

PERFECTING PUBLIC IMMIGRATION LEGISLATION: PRIVATE IMMIGRATION BILLS AND DEPORTABLE LAWFUL PERMANENT RESIDENTS

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I. INTRODUCTION

My daughter Alejandra has lived in the United States since she was a baby and loves this country. She made a mistake [referring to his teenage daughter's arrest for helping a friend to cross the U.S.-Mexico border illegally] but she is a good person and will make up for her mistake. Right now, a private bill is our only hope to avoid our daughter's deportation.

*Antonio Arias Garcia*¹

A private bill creates an exception to the public law for one individual or a specified group of individuals. Described as “an anomaly” in our democratic system, a private bill lacks the “generality of application” that is usually associated with legislation.² The individualistic nature of private bills has inspired both criticism and praise. Critics argue that private bills raise equal protection concerns because individuals in the same position may be treated differently.³ Some commentators praise private bills for creating “equitable law” that addresses unique situations that cannot be covered equitably by the

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1. Telephone Interview with Antonio Arias Garcia (Feb. 12, 2003). Alejandra Arias Garcia's private bill was introduced as H.R. 393, 108th Cong. (2003).

2. Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1684 (1966).

3. *Id.* at 1684–87; BERNADETTE MAGUIRE, IMMIGRATION: PUBLIC LEGISLATION AND PRIVATE BILLS 2 (1997). For other criticisms see Note, *Private Bills and the Immigration Law*, 69 HARV. L. REV. 1092 (1956). John Quincy Adams stated, “There ought to be no private bills before Congress A deliberative assembly is the worst of all tribunals for the administration of justice.” CHRISTINE P. BENAGH, STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 96TH CONG., THE HISTORY OF PRIVATE PATENT LEGISLATION IN THE HOUSE OF REPRESENTATIVES 102 (Comm. Print 1979). Private bills may violate the Naturalization Clause, which directs Congress to “establish a uniform Rule of Naturalization.” See U.S. CONST. art. I, § 8, cl. 4. See generally Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Conviction*, 74 N.Y.U. L. REV. 1696 (1999). Private bills are considered constitutional. See *Plaut v. Spendthrift Farms*, 514 U.S. 211, 239 n.9 (1995).

general public law.⁴ As Professor Aleinikoff has stated, “[s]uch bills have often been used to create humanitarian flexibility in a law that, if applied as written, would produce harsh results.”⁵ Private bills have also been praised for “mak[ing] meaningful the right to petition.”⁶ Historically, private bills have been an especially important vehicle for politically marginalized groups, such as immigrants, to petition the government for discretionary relief.⁷ Immigrants, for instance, have become naturalized and have received exclusion or deportation waivers through private bills.

By focusing on the fact that private bills are individual discretionary exceptions to the law, many commentators have under-appreciated the broader informational role of private bills.⁸ High numbers of private bills have informed Congress about necessary changes to rigid or unintended aspects of the public law. In this way, private immigration bills,⁹ for instance, have served as “examples” that have “perfected the general law and carry out the policy of reuniting families.”¹⁰ High numbers of private bills inspired public legislation that narrowed the categories of deportable immigrants and increased the discretionary authority of the executive branch¹¹ to grant waivers.¹² A Member of the Immigration Subcommittee stated that:

Private bills have over the course of the years demonstrated a need to amend the general law. The committee has responded to the need and legislation has been recommended to Congress. Examples of public legislation enacted as a result of private bills have been waivers of the

4. *Private Bills in Congress*, *supra* note 2, at 1686 (stating that Congress “resembles an ancient court of equity” when it enacts private laws). See *United States v. Realty Co.*, 163 U.S. 427, 440 (1896) (providing equitable rationale for Congressional power to enact private bills).

5. See T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 787 (4th ed. 1998).

6. *Private Bills in Congress*, *supra* note 2, at 1685; Robert Hooper & Juan P. Osuna, *Remedies of Last Resort: Private Bills and Deferred Action*, IMMIGR. BRIEFING No. 97-6 (1997). The Petition Clause of the U.S. Constitution has often been cited as authority for private bills. U.S. CONST. amend. I (stating that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances”).

7. See generally Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003).

8. For a rare but thorough account of the informational role of private bills, see MAGUIRE, *supra* note 3.

9. I will refer to “private immigration bills” as “private bills” throughout the remainder of the text.

10. 115 CONG. REC. 6075 (1969) (statement of Rep. Feighan).

11. The “executive branch” includes the Immigration and Naturalization Service (INS) and the immigration judges that work under the Attorney General. An immigration court is a trial-level tribunal that determines whether an immigrant is in the United States in violation of law, and, if so, whether any waiver or benefit is available that would allow the immigrant to remain in the United States lawfully. Decisions of Immigration Judges may be appealed to the Board of Immigration Appeals (BIA). Both the trial and appellate-level courts are components of the Department of Justice, under the authority of the Attorney General.

12. 6 CHARLES GORDON ET AL., *IMMIGRATION LAW AND PROCEDURE* § 74.09[2] 74-157 (Matthew Bender ed., 2000); see T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 669-70 (1991).

grounds of excludability based upon tuberculosis, convictions of a crime, mental retardation, misrepresentation, and the admission of adopted children.¹³

Private bills have increased historically, thereby intensifying their informational role, following the passage of highly restrictive immigration measures. In the 1930s and in the 1950s, the number of private bills increased following the expansion in the grounds for exclusion and deportation and the increase in limitations on executive discretion.¹⁴ For instance, as President Eisenhower noted, an “avalanche . . . of private bills for the relief of aliens” followed the restrictive measures and decreased executive discretion implemented by the Immigration and Nationality Act (INA) of 1952 (hereinafter referred to as the “INA of 1952”).¹⁵

This historical relationship between restrictive immigration law and high numbers of private bills, however, did not continue following the 1996 immigration laws, often described as the most sweeping and restrictive immigration laws since the INA of 1952. On April 24, 1996, Congress amended the INA of 1952 through the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),¹⁶ and on September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (hereinafter collectively referred to as the “1996 immigration laws”).¹⁷ Many commentators have noted the extreme rigidity of these laws.¹⁸ “In truth, IIRIRA may be the harshest, most procrustean immigration control measure in this century. . . .”¹⁹ Unlike the period of restrictive immigration measures following the enactment of the INA in 1952, however, private bills have not increased since 1996 for any of the categories of immigrant groups (lawful permanent residents (LPRs), undocumented immigrants, etc.) that have been negatively affected by the 1996 immigration laws.²⁰

This article examines why the historical relationship between immigration law and private bills has not continued following the enactment of the 1996

13. 115 CONG. REC. 6075 (1969) (statement of Rep. Feighan).

14. See U.S. PRESIDENT’S COMM’N ON IMMIGRATION & NATURALIZATION, *Whom We Shall Welcome* 215 (1953) [hereinafter PRESIDENT’S COMM’N]. See generally MAGUIRE, *supra* note 3.

15. H.R. DOC. NO. 84-329, at 3 (1956) (statement of President Eisenhower).

16. Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C. (1994 & Supp. V 1999)) [hereinafter AEDPA].

17. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of U.S.C., including titles 8, 18 and 28) [hereinafter IIRIRA].

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

19. Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J. L. & PUB. POL’Y 367, 371 (1999).

20. The 1996 immigrant laws refer to deportation as “removal” and exclusion from entry as “inadmissibility.” I continue to use the terms deportation and exclusion throughout the text.

immigration laws for any of the affected immigrant groups.²¹ The article focuses on LPRs with criminal convictions in particular because their likelihood of deportation has increased dramatically as their access to executive discretion to avoid deportation has decreased. Since 1996, even if an LPR has lived in the United States since childhood, she can be subject to mandatory deportation for almost any criminal conviction – including misdemeanors, such as shoplifting or a bar fight. Since 1996, it is much more likely that an LPR with only one conviction will be subject to deportation and that someone subject to deportation pursuant to a criminal conviction will be barred from access to executive discretion.²² Despite these increases in the likelihood of deportability and severe restrictions in executive discretion, only one person with a criminal conviction has benefited from a private bill since 1996.²³

Such interruption in this historical relationship has resulted in two negative effects. First, family members of deportable LPRs have suffered gravely from the greater likelihood of deportation and virtual non-existence of discretionary relief from any branch of government. As the Supreme Court has stated, “deportation is a drastic sanction, one which can destroy lives and disrupt families.”²⁴ Since the enactment of the 1996 immigration laws, thousands of United States citizens and lawful permanent resident family members have suffered emotionally and economically due to indefinite separation from their loved ones.²⁵ Second, the interruption in the historical relationship has also hindered private bills from informing members of Congress about the inadequacies and/or overly harsh aspects of the 1996 immigration laws. In this way, immigrants have reduced access to one of their rare opportunities to participate in the political process and to shape the laws that govern their lives and families.

In Section II, I will analyze the relationship between immigration law and private bills as well as the informational role of private bills prior to the enactment of the 1996 immigration laws. As I will illustrate below, pre-1996, the rise in private bills informed public immigration law, often resulting in

21. It is fairly well settled that lawful permanent residents are protected by the First Amendment and therefore have the right to petition. *See, e.g.,* *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Judge Murphy stated in his separate opinion, “Once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.”); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 310 n.5 (1970) (adopting Murphy concurrence in *Bridges*); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 n.5 (1953) (adopting Murphy concurrence in *Bridges*).

22. Morawetz, *supra* note 18, at 1936–37.

23. *See* Priv. L. No. 105-6, 112 Stat. 3666 (1998); H.R. REP. NO. 105-644 (1998).

24. *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963). *See* *Tan v. Phelan*, 333 U.S. 6, 10 (1948) (calling deportation “a drastic measure and at times the equivalent of banishment or exile”); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (stating that deportation may deprive an individual “of all that makes life worth living”); *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975) (“Deportation is not, of course, a penal sanction. But in severity it surpasses all but the most Draconian criminal penalties.”).

