conviction proceedings, arguing that he received ineffective assistance of counsel in violation of the Sixth Amendment based on his attorney’s erroneous advice about the immigration consequences of his

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58. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1638 (1992).

59. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

60. *Id.* at 1478.

61. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010).

62. The INA defines alien as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (2006).

63. *Padilla*, 130 S. Ct. at 1477.

64. *Id.*

65. *Id.* at 1478.

66. *Id.* (internal quotation omitted).

67. *Id.* at 1476–77.

plea.<sup>68</sup> The Supreme Court of Kentucky denied Padilla post-conviction relief.<sup>69</sup> It held that deportation is merely a “collateral” consequence of the criminal plea, and therefore he was not entitled to relief under the Sixth Amendment right to effective assistance of counsel.<sup>70</sup>

In a surprising 7-2 decision that received little media attention, the Court in *Padilla v. Kentucky* radically altered the role of the criminal defense bar in immigration proceedings.<sup>71</sup> The Court reversed the Supreme Court of Kentucky’s decision and remanded the case for the lower court to determine whether Padilla was prejudiced by the ineffective assistance he received from his counsel.<sup>72</sup> Writing for the majority, Justice Stevens held that criminal defense attorneys have a duty to their noncitizen clients to provide affirmative advice on the immigration consequences of a plea agreement.<sup>73</sup> If an attorney fails to investigate the immigration consequences of the plea or fails to advise her client of those consequences, this may constitute ineffective assistance of counsel under the Sixth Amendment.<sup>74</sup>

In an especially important aspect of its holding, the Court reasoned that deportation is a “particularly severe penalty,” not a mere collateral consequence of the criminal conviction.<sup>75</sup> This crack in the long-standing principle established in *Fong Yue Ting*—that deportation is not punishment<sup>76</sup>—is perhaps the most important effect of the *Padilla* decision. It has significant implications for both noncitizens and criminal defense counsel. Further, *Padilla* emphasizes the need for greater procedural protections in light of Congress’ stripping of judicial and administrative discretion in the immigration arena.<sup>77</sup>

### *1. Implications of Finding that Deportation is a Penalty*

*Padilla* opened a door that many scholars thought was barred shut by *Fong Yue Ting* in finding that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”<sup>78</sup> Not only could *Padilla* lead to the imposition of procedural safeguards on deportation proceedings, it also creates new, complex responsibilities for criminal defense counsel representing noncitizens.

Prior to *Padilla*, states took a variety of approaches in addressing whether counsel must inform a noncitizen of the immigration consequences of his

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68. *Id.* at 1478.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *See id.* at 1486.

75. *Id.* at 1481 (internal quotation omitted).

76. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

77. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010).

78. *Id.*

criminal plea.<sup>79</sup> Most jurisdictions adhered to the principle that an attorney does not have an affirmative duty to inform his client of potential deportation because it is a collateral consequence to the plea, and thus outside the sentencing authority of the state trial court.<sup>80</sup> The *Padilla* majority firmly rejects the attempt to classify deportation as a collateral consequence, finding that the distinction between a direct and collateral consequence does not apply.<sup>81</sup> The primary rationale for refusing to carve out deportation is that it is inextricably tied to the criminal process and would not occur but for the criminal conviction. The Court concludes that an immigration consequence is in a unique category under the “ambit” of the Sixth Amendment.<sup>82</sup>

In Justice Alito’s words, the Court’s decision is a “major upheaval” of the current law.<sup>83</sup> Justice Stevens notes that professional authorities, such as the American Bar Association, National Legal Aid and Defenders Association, and the Department of Justice, already issue guidelines stating that counsel has a duty to inform his client of the immigration consequences of the plea.<sup>84</sup> Additionally, some trial court judges, pursuant to state rules of criminal procedure, admonish criminal defendants regarding the potential adverse immigration consequences of their pleas.<sup>85</sup> Yet, many appellate courts were not previously persuaded that a client has a right under the Sixth Amendment to affirmative advice from counsel on the immigration consequences of his plea.<sup>86</sup> Despite the Court’s attempts to downplay the import of *Padilla*’s influence on counsel,<sup>87</sup> it appears likely that the decision will have far-reaching consequences for the criminal defense bar.<sup>88</sup>

Given the duty to investigate immigration consequences required by *Padilla*, criminal defense counsel will have to either gain a deeper knowledge of immigration law or seek consultation from an immigration attorney.

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79. *See id.* at 1484.

80. *Id.* at 1487 (Alito, J., concurring); *see also id.* at 1481 n.8 (majority opinion noting that there is not a consensus among the courts over how to distinguish between a collateral and direct consequence).

81. *Id.* at 1481. The Court’s analysis leaves open the question of when the distinction between direct and collateral consequences should apply.

82. *Id.* at 1482. It is difficult to predict what other unique categories would fall under the bounds of the Sixth Amendment without resorting to the traditional direct versus collateral analysis.

83. *Id.* at 1491 (Alito, J., concurring).

84. *Id.* at 1482.

85. *E.g.*, CAL. PENAL CODE § 1016.5 (West 1985) (“The court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.”).

86. *Id.* at 1491 (Alito, J., concurring); *see e.g.*, *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003).

87. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1481–83, 1486 (2010).

88. The Court rejects the argument that the decision will result in “floodgates” of litigation challenging pleas because most counsel have likely followed professional norms and advised their clients regarding adverse immigration consequences. *Id.* at 1485.

Specifically, *Padilla* requires that criminal defense attorneys (1) investigate the immigration status of all clients,<sup>89</sup> (2) investigate the potential adverse immigration consequence of the plea at issue for any noncitizen clients, including deportation, exclusion (barring entry into the U.S.), and eligibility for a waiver,<sup>90</sup> and (3) advise noncitizen clients of these consequences if the result is clear.<sup>91</sup> If the outcome is uncertain, the attorney need only advise the client that there is a risk of adverse immigration consequences.<sup>92</sup>

*Padilla* rejects the notion that defense counsel are not sufficiently equipped to provide definitive answers to clients about the immigration results of their criminal convictions.<sup>93</sup> In his concurring opinion, Justice Alito proposes a middle-ground approach to addressing the difficulties raised by the complexity of criminal and immigration law, which is supported by the Solicitor General's brief.<sup>94</sup> Justice Alito suggests that the attorney merely must refrain from providing incorrect advice (as in *Padilla*'s criminal case).<sup>95</sup> The majority rejects this rule as unpersuasive on two grounds. First, it would encourage criminal defense attorneys to remain silent on critically important matters that are central to evaluating the advantages of a plea agreement.<sup>96</sup> Second, "it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available."<sup>97</sup> In most instances that advice is not readily available when a noncitizen appears at the deportation hearing. Immigrants are not provided counsel in their removal proceedings and approximately sixty percent of noncitizens appear *pro se*.<sup>98</sup>

The fact that potential immigration consequences can be an explicit part of the plea negotiation further complicates the task of defense counsel. Justice Stevens suggests that prosecutors should be open to crafting a plea agreement that avoids deportation in exchange for a higher criminal sanction.<sup>99</sup> In that situation, the *Padilla* holding may ironically result in a noncitizen serving a longer criminal sentence in order to avoid adverse immigration consequences. For example, a noncitizen convicted of an offense punishable for more than a

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89. *See id.* at 1483. The majority clearly states that a "don't ask, don't tell" policy is unacceptable under the Sixth Amendment. *Id.* In order to fulfill the duty to advise on immigration consequences, counsel must determine whether the client is a noncitizen. *Id.*

90. *See id.* The Court uses the terms "adverse immigration consequence" and "deportation consequence" interchangeably. Deportation laws are inextricably tied to laws governing eligibility for a waiver and exclusion. Therefore, counsel must investigate possible immigration consequences in order to admonish clients where deportation is a clear consequence and inform them that immigration consequences are possible even if the law is not clear in a particular case.

91. *Id.* at 1483.

92. *Id.*

93. *Id.* at 1484.

94. *Id.* at 1487–97.

95. *Id.* at 1484.

96. *Id.*

97. *Id.*

98. HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY 42–43 (Dec. 2, 2009), available at <http://www.hrw.org/en/node/86760/section/8>.

99. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

year may land in removal proceedings, although he is actually sentenced to probation.<sup>100</sup> This noncitizen could avoid deportation by pleading a different offense requiring jail time. These decisions are not intuitive. The criminal defense bar will need to step up to the challenge of providing representation to a particularly vulnerable group.<sup>101</sup> And whether prosecutors will be willing to engage in such types of negotiations to avoid deportation penalty remains to be seen.

The *Padilla* characterization of deportation as a penalty in the criminal context may also more broadly expand the rights of noncitizens in immigration proceedings. If the outcome is the same, should the forum (civil versus criminal) determine the level of constitutional protection? Arguably, noncitizens facing a severe penalty should be appointed counsel, have the ability to invoke the exclusionary rule, and receive the benefit of other procedural safeguards.

In addition to the penalty of deportation, immigrants are subject to detention while they await the disposition of their cases. Detention for immigrants facing possible deportation is essentially akin to criminal incarceration, which suggests that they should also be entitled to procedural protections while they are detained. Although the current administration has made some efforts to reform the current detention system, progress has been slow. In a 2009 audit of the immigration detention system commissioned by DHS, Dr. Dora Schriro noted that approximately 19,000 immigrants were detained annually for at least four months and up to one full year.<sup>102</sup> The report also found that “[w]ith only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control.”<sup>103</sup>

If the government, by its own admission, insists on treating noncitizens facing deportation as criminals, those noncitizens should receive similar procedural protections as individuals facing criminal sentencing. Given the Court’s stance in *Padilla*, which relies heavily on the real-world impacts of harsh immigration laws, the Court may be open to expanding Fourth, Sixth, and Eighth Amendment rights in immigration proceedings as well.

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100. See 8 U.S.C. § 1101(a)(43)(F) (2006).

101. For counsel seeking greater expertise on immigration consequences, the Court cites to multiple practice manuals prepared by legal experts. *Padilla*, 130 S. Ct. at 1482. See also *Criminal and Immigration Law: Defending Immigrants’ Rights*, IMMIGRANT LEGAL RES. CTR., [http://www.ilrc.org/immigration\\_law/criminal\\_and\\_immigration\\_law.php](http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php) (database of criminal immigration defense tutorials and resources).

102. U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (Oct. 6, 2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (last visited Feb. 4, 2011).

103. *Id.* at 2.

2. *Padilla as a Reaction to the Loss of Judicial and Administrative Discretion in Immigration Adjudication*

The *Padilla* Court's rejection of *Fong Yue Ting* and of judicial deference toward the political branches' control over the immigration system can be interpreted as a response to the transformation of immigration adjudication from a civil system into something resembling the criminal justice system, without the attendant procedural protections. In *Padilla*, the Court embraces its role as a protector of minority rights, offering some hope for the much maligned "criminal alien."<sup>104</sup> In particular, the Court seems to be reacting to Congress' reduction of judicial and administrative discretion with regard to deportations of criminal noncitizens over the last twenty years and the concurrent sharp increase in removals. Much of the opinion focuses on the harsh impact of these changes on noncitizens,<sup>105</sup> a reality that underlies the Court's conclusion.

The Court emphasizes that the 1917 Immigration and Naturalization Act, the first law that authorized deportation as a result of criminal convictions, also contained a "critically important procedural protection to minimize the risk of unjust deportation."<sup>106</sup> This procedure, known as Judicial Recommendation against Deportation (JRAD), allowed state and federal judges to issue a binding official order that prevented the government from deporting an individual based on his criminal conviction.<sup>107</sup> This common sense process allowed the judge in the criminal case, the adjudicator most familiar with the facts, to weigh whether deportation should be part of the penalty. The Court is clearly troubled by Congress' decision to eliminate JRAD in 1990, rescinding judges' primary mechanism for buffering the harsh penalties attached to immigration law.<sup>108</sup>

The *Padilla* Court is also concerned about congressional action to curtail the discretion of the administrative branch in immigration proceedings.<sup>109</sup> Counterintuitively, immigration judges are employees of the Attorney General, not the judicial branch.<sup>110</sup> At the same time it eliminated JRAD, Congress reduced administrative discretion in the determination of whether a noncitizen was deportable and expanded the category of crimes for which immigrants could be automatically deported.<sup>111</sup> In 1996, Congress went even further in limiting discretion in deportation cases with the Illegal Immigration Reform

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104. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1476 (2010).