25. Morawetz, *supra* note 18, at 1937–38, 1950.

decreases in the grounds for exclusion and deportation and increases in access to discretionary relief through the executive branch. Because deportation of LPRs with criminal convictions was much less likely before 1996, the analysis draws from the experience of other immigrant groups in both the deportation and exclusion contexts. Section III will focus particularly on LPRs with criminal convictions to explore the relationship between immigration laws and private bills after the 1996 legal changes. It will illustrate that the introduction of unprecedented restrictive immigration measures in 1996 was not followed by a period of increased private bills. Section IV will explain the reasons for the interruption in the historical relationship and will try to identify what is hindering private bills from fulfilling their historical role. Section V will conclude and suggest some recommendations that may enable private bills to restore their historical discretionary and informative role during times of restrictive immigration policy.

II. IMMIGRATION LAW AND PRIVATE BILLS: THE RELATIONSHIP PRE-1996

This section will examine the relationship between immigration law and private bills from the early days of the twentieth century until the passage of the 1996 immigration laws. It will illustrate that legislative discretion through private bills often increased following the passage of restrictive immigration legislation. In turn, it will illustrate that decreases in the numbers of private bills followed the relaxation of restrictive immigration legislation, such as the expansion of executive discretionary relief from deportation and exclusion from entry. Where appropriate, the section will highlight the informational role of private bills.

A. *The First Half of the Twentieth Century*

1. *The Immigration Act of 1917 and Private Bills*

Although legislation mandating the exclusion from entry of certain immigrants with criminal convictions was established in the late nineteenth century,²⁶ it was not until 1917 that Congress enacted legislation mandating deportation of immigrants convicted of crimes in the United States after proper entry.²⁷ Congress passed the Immigration Act of 1917 “in large measure because World War I brought nervousness about the loyalty and

26. As a response to concerns regarding the importation of Chinese prostitutes and European criminals, Congress, through the Immigration Act of 1875, excluded from entry immigrants that had served sentences for convictions of felonious crimes in their own country. The Immigration Act of 1875, ch. 141, 18 Stat. 477 (1875); see E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1964 at 80 (1981).

27. See Immigration Act of 1917, Pub. L. No. 301, ch. 19, 39 Stat. 874 (1917); *INS v. Chadha*, 462 U.S. 919, 990 (1983) (White, J., dissenting).

assimilability of the foreign born to a fever pitch.”²⁸ The Immigration Act of 1917 and subsequent immigration legislation, such as the Quota Act of 1921 and the Immigration Act of 1924, imposed harsh immigration restrictions such as literacy requirements, economic self-sufficiency requirements and the establishment of a racially-based quota system for admitting immigrants.²⁹

Congress, however, did not explicitly grant the executive branch the ability to provide discretionary relief to immigrants in deportation proceedings until 1940.³⁰ In the context of restrictive immigration measures and limited executive discretion before 1940,³¹ private bills played a primary role in the provision of discretionary relief from deportation for individuals.³² The high number of private bills played a broader informational role as well.

2. *The Informational Role of Increased Private Bills: The Alien Registration Act of 1940*

In the 1930's private bills informed Congress about the need for the executive branch to have greater latitude to provide discretionary relief from deportation.³³ Despite initial hesitations,³⁴ a high number of private bill requests in the 1930's originally prompted Congress to delegate power over

28. U.S. SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, STAFF REPORT ON U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 182-84, 189 (1981).

29. Immigration Act of 1924, Pub. L. No. 139 ch. 190, 43 Stat. 153; Quota Act of 1921, Pub. L. No. 5, ch. 8, 42 Stat. 5.

30. Even before 1940 federal circuit courts were periodically throwing out some “obviously grotesque” cases. Mae Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 95 (2003).

31. The executive branch, however, did have some very limited executive discretion before 1940 through the Seventh Proviso of the Immigration Act of 1917. The Seventh Proviso provided that “aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General and under such conditions as he may prescribe.” Immigration Act of 1917, Pub. L. No. 301, 39 Stat. 874 (1917) (codified as amended at 8 U.S.C. § 156 (1917)) (repealed 1952). Even though the Seventh Proviso applied literally only to exclusion proceedings, and the deportation provisions of the statute did not have a similar provision, the executive branch increasingly used it to grant relief in deportation proceedings following the election of Franklin D. Roosevelt in 1933. *INS v. St. Cyr*, 533 U.S. 289 (2001) (citing *Matter of L*, 1 I. & N. Dec. 1, 2, 1940 WL 7544 (1940) and stating that the exercise of discretion was deemed a *nunc pro tunc* correction of the record of reentry). Roosevelt's Secretary of Labor, Frances Perkins, a New York Progressive-era reformer, and the new head of the INS, Daniel MacCormack, were not able to pass legislation but creatively interpreted the Seventh Proviso to suspend deportations and to legalize the status of certain illegal immigrants in hardship cases. Ngai, *supra* note 30, at 100. The secretary of labor granted the immigrant a waiver from deportation and allowed her to depart to Canada and to reenter the U.S. as a legal permanent resident. In approving of this construction of the Seventh Proviso, the Attorney General stated that strictly limiting the exception to exclusion proceedings would be “capricious and whimsical.” *Matter of L*, 1 I. & N. Dec. 1, 5, 1940 WL 7544 (1940).

32. See *INS v. Phinpathya*, 464 U.S. 183 (1984); *INS v. Chadha*, 462 U.S. 919, 991 (1983) (White, J., dissenting); *INS v. Wang*, 450 U.S. 139, 140, n.1 (1981); *Foti v. INS*, 375 U.S. 217, 222 (1963).

33. Historical evidence suggests that private bills played an informational role with respect to immigration legislation passed in the eighteenth and nineteenth centuries as well. See Wishnie, *supra* note 7, at 710-11.

34. See 81 CONG. REC. 5548-49 (1937) (remarks of Reps. Fish & Robinson).

deportation relief to the executive branch in 1940.³⁵ Members of Congress felt that they should delegate some of the responsibility over deportation waivers in order to relieve the burden caused by high numbers of private bill requests. In the debate on a 1937 bill, Representative Dies stated:

It was my original thought that the way to handle all these meritorious cases was through special [private] bills. I am absolutely convinced as a result of what has occurred in this House that it is impossible to deal with the situation through private bills.³⁶

In *INS v. Chadha* the Supreme Court noted that:

After long experience with the clumsy, time-consuming private bill procedure for making decisions on allowing deportable aliens to remain in the United States, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to make such decisions.³⁷

The Alien Registration Act of 1940 provided the executive branch with discretion to grant deportation relief to individuals in cases where the equities, or concern with fairness, weighed in the immigrant's favor.³⁸ The Act authorized the Attorney General to suspend an immigrant's deportation if the immigrant could prove five years of residence in the United States and good moral character. An individual also had to prove that deportation would result in "serious economic detriment" to a spouse, parent, or minor child who was an LPR or a United States citizen.³⁹ "Good moral character" did not preclude people with criminal records. Instead it referred to a "reputation which [would] pass muster with the average man need not rise above the level of the common mass of people."⁴⁰ In 1948, Congress extended the

35. Many felt that the private bill system became unmanageable as the number of hardship cases rose, necessitating the congressional delegation of its suspension-of-deportation power to the executive branch. See 81 CONG. REC. 5542 (1937) (remarks of Rep. Dies); GORDON ET AL., *supra* note 12, at § 74.07[2][a] 74-68 ("Confronted with large numbers of compassionate cases, the administrative authorities requested that Congress grant authority to remit deportation."); Susan L. Kamlet, Comment, *Judicial Review of "Extreme Hardship" in Suspension of Deportation Cases*, 34 AM. U. L. REV. 175, 175 n.4 (1984) ("In 1936 the Commissioner of Immigration cited nearly 3,000 cases under consideration which involved 'such incredibly cruel family separations . . . so repugnant to every American principle of justice and humanity that deportation was stayed until Congress might take some action.'").

36. 81 CONG. REC. 5542 (1937). Representative Dies' bill passed the House but did not come to a vote in the Senate. *INS v. Chadha*, 462 U.S. 919, 933 (1983).

37. *Chadha*, 462 U.S. at 954 (declaring unconstitutional the statutory provision that allowed Congress to have a one-house veto over executive branch decisions to grant deportation waivers).

38. Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670, 672; see *INS v. Wang*, 450 U.S. 139, 140 (1981).

39. Alien Registration Act § 20, 54 Stat. at 672; see *INS v. Phinpathya*, 464 U.S. 183, 190 (1984); *INS v. Wang*, 450 U.S. 139, 140 (1981); *Foti v. INS*, 375 U.S. 217, 223 (1963).

40. Pub. L. No. 76-670, 54 Stat. 670; see S. REP. NO. 81-1515, at 596 (1950) (discussing "good moral character" in suspension of deportation cases).

executive branch's ability to suspend deportation to immigrants without family ties who could establish seven years of residence in the United States.⁴¹ Despite calls for even further loosening of restrictive immigration legislation through expanded executive discretion,⁴² the early 1950's witnessed an intensification of legal restrictions on immigration.

B. *The Immigration and Nationality Act of 1952 and Private Bills*

1. *Restrictive Immigration Laws and Increases in Private Bills*

Amidst fears of Communist infiltration, U.S. legislators passed public immigration legislation that severely tightened U.S. borders vis-à-vis immigrants over President Truman's veto.⁴³ The INA of 1952 was an unprecedented re-codification and revision of existing immigration law.⁴⁴ It not only broadened the criteria for what made someone deportable or excludable but it also decreased access to executive discretion.⁴⁵ In the wake of this severe increase in restrictive immigration measures, private bills skyrocketed in the 1950s.

In the early 1950s, some Members of Congress felt that too many immigrants were benefiting from the executive branch's suspension of deportation under the Alien Registration Act of 1940.⁴⁶ Congress significantly expanded the crimes and misdemeanors that made an immigrant excludable from entry and deportable.⁴⁷ In 1952, INA § 244(a) decreased executive discretion over deportation.⁴⁸ Congress mandated that the executive branch could only grant relief to immigrants in circumstances where an

41. See Act of July 1, 1948, Pub. L. No. 80-863, 62 Stat. 1206. There was some resistance to this delegation of discretion as well. See S. REP. NO. 80-1204 (1948) (stating that Congress should not "relinquish its prerogatives" to pass upon suspension of deportation cases).

42. In the late forties the executive branch called for a greater increase in executive discretion to deal with deportation cases that were being handled through private bills. In 1947 House Judiciary Committee hearings on legislation allowing waivers for minor excludable offenses, Attorney General Tom Clark, for instance, emphasized the need for additional executive discretionary authority to cover the types of cases represented by private bills. HOUSE COMM. ON THE JUDICIARY, 80TH CONG., REGULATING POWERS OF ATTORNEY GENERAL 132 (Comm. Print 1947); see S. REP. NO. 81-1515, at 609-10 (1950) (indicating the existence of a need for extended executive discretion through the creation of an administrative procedure to correct errors in alien admission).

43. COMM. ON THE JUDICIARY U.S. SENATE, 96TH CONG., U.S. IMMIGRATION LAW AND POLICY: 1952-1979 1 (Comm. Print 1979).

44. See *id.* at 5.

45. The 1952 Act rendered excludable immigrants with criminal records, narcotic violators and addicts, people engaging in "immoral sexual acts," and smugglers. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered statutes at 8 U.S.C. §§ 1101-1189).

46. William C.B. Underwood, Note, *Unrenewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 IND. L.J. 885, 889 (1997) (citing S. REP. NO. 81-1515, at 600-01 (1950) and S. REP. NO. 82-1137, at 25 (1952)).

47. See generally HUTCHINSON, *supra* note 26.

48. See *INS v. Phinpathya*, 464 U.S. 183, 190-92 (1984).

immigrant's deportation would be "unconscionable."⁴⁹ INA § 244 restricted the Attorney General's ability to grant suspensions of deportation to cases that would result in "exceptional and extremely unusual hardship" for the immigrant or the immigrant's family.⁵⁰ To determine whether "exceptional and extremely unusual hardship" existed, the court evaluated factors such as the length of residency in the United States, the manner of entry, family ties, the possibility of obtaining a visa abroad, the age and health of the immigrant and the financial burden involved.⁵¹ Some, but not all, of these factors had to be present to grant a suspension of deportation.⁵² The 1952 provision also required an immigrant to show "good moral character" and a certain continuous period of residency depending on the seriousness of the deportation grounds.⁵³ The period of residency was seven years for lower level crimes and ten years for more serious crimes.⁵⁴

The restrictive immigration measures, however, were followed by a historic increase in private bills in the 1950s. As Figure 1 illustrates, the number of private bills soared after the enactment of the INA in 1952. Congress granted seven hundred private bills between 1953 and 1958 as waivers for exclusion and deportation based on criminal offenses.⁵⁵

49. See S. REP. NO. 82-1137, at 25 (1952) (stating that "to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual").

50. See INA § 244(a); INS v. Wang, 450 U.S. 139, 140 (1981).

51. See In re S., 5 I. & N. Dec. 409, 410-11 (B.I.A. 1953); In re U., 5 I. & N. Dec. 413, 414 (B.I.A. 1953).

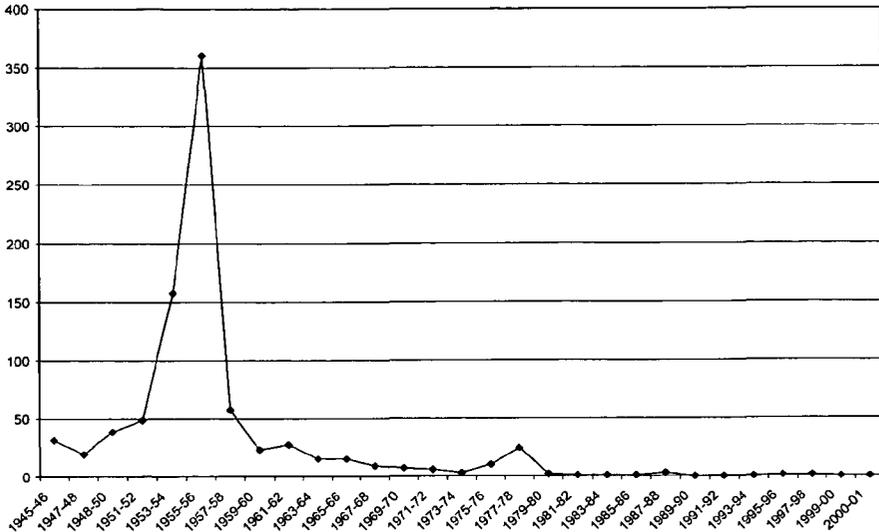
52. See In re S., 5 I. & N. Dec. 409, 410 (B.I.A. 1953).

53. See INA § 244(a). The 1952 Act outlined that the following individuals could not be found to be a person of good moral character: a habitual drunkard, an adulterer, one whose income is derived principally from illegal gambling, one who has been convicted of two or more gambling offenses, one who has given false testimony for the purpose of obtaining benefits under the INA of 1952, one who has served a period of 180 days or more in prison, or one who at any time has been convicted of the crime of murder. INA § 101(f). INA § 101(f) also stated that individuals convicted under certain sections of INA § 212(a) would also be considered not to have good moral character. The sections related to individuals with two or more convictions, polygamists, prostitutes, individuals convicted of any law or regulation related to illicit traffic in narcotic drugs, individuals who had assisted illegal entry for monetary gain and individuals convicted of a crime involving moral turpitude. Moral turpitude is not defined in the INA of 1952, but most courts evaluate whether a crime involves moral turpitude on whether the inherent nature of the act includes elements that demonstrate the perpetrator's "baseness, vileness and depravity." *Tutrone v. Shaughnessy*, 160 F. Supp. 433, 435-36 (S.D.N.Y. 1958). See *Lawyers' Coop. Publ'g Co. & Bancroft-Whitney Co., Annotation, What Constitutes "Crime Involving Moral Turpitude" Within Meaning of §§ 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. §§ 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. FED. 480 (2000) (describing crimes involving moral turpitude as including homicide, manslaughter, assault, robbery, burglary, embezzlement, extortion, bigamy, incest, indecent assault, and rape).

54. Individuals who were deportable under INA § 241(a) were subject to the ten-year requirement. These individuals included those who entered the U.S. without inspection, those convicted of a crime involving moral turpitude committed within five years after entry and sentenced or confined for a year or more, those who are convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. INA § 241(a).

55. MAGUIRE, *supra* note 3, at 148.

Figure 1. # of private bills enacted waiving exclusion/deportation based on criminal convictions.



2. *The Informational Role of Increased Private Bills: 1954 Act, 1957 Act, 1962 Reforms and the 1981 Drug Laws*

In the years following the INA of 1952, private bills helped to fine tune what some criticized as a poorly drafted and confusing immigration law,⁵⁶ as they educated members of Congress about the unintended consequences and problems with the existing immigration law. Private bills helped Congress figure out where it was necessary to “tinker[] with the machinery” of the INA of 1952.⁵⁷ The tremendous increase in private bills in the 1950s compelled Congress to enact legislation, most notably through the Act of 1954, the Act of 1957 and the reform of INA § 244 in 1962. Furthermore, after the early 1960s, when executive discretion was generally expanding, and legislative discretion through private bills was generally retracting, private bills played an informational role in relation to the 1981 drug laws, which were inspired by a small, but relative, increase in private bills.

a. *Act of 1954*

Immediately after the enactment of the INA of 1952, a series of private bills exempted immigrants with petty criminal offenses from the strict

56. PRESIDENT’S COMM’N, *supra* note 14, at 263 (stating that the INA of 1952 was criticized for being poorly drafted and confusing).

57. See generally COMM. ON THE JUDICIARY U.S. SENATE, *supra* note 43, at 52 (borrowing phrase from Elmer Fried, *Immigration and Nationality Law*, 35 N.Y.U. L. REV. 188 (1960)).

provisions of the general law set out in the INA of 1952.⁵⁸ In 1954, as a response to a rising tide of private bills, Congress created an exemption from exclusion for immigrants “whose only bar to entry was commission of a petty offense.”⁵⁹ House debate on the 1954 amendments shows the direct connection between private bills and the enactment of public legislation. The Chairman of the Immigration Subcommittee, Mr. Walter, stated in the House debate:

[I]t has become apparent to the Committee on the Judiciary that American consular officers are excluding entirely too many aliens on very technical grounds. Case after case has been brought before us under private legislation, in which visas are being denied to persons who committed such petty crime as theft of bread during the famine days of 1946 Germany. . . .⁶⁰

b. Act of 1957

A dramatic increase in private bills also inspired the enactment of public immigration legislation in 1957. As a response to private bills, legislation in 1957 granted discretionary authority to the Attorney General to waive exclusion and deportation based on crimes involving moral turpitude, fraud, and prostitution in cases of family reunification.⁶¹ “In enacting the waivers for minor criminal offenses, Senator Arthur V. Watkins (R-UT) noted during debate on the legislation that many of the cases had previously been the subject of a great deal of private legislation to accommodate the separation of families.”⁶² The House Judiciary Committee noted the connection between private bills and legislative reform in its report on the legislation:

The Committees on the Judiciary of the House and the Senate have a considerable number of private bills before them under which the conduct of such aliens, considering their family situation, would be condoned. A great number of such private bills passed the Congress and were enacted into law during the last few years. It appears to the committee that it is unfair and improper to extend the benefit of legislative relief solely on a few selected individuals who are in a position to reach the Congress for redress of their grievances. It is felt

58. Many of these private bills were for alien wives of American servicemen who had been convicted of minor offenses during the post-war period. See ALEINIKOFF & MARTIN, *supra* note 5, at 787–88; MAGUIRE, *supra* note 3, at 150.