105. *Id.* at 1479–81.

106. *Id.* at 1479.

107. *Id.*

108. *Id.* at 1479–80.

109. *Id.* at 1480 ("If a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.")

110. 8 C.F.R. § 1003.10 (2011).

111. Immigration Act of 1990, Pub. L. No. 100-649, § 602, 104 Stat. 4978, 5077.

and Immigrant Responsibility Act (IIRIRA).<sup>112</sup> This legislation eliminated the 212(c) waiver that allowed immigration judges to grant relief from deportation for lawful permanent residents convicted of criminal offenses.<sup>113</sup> The IIRIRA also limited judges' ability to take mitigating factors, including length of residence and the impact of deportation on lawfully residing family members, into consideration in removal proceedings for aggravated felonies.<sup>114</sup> These mandatory deportation laws continue to be applied to crimes committed before the passage of IIRIRA, long after some noncitizens have been rehabilitated.<sup>115</sup>

The loss of judicial and administrative discretion in immigration proceedings has undoubtedly led to the more frequent deportation of noncitizens, a fact central to the Court's holding that deportation is an integral part of the criminal penalty. As the majority opinion notes, deportation is "virtually inevitable for a vast number of noncitizens convicted of crimes."<sup>116</sup> Recent data confirms that in the decade following passage of the IIRIRA, approximately 88,000 lawful residents were deported from the United States.<sup>117</sup> On average, these green-card holders had lived in the country for ten years when they were deported.<sup>118</sup> Like Jose Padilla, many spent the better part of their lives here. In addition, there are approximately eleven million undocumented immigrants residing in the United States today.<sup>119</sup> Sixty-three percent of undocumented residents entered prior to 2000,<sup>120</sup> making them potentially eligible to legalize their status based on length of residency and ties to the country.<sup>121</sup> There is no data on the number of undocumented residents who might have been eligible to legalize their status but for their criminal plea.

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112. Title III, Section (b)(9)(B)(v), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8, 18 U.S.C.).

113. Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c) (1988). However, in *INS v. St. Cyr*, the Court ruled that certain categories of noncitizens with convictions pre-dating IIRIRA may be eligible for 212(c) relief. 533 U.S. 289, 326 (2001).

114. See 8 U.S.C. § 1229b(a) (2006). Cancellation of Removal is not available to noncitizens convicted of aggravated felonies, and even LPRs who are eligible for Cancellation do not always prevail. In FY 2009, approximately 2900 cases of Cancellation of Removal were granted. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2009 STATISTICAL YEAR BOOK, at R3 tbl.15, available at <http://www.justice.gov/eoir/statspub/fy10syb.pdf>.

115. See *St. Cyr*, 533 U.S. at 289.

116. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

117. Jonathan Baum, Rosha Jones & Catherine Barry, *In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation* 4 (2010), available at [http://www.law.berkeley.edu/files/Human\\_Rights\\_report.pdf](http://www.law.berkeley.edu/files/Human_Rights_report.pdf).

118. *Id.*

119. MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 1 (2010), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf).

120. *Id.*

121. See 8 U.S.C. § 1229b(b) (2006).

*B. Carachuri-Rosendo v. Holder*

On the very same day that *Padilla* was decided, March 31, 2010, the Court heard oral arguments in *Carachuri-Rosendo v. Holder*.<sup>122</sup> Ironically, *Carachuri-Rosendo* threatened to undermine the central notion behind *Padilla*—that a criminal defense counsel has the ability to craft a plea that avoids adverse immigration consequences for her client or at least advise the client with certainty as to the consequences of the plea.<sup>123</sup> If the *Carachuri-Rosendo* Court had allowed the executive branch broad discretion in determining what crimes fall under the category of aggravated felonies, then counsel’s task of advising on the immigration consequences would be more difficult. Rather, the Court limited the government’s discretion and expanded upon *Padilla* to further criticize the harshness of deportation provisions and the executive branch’s interpretation of those laws.<sup>124</sup>