59. Act of September 3, 1954, 68 Stat. 1145; MAGUIRE, *supra* note 3, at 146.

60. 100 CONG. REC. 15,490–91 (1954).

61. Act of Sept. 11, 1957, 71 Stat. 639; MAGUIRE, *supra* note 3, at 153. This statute was a predecessor statute to INA § 241(f), 8 U.S.C. § 1251(f). *Chow v. INS*, 641 F.2d 1384, 1388 (1981).

62. MAGUIRE, *supra* note 3, at 153; 103 CONG. REC. 15,492 (1957).

that that humanitarian approach should be extended to an entire defined class of aliens rather than to selected individuals.⁶³

c. *1962 Reforms*

Historical evidence suggests that high numbers of private bills in the 1950s played an informational role in the 1962 reforms to the INA of 1952 that lead to increased executive discretion. A 1953 independent commission that Congress requested to review the immigration laws commented, "The increase in the number of private immigration bills introduced into, and passed, by the Congress is itself evidence that something is wrong with our immigration laws. . . ."⁶⁴

In 1956, President Eisenhower recommended a reform of the INA of 1952 to "provide a fair and workable substitute for the private bill system of granting relief from deportation in hardship cases."⁶⁵ Some thought that the increase in the number of private bills was not a sufficient solution to the strict "exceptional and extremely unusual hardship" standard for executive branch discretion provided in INA § 244. The INA of 1952 was widely criticized for its lack of executive discretion and its rigid "exceptional and extremely unusual hardship" standard.⁶⁶ Some felt that the Attorney General should have been granted more discretion than allowed for by § 244 of the INA of 1952.⁶⁷ President Truman, in his veto of the INA of 1952, expressed fear that INA § 244 "would narrow the circle of those who can obtain relief. . . ." Section 244, Truman felt, would be an unfortunate reduction in executive discretion because other sections of the INA of 1952 would impose

63. H.R. REP. NO. 85-1199, at 11 (1957). The Act of September 26, 1961 incorporated this and other ameliorative legislation as INA § 212(h).

64. PRESIDENT'S COMM'N, *supra* note 14, at 216.

65. COMM. ON THE JUDICIARY U.S. SENATE, *supra* note 43, at 16-17.

66. See Jonathon P. Foerstel, Comment, *Suspension of Deportation—Toward a New Hardship Standard*, 18 SAN DIEGO L. REV. 663, 667 n.31 (1981). In a letter to Senator Arthur Watkins, President Eisenhower stated that there would be problems interpreting the exceptional and extremely unusual hardship standard, and therefore, "the laws should more clearly state the standards upon which this discretionary relief may be granted by the Attorney General." 99 CONG. REC. 4321 (1953). One of the harshest criticisms of the "exceptional and extremely unusual" hardship standard came from Ben Touster, President of the Hebrew Sheltering and Immigration Aid Society:

[S]ection 244 [along with §§ 212(c), 245] . . . rob our immigration laws of every vestige of humaneness which has developed since 1917. The hardship attendant upon separating families is not enough to grant suspension . . . One must measure degrees of suffering and torture, and only those who suffer the anxiety of mental and physical pain to the utmost may be relieved under this law. The rest must suffer exile, a dreadful punishment abandoned by the common consent of all civilized peoples.

(quoting STAFF OF PRESIDENT'S COMM'N ON IMMIGRATION & NATURALIZATION, 82D. CONG., HEARINGS BEFORE THE PRESIDENT'S COMM'N ON IMMIGRATION AND NATURALIZATION 1789 (Comm. Print 1952)) (alterations in original).

67. PRESIDENT'S COMM'N, *supra* note 14, at 214 ("The exercise of discretion according to standards fixed by Congress is peculiarly an executive function. The legislature is not equipped, and not intended to be equipped, to handle the details of administration . . .").

even harsher restrictions and would add to the number deserving relief.⁶⁸

In 1962, INA § 244(a)(1) was amended, reducing the hardship requirement to an “extreme hardship” standard instead of “exceptional and extremely unusual hardship” for an immigrant deportable on any other grounds except serious criminal convictions.⁶⁹ The “exceptional and extremely unusual hardship” requirement was maintained for LPRs with serious criminal convictions.⁷⁰ The main difference was that the Attorney General could suspend a deportation if she found that deportation would result in extreme hardship for the immigrant or her family.⁷¹ The other requirements remained the same. The immigrant had to have “good moral character” and seven years of physical presence in the United States. Immigrants who were deportable on the basis of convictions of more serious crimes had to establish ten years of residence and show that their deportation would result in “exceptional and extremely unusual hardship” before the Attorney General would grant suspension of deportation.⁷²

d. The Drug Laws of 1981

Amidst a general decline in private bill numbers, private bills granting waivers for drug crimes increased during the 94th and 95th Congresses (1975-1978). Following this increase, Congress introduced public legislation in 1981.⁷³ The public legislation provided a discretionary waiver of the narcotics exclusion for a single offense of thirty grams or less of simple possession of marijuana if the waiver was on behalf of the spouse, child or parent of a U.S. citizen or lawful permanent resident.⁷⁴ A limited waiver was provided in cases of extreme hardship.

There were twenty-nine private bills waiving exclusions and deportations for drug offenses leading up to the legislative change. The passage of twenty-nine private bills represented a significant increase in light of the general reduction in the passage of private bills since 1962. The House Judiciary Committee report on the legislation stated that private bills played an informational role in its decision to pass the general legislation:

The private bills have demonstrated to the Committee that this ground of exclusion has resulted in undue hardship to many U.S.

68. H.R. Doc. No. 82-520, at 7 (1952).

69. See Act of Oct. 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247-48. LPRs deportable under INA § 244(a)(2) did not benefit from this relief. For a discussion of what constitutes serious criminal convictions see *supra* note 54.

70. This referred to crimes that fell under INA § 244(a)(2) or under certain subsections of INA § 241(a).

71. INA § 244, 66 Stat. 214 (amended by 8 U.S.C. § 1254(a)(1) (1962)); *INS v. Wang*, 450 U.S. 139, 139-40 (1981).

72. INA § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1976).

73. MAGUIRE, *supra* note 3, at 149.

74. Act of December 29, 1981, 95 Stat. 1611.

citizens. . . [I]n the past 10 years the Committee has approved 34 private bills for spouses or children of U.S. citizens who had been convicted of a minor drug violation and had since demonstrated their rehabilitation.⁷⁵

The enactment of the 1954 Act, the 1957 Act, the 1962 reforms and the 1981 drug laws illustrate that private bills not only have a discretionary impact on individuals but also have a broader informational role that often leads to legislative reform.

C. *The Expansion of Executive Discretion and the Decrease in Private Bills: 1962-1996*

In contrast to increases in private bills following restrictive immigration measures, private bills tended to decrease after the loosening of restrictive immigration laws.⁷⁶ This section will illustrate the more general trend that as executive discretion to grant deportation waivers increased in the 1960s, 1970s and 1980s legislative discretion via private bills decreased.

As Figure 1 illustrates, the number of private bills remained low after an increase in executive discretion over deportation in the early 1960's. In 1962, the executive branch was allowed to grant waivers when there was evidence of "extreme hardship" as opposed to limiting itself to situations involving "exceptional and extremely unusual hardship." The distinction between "extreme hardship" and "exceptional and extremely unusual hardship" has never been clearly defined, but it is generally agreed that, in 1962, Congress intended to lessen the degree of hardship required for the Attorney General to suspend deportation.⁷⁷ Even though there is no explicit evidence that the 1962 delegation of executive discretion was directly inspired by private bills, the reduction in private bills suggests that increased executive discretion reduced Congressional incentives to pass private bills on behalf of immigrants excludable or deportable due to criminal offenses.

The use of private bills remained low as executive branch discretion expanded further in the 1970s.⁷⁸ Individuals returning to a lawful unrelin-

75. MAGUIRE, *supra* note 3, at 154 (citing H.R. REP. NO. 97-264, at 12 (1981)).

76. Immediately following the delegation of executive discretion with the Act of 1957, for instance, the numbers of private bills decreased significantly. MAGUIRE, *supra* note 3, at 148. Private law waivers for fraud decreased from seventy-three in the 84th Congress (1955-1956) to thirty-nine in the 85th Congress (1957-1958) and to eight in the 86th Congress (1959-1960). In 1961, the criminal waivers' mechanisms became permanent. MAGUIRE, *supra* note 3, at 153.

77. *In re Hwang*, 10 I. & N. Dec. 448, 452 (1964); *In re Louie*, 10 I. & N. Dec. 223, 225 (1963); *see Wang v. INS*, 622 F.2d 1341, 1345 n.2 (9th Cir. 1980), *rev'd*, 450 U.S. 139 (1981).

78. 66 Stat. 187, 8 U.S.C. § 1182 (Supp. 1953). The 1952 INA § 212(c) provision was facially limited to exclusion (inadmissibility) proceedings but was significantly extended to cover the deportation context over time. *See, e.g., Atwood v. Ashcroft*, 260 F.3d 1, 2 n.1 (1st Cir. 2001); *Goncalves v. Reno*, 144 F.3d 110, 114 (1st Cir. 1998); *Barreiro v. INS*, 989 F.2d 62, 63 (1st Cir. 1993); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Matter of Smith*, 11 I. & N. Dec. 325 (1965); *Matter of G. A.*, 7 I. & N. Dec. 274 (1956).

quished domicile of seven consecutive years qualified for a discretionary hearing for a waiver under INA § 212(c).⁷⁹ In 1976, executive discretion through INA § 212(c) became available to a much larger number of LPRs with criminal convictions. Before 1976, there had been some dispute about whether INA § 212(c) covered the deportation context, thereby reducing access to the remedy.