Jose Angel Carachuri-Rosendo is the father of four children of American citizenship and a lawful permanent resident who has lived in the United States since the age of five.<sup>125</sup> In 2004, Carachuri-Rosendo was convicted in Texas state court of a single count of possession of marijuana and sentenced to twenty days in jail.<sup>126</sup> A year later, he was convicted of unlawful possession of one Xanax pill, a prescription drug.<sup>127</sup> The Texas state court sentenced him to ten days in jail for the second charge.<sup>128</sup> The federal government then placed him in removal proceedings based on the prescription drug conviction.<sup>129</sup>

Carachuri-Rosendo did not contest his removability based on the 2005 drug offense,<sup>130</sup> but argued that he was eligible for cancellation of removal.<sup>131</sup> Cancellation of removal is a form of administrative discretion under the immigration code that allows the immigration judge to grant the noncitizen permission to remain in the United States based on certain criteria, such as length of residence, community ties, and hardship to lawfully residing family members.<sup>132</sup> However, as noted above, the IIRIRA made any noncitizen convicted of an “aggravated felony” ineligible for most forms of relief from deportation, including cancellation of removal.<sup>133</sup> The government argued that

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122. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010).

123. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

124. *Carachuri-Rosendo*, 130 S. Ct. at 2588.

125. *Id.* at 2583.

126. *Id.* at 2583.

127. *Id.* at 2580.

128. *Id.*

129. *Id.*

130. Noncitizens are subject to removal for any controlled substance-related offenses except possession of thirty grams or less of marijuana for personal use. 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

131. *Carachuri-Rosendo*, 130 S. Ct. at 2580.

132. See 8 U.S.C. § 1229b(b) (2006).

133. *Carachuri-Rosendo*, 130 S. Ct. at 2581. In the complex maze of immigration law, there are other waivers for specific grounds of deportability and exclusion, but most of these are not available to aggravated felons. *Aggravated Felonies and Deportations*, TRAC, June 9, 2006,

Carachuri-Rosendo was a felony recidivist drug offender under the federal Controlled Substance Act because his two misdemeanor state convictions would be the equivalent of a felony if he were charged by the federal government, and that hypothetical federal charge is considered an aggravated felony under the INA.<sup>134</sup> During oral argument Justice Ginsburg commented on the severity of Carachuri-Rosendo's treatment, asking the government attorney:

If you could just present this scenario to an intelligent person who didn't go to law school, that you are going to not only remove him from this country, but say never, ever darken our doors again because of one marijuana cigarette and one Xan-something pill . . . it just seems to me that if there is a way of reading the statute that would not lead to that absurd result, you would want to read the statute.<sup>135</sup>

In response, the Assistant to the Solicitor General asserted that the statute required such an interpretation, and moreover, Texas's judgment in punishing a criminal defendant does not control: "What controls is Congress's judgment, and Congress has taken a hard line over the past 20 years on criminal aliens, particularly recidivist criminal aliens."<sup>136</sup> Here, the government implicitly asserted the plenary power doctrine to defend the primary role of Congress and the executive branch in creating and implementing immigration laws.<sup>137</sup> The Assistant Solicitor General implied that if Congress did intend to take a hard line on criminal aliens via immigration statutes, then the executive should have expansive powers to implement and interpret those statutes. Yet, the Court resisted these arguments.

In a 9-0 opinion, the Court soundly rejected the government's position, holding that in order to be considered guilty of an "aggravated felony," the noncitizen must have been convicted of a crime equivalent to that punishable as a felony under federal law.<sup>138</sup> The Court found that if Carachuri-Rosendo had been convicted of recidivist possession in Texas court for the Xanax pill, then the government could argue that the state charge is equivalent to the federal Controlled Substances Act charge.<sup>139</sup> Since Carachuri-Rosendo was not convicted of recidivist possession (only of a second charge for simple drug possession of the Xanax pill), the Court held that the government could not

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<http://trac.syr.edu/immigration/reports/155>.

134. See *Carachuri-Rosendo*, 130 S. Ct. at 2580–84.

135. Transcript of Oral Argument at 31–32, *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (No. 09-60).

136. *Id.*

137. Plenary power is not raised in the Government's brief. Brief of Respondent, *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (No. 09-60), 2010 WL 723015. However, in a nod to Congress' plenary power over immigration, Justice Stevens' opinion does repeat an observation made by Justice Souter in an earlier aggravated felony deportation case: "Congress, like 'Humpty Dumpty,' has the power to give words unorthodox meanings." *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2585 (2010) (citing *Lopez v. Gonzalez*, 549 U.S. 47, 54 (2006)).

138. *Carachuri-Rosendo*, 130 S. Ct. at 2586–88.

139. See *id.* at 2585 n.10.

infer that he was guilty of recidivist possession.<sup>140</sup> The Court reasoned that under the plain meaning of the statute, the text of the INA requires a “conviction” for the aggravated felony offense at issue.<sup>141</sup>

To demonstrate the disconnect between the common law understanding of the terms and Carachuri-Rosendo’s state misdemeanor convictions, the Court resorted to Black’s Law Dictionary definitions of “felony” and “aggravated.”<sup>142</sup> The Court compared the light sentences imposed for Carachuri-Rosendo’s convictions (twenty and ten days, respectively) with the one-year minimum requirement for most low-level federal felonies, finding that it would be unorthodox to classify the convictions as aggravated felonies.<sup>143</sup> The Court concluded that the plain meaning of the term “aggravated felony” in the English language supersedes the government’s argument for an expansive reading of the term, making the Court “very wary of the [g]overnment’s position.”<sup>144</sup> The Court disregarded, rather than deferred to, the executive branch’s role in interpreting immigration law.

As in *Padilla*, the majority was concerned with the lack of procedural protections for noncitizens reaching the immigration hearing.<sup>145</sup> As the Court noted, a defendant is provided notice that the government intends to prove a prior conviction and the ability to challenge that prior conviction under the federal felony recidivism statute.<sup>146</sup> No such procedural safeguards existed for Carachuri-Rosendo, other than an opportunity to challenge the conviction in his immigration hearing.<sup>147</sup> The Court rejected the government’s argument that the ability to challenge the prior conviction in an immigration proceeding equals the opportunity to challenge it in criminal court.<sup>148</sup> Interestingly, the Court focused on the role of both state and federal prosecutors in this arena, citing the need for deference to a criminal prosecutor’s charging decisions.<sup>149</sup> The Court noted that it would be highly unlikely that a federal prosecutor would have charged a low-level offender such as Carachuri-Rosendo under the Controlled

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140. *Carachuri-Rosendo*, 130 S. Ct. at 2589–90.

141. *Id.*

142. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2585 (2010) (defining “felony” as a “serious crime usu[ally] punishable by imprisonment for more than one year or by death” and “aggravated” offense as one “made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime” (citing BLACK’S LAW DICTIONARY 694 (9th ed. 2009))).

143. *Id.* at 2585.

144. *Id.*

145. *Id.* at 2588. Under the Phantom Norm framework developed by Professor Motomura, these might be considered subconstitutional decisions. Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564 (1990). He argues that the noncitizens have more success in asserting procedural due process rights rather than substantive due process claims. *Id.* at 560.

146. *Carachuri-Rosendo*, 130 S. Ct. at 2587–88 (2010).

147. *Id.*

148. *Id.* at 2588.

149. *Id.*

Substances Act.<sup>150</sup> Here, the Court reminded us of *Padilla* by highlighting the protections within the criminal proceeding that are not available to noncitizens in the civil immigration context.

In addition to demonstrating the complexity of the interplay between state and federal criminal charges, *Carachuri-Rosendo* builds upon *Padilla* to further criticize the harshness of the aggravated felony provision and whittle away at the deference accorded the political branches in the immigration sphere. In his parting shot at Congress and the Administration, Justice Stevens asserted that the Court's rejection of the government's broad definition of "aggravated felony" will have a limited "practical effect" on the implementation of immigration policy.<sup>151</sup> He contended that Carachuri-Rosendo and similarly situated noncitizens "may now seek cancellation of removal and thereby avoid the harsh consequence of mandatory removal. But he will not avoid the fact that his conviction makes him, in the first instance, removable. Any relief he may obtain depends upon the discretion of the Attorney General."<sup>152</sup> Here, the Court sent a clear signal that the Attorney General could (and perhaps should) use available discretion to allow noncitizens to remain with their families.