The 1952 INA § 212(c) provision was facially limited to exclusion from entry proceedings. Over time INA § 212(c) was extended to cover the deportation context.⁸⁰ A temporary absence from the United States was interpreted to grant individuals with the opportunity for INA § 212(c) relief. In 1956 the Board of Immigration Appeals concluded that the respondent was eligible for INA § 212(c) consideration by reason of a temporary absence from the United States in 1952.⁸¹ The Board reasoned that since the respondent would have been eligible for INA § 212(c) relief at the time that he reentered the country, relief could be granted at this later juncture. Section 212(c) was also extended to deportation proceedings where an LPR requested an adjustment of status.⁸² The Board stated that since the adjustment of status application subjected the immigrant to all bases for exclusion, there was “no valid reason for denying him the benefits of INA § 212(c) on the technical ground that he is not returning to the United States after a voluntary departure.”⁸³

It was not until 1976, however, that the Second Circuit affirmatively held in *Francis v. INS* that INA § 212(c) relief was available in deportation proceedings.⁸⁴ “The INS has adopted *Francis* nationwide so that all eligible permanent resident aliens who are ordered deported may ask the Attorney General to waive the ground for deportability under INA § 212(c).”⁸⁵ From 1976 until 1996, § 212(c) provided administrative relief for LPRs who were inadmissible or deportable for committing criminal offenses.⁸⁶ Between

79. 66 Stat. 187, 8 U.S.C. § 1182 (Supp. 1953).

80. Blurring the line between exclusion (at entry) and deportation (once admitted) is a common theme in U.S. immigration history. During the 1920s, Congress and the Immigration Service conceived of and executed deportation as an adjunct to the exclusion process. The Immigration Service blurred the lines between “excludability” and “deportability” by deporting immigrants who committed minor crimes or violated norms of sexual morality even though they were not deportable offenses. The Service did this by considering these people likely to become liable for a public charge at time of entry (LPC). The Service, in other words, “considered lapses or misfortune subsequent to entry to be the teleological outcome of a prior condition, which it adduced by way of retroactive judgment.” Courts clarified somewhat in the 1930s that conviction of a crime “before entry” referred to crimes committed outside the United States before the immigrant’s first entry. *Ngai, supra* note 30, at 96.

81. *Matter of G. A.*, 7 I. & N. Dec. 274 (1956).

82. *Matter of Smith*, 11 I. & N. Dec. 325 (1965) (citing INA § 245, 8 U.S.C. § 1255 (1964)).

83. *Id.* at 327.

84. *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

85. *Variampambal v. INS*, 831 F.2d 1362, 1364 (7th Cir. 1987).

86. *See Barreiro v. INS*, 989 F.2d 62, 63 (1st Cir. 1993) (stating that, while the statutory language specified aliens attempting to reenter the country, it uniformly interpreted former INA § 212(c) to give aliens in deportation proceedings, as well as exclusion proceedings, the right to apply for a

1989 and 1994 over half of all immigrants who petitioned for INA § 212(c) relief demonstrated sufficient equities to receive discretionary relief from deportation.⁸⁷

This provision increased executive discretion significantly. It gave an immigration judge an opportunity to consider issues such as rehabilitation, harm to family members and whether the individual had strong ties to his or her country of origin.⁸⁸ If this balance of equities tipped in favor of the LPR, the immigration judge could grant relief from deportation.⁸⁹ The hearings evaluated the fundamental fairness of deporting a particular LPR. A careful consideration of the factors allowed immigration judges to weigh the LPR's overall value to her family and community against any potential danger posed to society. For instance:

The Immigration Judge's decision to grant the waiver depend[ed] on the weighing of many factors [including] family ties within the United States, residence of long duration in this country[,] . . . evidence of hardship to the individual and family if deportation were to occur, service in this country's armed forces, a history of employment, existence of property or business ties, evidence of value and service to the community, proof of rehabilitation, and other evidence attesting to an individual's good character and likelihood of future positive contributions to American society.⁹⁰

In this atmosphere of expanded executive discretion, the number of private bills remained low.

III. IMMIGRATION LAW AND PRIVATE BILLS: THE RELATIONSHIP POST-1996

This section will examine the relationship between immigration law and private bills since 1996. The 1996 immigration laws created the most sweeping changes in immigration law since the enactment of the INA in 1952.⁹¹ In many ways, the 1996 immigration laws are even more restrictive than the INA of 1952 as they expanded grounds for deportation and eliminated almost all forms of executive discretionary relief from deportation. Unlike the period following the enactment of the INA of 1952, however,

discretionary waiver); *Atwood v. Ashcroft*, 260 F.3d 1, 2 n.1 (1st Cir. 2001); *Goncalves v. Reno*, 144 F.3d 110, 114 (1st Cir. 1998).

87. See *Mojica v. Reno*, 970 F. Supp. 130, 178 (E.D.N.Y. 1997).

88. *Morawetz*, *supra* note 18, at 1939.

89. See *Matter of Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978); *Morawetz*, *supra* note 18, at 1939.

90. *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997); see *In re C-V-T*, Int. Dec. No. 3342, 1998 WL 151434 (B.I.A. 1998); *Matter of Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978).

91. Nathan Gordon & Louis Gordon, *Discretionary Relief from Deportation Curtailed*, L.A. LAWYER, Mar. 2002, at 53; Alexander E. Chopin, *Disappearing Due Process: The Case for Indefinitely Detained Permanent Residents' Retention of Their Constitutional Entitlement Following a Deportation Order*, 49 EMORY L. J. 1261, 1276 (2000); see *Sabino v. Reno*, 8 F. Supp. 2d 622, 623 (S.D. Tex. 1998).

the restrictive 1996 immigration laws have not been coupled with an “avalanche” of private bills. Instead, private bills have continued to decline.

A. *The Intensification of Restrictive Immigration Measures*

Before 1996, far fewer LPRs with criminal convictions were “deportable” under the immigration laws. Furthermore, when an LPR was rendered to be deportable, the pre-1996 immigration laws gave the individual an opportunity to demonstrate to an immigration judge why she deserved to remain in the U.S. LPRs could present equities weighing in their favor, such as evidence of rehabilitation, extensive family ties in the U.S. and productive participation in the community. Upon hearing about the equities in favor of an LPR and the counter arguments, an immigration judge had the discretion to waive deportation in cases where the LPR’s equities significantly outweighed any potential danger to society. When there was a non-frivolous legal basis to do so, LPRs had the right to appeal an immigration judge’s unfavorable decision in a federal court. Since the 1996 immigration laws, however LPRs with criminal convictions are much more likely to be rendered deportable and to be barred from presenting the equities of their case in executive or judicial hearings, even in the most sympathetic of cases.

1. *Expansion of Aggravated Felonies Definition and Increased Grounds for Deportability*

Immigration measures became more restrictive after 1996, dramatically increasing the grounds for deportability. In 1996, Congress significantly expanded the crimes and misdemeanors that make an LPR almost automatically deportable. The new immigration laws increased the likelihood that an LPR will face mandatory deportation for any criminal conviction without the possibility to benefit from executive discretion.⁹² The 1996 immigration laws expanded the definition of “aggravated felonies”⁹³ to encompass the majority

92. Morawetz, *supra* note 18, at 1937.

93. The Anti-Drug Abuse Act of 1988 included only murder, drug trafficking, and weapons trafficking in the aggravated felony category. See Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (codified as amended at 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997)). In 1990, it was amended to include money laundering, crimes of violence with a sentence of at least five years, and foreign convictions with a term of imprisonment completed within the previous fifteen years. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997)). In 1994, it was amended to include several firearms offenses, monetary transactions from illegally derived funds, theft or burglary with a sentence of at least five years, alien smuggling for commercial gain, and trafficking in false documents. See Immigration and Nationality Technical Correction Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, 4320-22 (codified as amended at 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997)). In 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) added additional crimes to the list of aggravated felonies (alien smuggling not for commercial gain, failure to appear for service, obstruction of justice, perjury etc.) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) added crimes (rape, sexual abuse of a minor etc.) and lowered the sentencing threshold from five years to one year for, *inter alia*, crimes of violence, theft offenses, obstruction of justice and perjury. See AEDPA § 440(e),

of crimes and misdemeanors.⁹⁴ This change is especially important to LPRs with criminal convictions because “aggravated felons” are deportable and excluded from the possibility of any form of § 240A(a) discretionary relief. Many scholars have noted that the term, “aggravated felony,” is extremely misleading because a crime does not need to be aggravated or a felony to satisfy the definition.⁹⁵

A possible sentence of one year for any “crime of violence” as defined at 18 U.S.C. § 16 makes a crime an aggravated felony.⁹⁶ INA § 101(a)(43) specifies broad categories of offenses, sometimes by reference to federal criminal law, but is most often applied to the fifty different states’ codes. It is often difficult to discern what state offenses meet the extremely broad and general definitions in INA § 101(a)(43). For instance, even though “petty theft” and “misdemeanor assault and battery” do not appear in INA § 101(a)(43), these crimes appear to be included within “theft” in INA § 101(a)(43)(G) and “crime of violence” in INA § 101(a)(43)(S) when the relevant state law allows for a sentence of one year.⁹⁷ Prior to 1996, many crimes were not denominated aggravated felonies unless the LPR was actually sentenced to at least five years.⁹⁸ A conviction for a simple battery like a bar fight or for shoplifting with a one-year suspended sentence can now be deemed an aggravated felony.⁹⁹

The provisions are even more restrictive for LPRs who are convicted of a crime within their first five or seven years of lawful entry. Any crime committed during the first five years of legal residence that *could be* punished by a one-year sentence triggers mandatory deportation even if the individual

8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997); IIRIRA § 321, 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997).

94. Schuck & Williams, *supra* note 19, at 397, 450. Case law is unresolved about exactly which misdemeanors and crimes constitute aggravated felonies. See Bennett, *supra* note 3, at 1696. For discussion of the definition of “felony” in 8 U.S.C. § 1101(a)(43)(B), see *In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002) (holding that the Board determines whether an offense constitutes an aggravated felony by reference to decisional authority from the federal circuit court of appeals in which the case originates); *In re Elgendi*, 23 I. & N. Dec. 515 (B.I.A. 2002) (holding that the law of the convicting jurisdiction is the ‘applicable’ law in the Second Circuit); *Copeland v. Ashcroft*, 246 F. Supp. 2d 183 (W.D.N.Y. 2003) (holding that *Elgendi* was incorrect in interpreting Second Circuit law which establishes that if a crime is a felony under federal law then it is determined to be an aggravated felony).