In *Padilla*, Justice Stevens correctly asserts that the criminal defender is often the last bastion of hope for a noncitizen facing removal, especially under the current enforcement regime.<sup>153</sup> But as *Carachuri-Rosendo* demonstrates, parsing immigration law is a heavy burden for any counsel given the government's predilection to argue for a broad reading of the "aggravated felony" provision in immigration law. In both cases, the Court focuses on the criminal proceeding that leads to deportation in an effort to insert greater procedural protections for noncitizens. In *Padilla*, the Court appears to chastise Congress for eliminating administrative discretion for immigration judges, yet in *Carachuri-Rosendo*, the Court does not agree with the use of administrative discretion to broadly—and incorrectly—interpret the aggravated felony provision.<sup>154</sup> Although the Court's disapproval may appear to be contradictory, it becomes coherent if one views the role of immigration judges as adjudicators, rather than prosecutors.<sup>155</sup> In *Padilla* and *Carachuri-Rosendo*, the Court seeks judicial discretion and administrative restraint to counterbalance the unduly harsh reach of the immigration laws.

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150. *Id.* at 2588–89.

151. *Id.* at 2589 ("In other words, to the extent that our rejection of the Government's broad understanding of the scope of 'aggravated felony' may have any practical effect on policing our Nation's borders, it is a limited one."). However, one could argue that drug offenses constitute a significant number of the convictions that lead to deportation.

152. *Id.*

153. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478–80 (2010).

154. *Id.* at 1480; *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010).

155. See Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGRATION BULLETIN (Jan 1, 2008) (Immigration Judge advocating for the establishment of Article I immigration courts), [http://law.psu.edu/\\_file/Urgent%20Priority.pdf](http://law.psu.edu/_file/Urgent%20Priority.pdf).

## III.

## NEEDED ACTION FROM THE LEGISLATIVE AND EXECUTIVE BRANCHES

It is difficult to predict whether Congress and the Administration will have the courage to reinstate immigration judges' discretion to limit the removal of a politically disfavored group. The debates over birthright citizenship and local enforcement of immigration laws reflect a desire of part of the American polity to further limit the rights of noncitizens. Yet, policymakers cannot ignore the mounting evidence that the current deportation system leads to absurd results.<sup>156</sup> Congress should consider replacing the artificial category of "aggravated felony" with a fact-based inquiry by the immigration judge that weighs the equities, such as length of residence, family ties, and rehabilitation, to determine whether deportation is warranted. And at the very least, ICE attorneys and investigators could focus resources on those noncitizens who present a real threat to community safety, rather than individuals with minor criminal histories.

Justice Stevens' opinions in *Padilla* and *Carachuri-Rosendo* reflect an incisive understanding of the intersection of criminal and immigration law and the disproportionately severe consequences of immigration laws. In particular, *Padilla* brings to light what is at stake for noncitizens facing the prospect of removal—"possible exile . . . and separation from their families."<sup>157</sup> Yet, the Court's implicit appeal in these cases to Congress and the Administration to alter the current state of the law continues to fall on deaf ears.

Under the guise of targeting terrorists and drug kingpins, Congress has created an overly harsh system of detention and deportation for noncitizens.<sup>158</sup> Data show that non-violent offenders with minor criminal histories are often deported.<sup>159</sup> And it is likely that the majority of these noncitizens appeared pro se in their immigration proceedings.<sup>160</sup> The prospect of exile is particularly severe for long-term permanent residents who entered the U.S. as children and have no ties to their countries of birth. For many offenses, immigration judges cannot exercise any discretion, even if the noncitizen has reformed and is a model resident.<sup>161</sup> Numerous noncitizens are subject to jail-like detention while waiting for the outcome of their civil immigration case.<sup>162</sup> The current

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156. Transcript of Oral Argument at 31, *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (No. 09-60).

157. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010).

158. See MICHAEL JOHN GARCIA AND RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 32564, IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION AND REMOVAL OF ALIENS (2010) available at <http://www.fas.org/sgp/crs/homsec/RL32564.pdf>; Maharaj, *supra* note 38.