95. Morawetz, *supra* note 18, at 1939. See Bennett, *supra* note 3, at 1699 (stating that the aggravated felony provision “now appears to include a number of crimes that may not seem deserving of their menacing label, such as petty theft, and misdemeanor assault and battery”).

96. See INA §§ 101(a)(43)(F)-(G), 8 U.S.C. §§ 1101(a)(43)(F)-(G) (Supp. II 1996). Before 1996, these crimes would only be considered aggravated felonies if a sentence of at least five years was actually imposed. See INA §§ 101(a)(43)(F)-(G), 8 U.S.C. § 1101(a)(43)(F)-(G) (1994) (amended 1996).

97. See INA §§ 101(a)(43)(F)-(G), (S), 8 U.S.C. §§ 1101(a)(43)(F)-(G), (S) (Supp. III 1997). See generally Bennett, *supra* note 3.

98. 8 U.S.C. §§ 1101(a)(43)(F)-(G).

99. See Philip S. Anderson, Editorial, *Immigration Reform Unfairly Includes Petty Offenses*, MIAMI HERALD, Apr. 9, 1999 (reporting that mother of two was ordered deported because she was convicted six years earlier of shoplifting baby outfits worth \$14.99); Morawetz, *supra* note 18, at 1939.

receives only probation or a fine.¹⁰⁰ Before 1996, a single crime involving moral turpitude within five years of entry was not a ground of deportability for this group of LPRs unless the individual was actually sentenced to at least one year of incarceration.¹⁰¹ After 1996, in New York, a person could receive mandatory deportation for such offenses as jumping a turnstile or using unauthorized cable service.¹⁰² Furthermore, a lawful permanent resident who has been convicted of simple possession of marijuana will receive mandatory deportation if the crime is committed within the first five years of residence as an LPR.¹⁰³

2. *Elimination of INA § 244 and INA § 212(c) and Decreased Executive Discretion*

Immigration measures became more restrictive due to a severe reduction in LPRs' access to executive discretionary relief from deportation. In 1996, cancellation of removal under INA § 240A(a) repealed § 244(a) and § 212(c) entirely.¹⁰⁴ The 1996 immigration laws arguably decreased executive discretion even further than the original INA of 1952 by tightening the standards on hardship and increasing residency requirements.

The 1996 immigration laws repealed INA § 244(a) in its entirety and replaced it with § 240(A)(a). The 1996 immigration laws mandated that hardship to the individual is no longer relevant to the review.¹⁰⁵ Since § 244(a) relief has always had very limited application, the loss of § 212(c) relief was more devastating to LPRs with criminal convictions. Unlike § 212(c) the new law requires that the LPR is lawfully admitted for permanent residence for no less than five years and has resided in the United States continuously for seven years after having been admitted in any status. Section 240A(a) relief is not available for an LPR who has been convicted of an aggravated felony regardless of the time served. Unlike under the pre-1996 law, the period of continuous residence ends when the INS serves a

100. INA § 237(a)(2)(A)(I); Morawetz, *supra* note 18, at 1941.

101. INA § 241(a)(2)(I).

102. Morawetz, *supra* note 18, at 1941; Schuck & Williams, *supra* note 19, 388 (citing discussion in *Yesil v. Reno*, 973 F. Supp. 372 (S.D.N.Y. 1997), *aff'd sub nom.* *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied*, *Reno v. Navas*, 526 U.S. 1004 (1999)).

103. See INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B)(2000).

104. IIRIRA § 304, 8 U.S.C. § 1229(b) (1997). LPRs that are deportable under INA § 237(a)(2) and § 237(a)(3) cannot benefit from this form of relief. These two provisions cover LPRs who have committed crimes of moral turpitude within five years (or ten years in the case of an alien provided lawful permanent resident status under § 1255(j)) after the date of admission, and are convicted of a crime for which a sentence of one year or longer may be imposed. An LPR who committed an aggravated felony at any time after admission is not eligible. An LPR who is convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation relating to a controlled substance, other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable. Any immigrant who is, or at any time after admission has been, a drug abuser or addict is deportable. Failure to register, document fraud, and falsification of documents also render an LPR ineligible for this form of relief. *Id.*; see INA § 237(a)(2)-(a)(3).

105. See IIRIRA § 304 (codified at 8 U.S.C. § 1250(2)).

notice to appear or when the person commits a crime that makes the person deportable. The court had previously counted the time from the commencement of the immigration proceeds through a non-frivolous appeal to fulfill the seven-year requirement.¹⁰⁶

The 1996 immigration laws expanded the definition of aggravated felony,¹⁰⁷ lowered the length of a sentence required to trigger mandatory deportation,¹⁰⁸ and shut off all forms of relief (except for withholding of removal and relief under the torture convention) from deportation for almost all LPRs with criminal convictions.¹⁰⁹ Along with these restrictive measures came a severe reduction in judicial review.¹¹⁰ Unlike the period before the 1996 immigration laws, however, private bills have not increased as a response to restrictive immigration measures.

B. *Private Bills Post-1996*

Because of the restrictive nature of the 1996 immigration laws, some commentators have wondered if private bills would increase as a way to provide legislative discretion to the higher numbers of deportable LPRs. As Professor Aleinikoff stated in the immediate aftermath of IIRIRA's passage, "It remains to be seen what impact the recent restrictions on relief from deportation and judicial review will have on the number of private bills introduced and enacted each year."¹¹¹ Private bills may find "new life in compelling hardship cases now that other, more traditional, defenses to removal have been eliminated or restricted to near extinction by the 1996 immigration laws."¹¹² The historical relationship described in Section II suggests that the increase in restrictive immigration measures would be followed by an increase in access to legislative discretion through private bills. Despite this historical pattern, since 1996, the number of private bills introduced on behalf of LPRs with criminal convictions has not increased.¹¹³

106. The Board of Immigration Appeals (BIA) held that a final administrative order of exclusion or deportation was necessary to end an immigrant's lawful unrelinquished domicile. *See In re Duarte*, 18 I. & N. Dec. 329 (B.I.A. 1982). However, some circuit courts of appeals have held that an immigrant's lawful unrelinquished domicile continues if she files a non-frivolous appeal of her deportation order. *See, e.g., Torres-Hernandez v. INS*, 812 F.2d 1262 (9th Cir. 1987).

107. *See* AEDPA § 440(e), 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997); IIRIRA § 321, 8 U.S.C. § 1101(a)(43) (1994 & Supp. III 1997).

108. *See* AEDPA § 435(a).

109. *See* AEDPA § 440(d); IIRIRA § 304.

110. IIRIRA bars judicial review of most removal orders. Schuck & Williams, *supra* note 19, at 371. The extent of judicial review, however, is highly contested. *See, e.g., INS v. St. Cyr*, 533 U.S. 289 (2001).

111. ALEINIKOFF & MARTIN, *supra* note 5, at 788. *See generally* Hooper & Osuna, *supra* note 6, at 3.

112. Hooper & Osuna, *supra* note 6, at 2. For the potential increased use of private bills see B. John Ovink, *Why a Plea Bargain May No Longer Be a Bargain for Legal Permanent Resident Aliens*, 46 FED. LAW 49, 53 (1999).

113. This is confirmed by the author's review of all private legislation introduced between 1996-2003. U.S. House Immigration Subcommittee Staff also confirms this observation. Telephone Interview with anonymous member of U.S. House Immigration Subcommittee Staff (Feb. 28, 2003).

In fact, Congress has only enacted one private bill that involved a lawful permanent resident with a criminal conviction.¹¹⁴

1. *The Rhetorical Increase in Access to Private Bill Relief?*

Even though private bills have not been increasingly introduced or passed since 1996, Congress has rhetorically acknowledged that individuals should increasingly use the private bill process as a surrogate for reduced executive discretion. During the mark-up session of proposed legislation to grant the Attorney General increased discretion, Representative Lamar Smith (R-TX), one of the most vocal and powerful architects of the 1996 immigration laws, stated, “The genuine hardship cases need to be addressed.”¹¹⁵ Rep. Smith and other Members of Congress stated, however, that the Immigration Subcommittee, rather than the Attorney General, is better suited to deal with deportation cases through private immigration bills.¹¹⁶ Six dissenting Members to the proposed legislation jointly wrote:

If there are true ‘hardship’ cases, they should be addressed. But they should follow the regular order and be reviewed by the Immigration Subcommittee [through private bills]. They should not be piled up on the Attorney General.¹¹⁷

The sponsor of the bill, Representative Barney Frank (D-MA), responded to Rep. Smith’s proposal to deal with hardship cases through private bills by stating that:

[T]he gentleman is right, these should be case-by-case. But I do think letting the Attorney General do it is a better way, since he acknowledges there are cases where it should happen, than doing it by a private bill. And what this Committee began to do years ago was to say, a private bill that is unique, we will deal with it. But where there appears a class of cases, it is better to deal with it through legislation. So I do not think the existence of the private bill remedy is a real relief. In fact, the gentleman from Florida, Mr. McCollum, had tried to do that, and that’s what led the then-Chairman of the Committee, the gentleman from Illinois, to say, let’s do a [public] bill.¹¹⁸

114. Priv. L. No. 105-6, 112 Stat. 3666 (1998); see Statutes at Large (private legislation) 1996-2003.

115. H.R. REP. NO. 107-785 (2002).

116. Smith stated, “[T]he genuine hardship cases need to be addressed, but they should be considered under regular order by the Immigration Committee, and that’s why we need to oppose this amendment in the nature of a substitute.” Smith further stated, “if there are genuine hardship cases . . . it’s the Immigration Committee that should take care of them, not the Attorney General.” H.R. REP. NO. 107-785 (2002).

117. *Id.*

118. *Id.*

Despite this rhetorical commitment to loosening restrictive immigration measures through providing access to the private bill process, however, Congress has not increasingly introduced or passed private bills subsequent to the 1996 immigration laws. This interruption in the historical relationship has decreased the discretionary and informational role of private bills.

III. WHAT EXPLAINS THE DISRUPTION IN THE HISTORICAL RELATIONSHIP?

In 1998, the Congressional Research Service stated that the sharp decline in private bills was a result of expanded agency discretion “to deal with many of the situations that tended to give rise to private bills.”¹¹⁹ Section IIC of this Article illustrated that during the 1960’s, 1970’s, and 1980’s expanded agency discretion may have contributed to the decrease in the number of private bills.¹²⁰ As executive discretion expanded, the need for private bills decreased. As Section III illustrated, however, expanded executive discretion cannot explain why private bills have not increased following the enactment of the 1996 immigration laws. Rather than increase, executive discretion vis-à-vis LPRs with criminal convictions has decreased sharply. This section will explore alternative explanations for the interruption in the historical relationship that is hindering private bills from playing their historical discretionary and informative role.

A. *Tightening the Standards: “Precedents” and Hardship*¹²¹

The changes in the rules¹²² and practices related to precedents and hardship can help explain the interruption in the historical relationship.¹²³ These changes, which represent the major changes to the rules and procedures since 1954, have further decreased the transparency and viability of the private bill process. The changes tightened “the rules regarding the hardship

119. Richard S. Beth, *Private Bills: Procedure in the House*, CRS REPORT FOR CONGRESS (1998), available at <http://www.house.gov/rules/98-628.htm>.

120. The Chairman of the Immigration Subcommittee stated in 1971 that private bills were not a panacea for all cases, particularly where administrative relief may be available. 117 CONG. REC. 10,143 (1971).

121. Currently, private bills can only be introduced in Congress once the private bill applicant exhausts all judicial and administrative remedies. The first step for a private bill applicant is to persuade a Member of the U.S. Senate or House of Representatives to author the bill. If the Senator or Representative agrees to author and introduce the bill, the bill is referred to the appropriate subcommittee of the Judiciary Committee of the house of Congress in which it is introduced. After referral, the subcommittee may decide to table the private bill with no further action. In its discretion, the subcommittee may schedule a hearing on the private bill and hear testimony. If approved by the subcommittee, the private bill is referred to the full Judiciary Committee for a vote. If the vote is favorable, the private bill is sent to the floor for a vote. The private bill undergoes this process in each house of Congress. If both the House and the Senate vote in favor of the private bill, the President will then decide whether to sign the bill into law. See Hooper & Osuna, *supra* note 6, at 2.

122. There are two primary sets of rules that govern the private bill process: the rules of the Judiciary Committee’s Immigration Subcommittee of each house of Congress and the rules of each house relating to debate on legislation by all Members of Congress.

123. This section focuses exclusively on the experience of the House of Representatives, as the Senate followed the House lead. See MAGUIRE, *supra* note 3.

criteria necessary for the Committee's consideration of bills as well as the guidelines on precedents to which the Committee would adhere."¹²⁴

1. "Precedents"

The introduction of the use of "precedents" since the early 1980s is hindering the historical relationship between private bills and immigration law as it reduces the likelihood of a private bill's introduction and passage.¹²⁵ Precedents can determine the fate of a private bill as they "can help or hinder a case, can guide a bill through Congress, or kill it upon introduction."¹²⁶ The Congressional Research Service in 1998 stated that it is current practice for a panel to decline to report a private bill if its records show few precedents for favorable House action on bills dealing with similar conditions.¹²⁷ The word "precedent," however, is misleading because the Immigration Subcommittee picks and chooses which precedents it will look more favorably upon.¹²⁸ In other words, successful private bills in the past cannot be persuasively used as precedents unless there is Congressional will to do so.

Private bills related to immigrants with criminal convictions illustrate the highly political and selective nature of "precedent." Even though there have been successful private bills related to immigrants with criminal convictions, Immigration Subcommittee staff confirm that virtually all private bills related to criminal convictions are rejected because of a lack of precedent.¹²⁹ Historically there have been several kinds of private bills related to criminal convictions that have received favorable treatment. From 1789 to 1997, of the private bills related to criminal convictions, "712 (74%) involved moral

124. MAGUIRE, *supra* note 3, at 28.

125. Until the late 1970s, the Immigration Subcommittees did not expressly use precedent as a way to limit access to the private bill process. In the early 1980s, the Immigration Subcommittees published rules relating to precedents through "Dear Colleague" letters to members of the House or Senate. During the 1981-1982 Congress, a letter from the House Immigration Subcommittee stated that the role of precedents is an important factor "because a decision on one private bill" could "set a precedent for thousands." 127 CONG. REC. 17,036 (1981). This is one of the first occasions that the House Immigration Subcommittee circulated its policies through Dear Colleague letters. MAGUIRE, *supra* note 3, at 34. In the 98th Congress (1983-1984), another notice was inserted into the Congressional Record stating, "it is the policy of the Subcommittee generally to act favorably on only those private bills which meet certain precedents." 129 CONG. REC. 3701 (1983). See generally HOUSE COMM. ON THE JUDICIARY, 98TH CONG., RULES OF PROCEDURE AND STATEMENT OF POLICY (PRIVATE LEGISLATION), (Comm. Print 1984). House Immigration Subcommittee Chairman Romano L. Mazzoli (D-KY) stated in a letter to House Members in 1983, "while the Subcommittee is not bound by precedent . . . it rarely deviates from precedent when handling private immigration bills." 129 CONG. REC. 3702 (1983). To further reinforce the need to adhere to precedents, the House Subcommittee amended its Rules of Procedure in 1985-86 to require a two-thirds favorable vote to even schedule a bill in certain categories. See generally HOUSE COMM. ON THE JUDICIARY, 99TH CONG., RULES OF PROCEDURE AND STATEMENT OF POLICY (PRIVATE LEGISLATION), (Comm. Print 1986).

126. MAGUIRE, *supra* note 3, at 4.

127. The panel "makes available to Member offices information on what documentation it requires and the kinds of bills on which it is likely to take favorable action." Beth, *supra* note 119, available at <http://www.house.gov/rules/98-628.htm>.

128. MAGUIRE, *supra* note 3, at 33.

129. Telephone interview with anonymous member of U.S. House Immigration Subcommittee Staff (Feb. 28, 2003).

turpitude and other related crimes, 66 (7%) involved drugs, 186 (19%) involved fraud, and 18 (2%) involved smuggling.”¹³⁰ Private bill cases in the past have granted relief for individuals with convictions related to, among other things, theft, fraud, assault, prostitution, illegal entry, aiding and abetting illegal entry and drug possession.¹³¹ Even though there is historical precedent related to immigrants with criminal convictions, however, the House Subcommittee in recent years has only referred to very recent precedent in its evaluation of private bill cases.¹³²

The current use of “precedent,” therefore, makes it difficult for groups like LPRs with criminal convictions to receive private bill relief even when there is historical precedent in their favor.¹³³ Congress, however, in rare, politically important cases, does look exhaustively at historical precedent. In the case of Elian González, Members of Congress who supported the private bill poured through historical private bill cases to find favorable precedent.¹³⁴

2. Hardship

Similar to the use of precedent, Congress has reduced access to private bills through its increasingly strict use of the definition and interpretation of hardship. This change hinders the historical relationship because it makes it even more difficult to introduce or pass a private bill.

Congress has increasingly tightened the definition of hardship. In the 1950s,¹³⁵ 1960s and most of the 1970s, the rules created a two-tiered standard for the definition of hardship. In the 1950s, those who entered the U.S. as “stowaways, or deserting seamen, or by surreptitiously entering without inspection through the land or sea borders of the United States” needed to show “extreme hardship” to receive consideration for a private

130. MAGUIRE, *supra* note 3, at 149.

131. Priv. L. No. 321, 71 Stat. A126 (1957); Priv. L. No. 183, 65 Stat. A70 (1951); Priv. L. No. 730, 64 Stat. A142 (1950); Priv. L. No. 810, 52 Stat. 1434 (1938); Priv. L. No. 620, 52 Stat. 1355 (1938); S. REP. NO. 794 (1957); H.R. REP. NO. 1250 (1957); S. REP. NO. 523 (1951); H.R. REP. NO. 474 (1951); S. REP. NO. 1397 (1950); H.R. REP. NO. 2614 (1950); S. REP. NO. 2213 (1938); S. REP. NO. 2026 (1938); H.R. REP. NO. 2055 (1938); H.R. REP. NO. 2040 (1938).

132. Telephone Interview with anonymous member of U.S. House Immigration Subcommittee Staff (Feb. 28, 2003).

133. *Id.* See 131 CONG. REC. 11,682 (1985).

134. See Margaret Mikyung Lee, *Private Bills for Citizenship or Permanent Residency: A Brief Overview*, CRS REPORT FOR CONGRESS 2 (2000) (discussing efforts related to a private bill for Elian González); Karen DeYoung, *Rare Act of Congress is Planned for Elian; GOP Leaders Back Citizenship Bills*, WASH. POST, Jan. 16, 2000, at A3 (describing congressional efforts to pass private bill to naturalize or grant permanent residency to Elian González).

135. There were some major changes to the rules in 1954 to reduce the number of private bill requests aimed at obtaining stays of deportation. MAGUIRE, *supra* note 3, at 27. The Subcommittee no longer reconsidered cases unless some of the facts changed substantially. 100 CONG. REC. 610 (1954). “The Subcommittee would no longer request a report from the Attorney General, thus staying deportation, on behalf of immigrants who entered the United States as ‘stowaways, or deserting seamen, or by surreptitiously entering without inspection through land or sea border of the United States’ unless the Subcommittee found that the purpose of the private bills involved ‘uniting or preventing separation of families.’ This became Subcommittee Rule 4 which was altered later to use the word hardship.” MAGUIRE, *supra* note 3, at 27.

bill.¹³⁶ This category was meant to make it more difficult for beneficiaries with no legal status.¹³⁷ The individuals that did not fall into this category were required to satisfy the less strict, but vaguely defined, “hardship” standard.¹³⁸ In 1971, the rules were amended to state that all non-immigrants (aliens entering the United States on any temporary visa) needed to show “extreme hardship.”