159. *Forced Apart (By the Numbers): Non-citizens Deported Mostly for Nonviolent Offenses*, HUMAN RIGHTS WATCH (April 15, 2009) <http://www.hrw.org/en/reports/2009/04/15/forced-apart-numbers>; see also *Detention of Criminal Aliens: What Has Congress Bought?*, TRAC (Feb. 11, 2010), <http://trac.syr.edu/immigration/reports/224>.

160. In FY 2009, only 39% of noncitizens had representation in immigration proceedings. EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 114.

161. See *supra* note 36, and accompanying text.

162. See HEARTLAND ALLIANCE, ET AL., YEAR ONE REPORT CARD: HUMAN RIGHTS AND

deportation regime operates like a blunt instrument, and in the process wreaks havoc on the lives of noncitizens and their children, spouses, and parents.<sup>163</sup> While not every noncitizen should be afforded the right to remain in the United States, the severity of banishment necessitates a more balanced approach with discretion for adjudicators and procedural protections for noncitizens.

Since its inception in 1988, the aggravated felony provision has been particularly problematic because it requires mandatory deportation.<sup>164</sup> Still, even if deportation were not mandatory, the unfortunate reality is that executive discretion might provide little comfort for immigrants in removal proceedings. The current administration deported 389,934 noncitizens in 2009<sup>165</sup> and committed resources to deporting 400,000 people in 2010.<sup>166</sup> In fact, “criminal aliens” are the focus of recent enforcement efforts by the administration,<sup>167</sup> likely because deporting “criminal aliens” is more politically palatable than removing the general immigrant population. The title of “criminal alien” denotes someone who is more deserving of removal because of misconduct. Even policymakers supportive of immigration reform are careful to assert that immigration benefits should only accrue to those who “follow the rules.”<sup>168</sup> Yet what many policymakers and the general public fail to realize is that the fundamental values of fairness, dignity and proportionality that are the foundation for our legal system do not apply to noncitizens with criminal convictions.

#### CONCLUSION

The Court has begun to recognize that for noncitizens with criminal convictions, the immigration proceeding is inextricably tied to the criminal case. But the Court could reasonably take its analysis in *Padilla* and *Carachuri-*

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THE OBAMA ADMINISTRATION’S IMMIGRATION DETENTION REFORMS 6–15 (2010), available at <http://www.immigrantjustice.org/policy-resources/icereportcard/icereportcard.html>; NEW YORK CIVIL LIBERTIES UNION, VOICES FROM VARICK: DETAINEE GRIEVANCES AT NEW YORK CITY’S ONLY FEDERAL IMMIGRATION DETENTION FACILITY (2010), available at [http://www.nyclu.org/files/publications/Varick\\_Report\\_final.pdf](http://www.nyclu.org/files/publications/Varick_Report_final.pdf).

163. See Baum, Jones & Barry, *supra* note 105, at 7–9. See generally FAMILIES FOR FREEDOM, <http://familiesforfreedom.org> (last visited Mar. 15, 2011).

164. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342–44, 102 Stat. 4181, 4469–71.

165. CURRENT ICE REMOVALS OF NONCITIZENS EXCEED NUMBERS UNDER BUSH ADMINISTRATION, TRAC (2010), <http://trac.syr.edu/immigration/reports/234> (last visited Mar. 15, 2011).

166. See Memorandum from John Morton, Ass’t Sec’y for ICE, for all ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010), available at <http://www.ilw.com/immigrationdaily/news/2010,0630-ice.pdf>.

167. See, e.g., *Secure Communities*, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities](http://www.ice.gov/secure_communities) (last visited Mar. 15, 2011).

168. JEFF DAYTON-JOHNSON, ET AL., ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), GAINING FROM MIGRATION: TOWARDS A NEW MOBILITY SYSTEM (2007), available at [http://www.migrationpolicy.org/pubs/Gaining\\_from\\_Migration.pdf](http://www.migrationpolicy.org/pubs/Gaining_from_Migration.pdf).

*Rosendo* one step further. In particular, *Padilla* opens the door for arguments in favor of importing criminal protections, such as proportionality, suppression of illegally obtained evidence, and the right to government-appointed counsel, into immigration proceedings. This shift may appear radical, but the law would merely be catching up to the reality that the immigration system is not a civil one, particularly for noncitizens facing deportation.