In 1983 Congress tightened the rules and began to apply the “extreme hardship” standard to all private bill applicants (including LPRs).¹³⁹ Moreover, in the 1980’s the Subcommittee stated that it would only support private bills that have “extraordinary merit” and pose “heavy hardship.”¹⁴⁰ In 1987, the Subcommittee stated that private bills are:

An extraordinary remedy available only to assist aliens with unusual problems and where extreme hardship to a U.S. citizen or permanent resident alien can be demonstrated . . . the subcommittee interprets very narrowly the criteria for hardship.¹⁴¹

An increasingly narrow interpretation, as well as the black letter definition of who must show “extreme hardship,” has contributed to the decrease in the use of private bills. The current House Subcommittee’s rules caution potential private bill petitioners about the rigid hardship standard for private bills. The Subcommittee reviews “only those cases it finds are of such an extraordinary nature that an exception to the law is needed.”¹⁴² A Staff member of the House Subcommittee on Immigration confirmed that to meet the hardship standard there needs to be an unbelievably egregious mistake on the part of the government or a grave health or safety risk to a family member.¹⁴³

The interpretation of the hardship criteria, however, has not always been so narrow. Before the late 1970s, family separations played a more substantial role in hardship determinations for excludable or deportable immigrants with

136. 103 CONG. REC. 2249 (1957). The author of the bill also had to provide the subcommittee with documentary evidence in support of the request to waive this rule. *Id.* In 1969 this list was amended to include visitors, exchange visitors and students within the purview of this rule. 115 CONG. REC. 6075 (1969) (statement of Rep. Feighan).

137. 113 CONG. REC. 14,049 (1987).

138. 103 CONG. REC. 2249 (1957).

139. See MAGUIRE, *supra* note 3, at Appendix A. 131 CONG. REC. 11,682 (1985); cf. 117 CONG. REC. 10,142 (1971) (interpreting the standard for private bills as a remedy for aliens with “unusual problems resulting in unusual hardship”).

140. 131 CONG. REC. 11,682 (1985).

141. HOUSE COMM. ON THE JUDICIARY, 100TH CONG., RULES OF PROCEDURE AND STATEMENT OF POLICY (PRIVATE LEGISLATION), (Comm. Print 1987).

142. HOUSE COMM. ON THE JUDICIARY, 106TH CONG., RULES OF PROCEDURE AND STATEMENT OF POLICY (PRIVATE LEGISLATION), (Comm. Print 2000).

143. Telephone Interview with anonymous member of U.S. House Immigration Subcommittee Staff (Feb. 28, 2003).

criminal convictions.¹⁴⁴ In 1938, for instance, the House Committee cancelled Gordon Cheasley's deportation, stating, "because of his wife, children, and position, it would be unjust hardship to deport him."¹⁴⁵ In 1950, the Committee's report stated that Augusto Pereira's deportation would cause hardship because he "reared seven stepchildren . . . has the reputation of being a good workman, a good family man, hard working, and a good provider, devoted to his wife and stepchildren."¹⁴⁶ The House Committee granted Mrs. Maryanna Boppel relief in 1951 through a private bill, noting that "she has effected a complete reformation and rehabilitation and . . . her deportation would seriously affect her foster children and her [U.S. citizen] husband."¹⁴⁷ In Fernando Alves Macos' case in 1976, the House Committee noted, "the [private] bill should be approved solely on the basis of hardship which is being caused to the beneficiary's second wife and child."¹⁴⁸

Private bill cases related to immigrants with criminal convictions since the 1980s, however, illustrate the narrow interpretation of hardship and consideration of family separation only in very extreme, life threatening, cases. Oscar Salas-Velázquez, for example, was deportable due to his involvement in marriage fraud in 1985. When the INS began actively pursuing deportation proceedings against Mr. Salaz-Velázquez, he had a U.S. citizen spouse and child. Congress granted Mr. Salas-Velazquez relief through a private bill because both his wife and child had serious life threatening diseases that required treatment in the U.S. Congress noted that their lives would be in severe danger if they were forced to live in Mexico.¹⁴⁹ The only other private bill for an immigrant with a criminal conviction that has passed since 1988 also illustrates the extreme situations that constitute hardship. The bill was on behalf of Larry Pieterse who was convicted of possession of drug paraphernalia. In 1991, after thorough investigation of the case by Parole Board investigators, the State of Florida granted Mr. Pieterse a full pardon. However, even though he had received a waiver the laws required Mr. Pieterse's deportation because the state pardon did not prevent a drug conviction from being utilized for deportation purposes. The private bill granted Mr. Pieterse a waiver from deportation.¹⁵⁰

Family members of deportable LPRs have also felt the consequences of

144. See Priv. L. No. 810, 52 Stat. 1434 (1938); H.R. REP. NO. 2055 (1938); Priv. L. No. 321, 71 Stat. A126 (1957); S. REP. NO. 794 (1957); H.R. REP. NO. 1250 (1957) (noting that Refugio Guerrero-Monje's deportation would cause hardship as he was the "sole support of his family and were he required to depart from the United States, it is stated that they would suffer severe economic hardship."); Priv. L. No. 100, 86 Stat. 1541 (1972); H.R. REP. NO. 827 (1972); S. REP. NO. 884 (1972).

145. Priv. L. No. 620, 52 Stat. 1355 (1938); S. REP. NO. 2026 (1938); H.R. REP. NO. 2040 (1938).

146. Priv. L. No. 730, 64 Stat. A142 (1950); S. REP. NO. 1397 (1950); H.R. REP. NO. 2614 (1950).

147. Priv. L. No. 183, 65 Stat. A70 (1951); S. REP. NO. 523 (1951); H.R. REP. NO. 474 (1951).

148. Priv. L. No. 121, 90 Stat. 3004 (1976); S. REP. NO. 1291 (1976); H.R. REP. NO. 907 (1976).

149. Priv. L. No. 104-3, 110 Stat. 4287 (1996).

150. Florida granted Pieterse a pardon, in part, based on evidence that his wife had planted the drugs. Priv. L. No. 105-6, 112 Stat. 3666 (1998); H.R. REP. NO. 105-644 (1998).

the narrowing of the hardship standard. Family members of potential private bill beneficiaries report that they are frequently told by Members of Congress that their case does not meet the extremely strict hardship requirement.¹⁵¹ Deborah Aaron's story is very typical. Ms. Aaron came to the United States from Britain and had been married to a U.S. citizen for twenty-two years. In 1999, Ms. Aaron faced deportation and separation from her family because at the age of twenty she had been fined about sixteen dollars for a minor drug violation. Ms. Aaron tried to get Congress to introduce a private bill on her behalf. "They [Members of Congress] responded with sympathy but said they could not do so when drugs were involved."¹⁵² Immigration Subcommittee Staff confirm that difficult hardship standards stand in the way of the introduction and passage of private bills today and provide members of Congress with an easy excuse.¹⁵³

Congress has gone so far with its strict interpretation of hardship that even the most sympathetic of cases that do not involve criminal convictions are not successful.¹⁵⁴ The case of Deena Gilbey illustrates the impossible odds that a private bill candidate faces as she challenges deportation. Deena Gilbey's U.S. citizen husband died at the World Trade Center on September 11, 2001. Prior to her husband's death, Ms. Gilbey lived in the U.S. with her husband and their two U.S. citizen sons for over ten years. When Ms. Gilbey contacted the INS shortly after September 11 to ask what paperwork she would need to allow her to visit her family in England, the INS notified her that she would soon be deported because her U.S. citizen husband had died. Senators Jon Corzine and Robert Torricelli introduced a private bill on Ms. Gilbey's behalf. The private bill died, she was told, "because her case was not serious enough."¹⁵⁵

This hardship standard, however, has been loosened at times on behalf of high profile applicants. In 1987, for instance, Congress passed a private bill for the stepson of Senator John Warner (R-VA) and the natural son of his spouse, actress Elizabeth Taylor. The bill waived exclusion based on a conviction of possession of 13.6 milligrams of cannabis.¹⁵⁶

151. Letter from anonymous member of Citizens and Immigrants for Equal Justice to the author (Apr. 3, 2003) (on file with author); Interviews with anonymous members of Citizens and Immigrants for Equal Justice, in Wash. D.C. (Jan. 14, 2003).

152. Anthony Lewis, *Random Cruelties of 1996 Immigration Law*, ORLANDO SENTINEL, Mar. 2, 1999, at A23.

153. *Id.*; Telephone Interview with anonymous member of U.S. House Immigration Subcommittee Staff (Feb. 28, 2003).

154. See Michael Riley, *Campbell Bill Backs Apodaca: Senator's Measure Would Make Student Permanent Resident*, DENVER POST, Sept. 27, 2002, at A-01; Bryan Mitchell, *Accident's Victims Still Suffering After Effects*, KNOXVILLE NEWS-SENTINEL, June 25, 2002 (quoting Rep. John J. Duncan Jr., R-TN who stated that "Congress almost never passes a private bill . . . [i]t has to be unbelievably incredible circumstances").

155. Kristen A. Graham, *9/11 Widow's Plight Stirs S. Jersey Aid: Gloucester City Reaches Out to Woman Facing Deportation*, PHILADELPHIA INQUIRER, June 7, 2002.

156. Priv. L. No. 100-36, 102 Stat. 4859 (1988). See MAGUIRE, *supra* note 3, at 178-79.

3. “Official Objectors” and Requirement to Exhaust Administrative Remedies

The introduction and continued use of Official Objectors also reduces access to private bills and allows political, rather than equitable, concerns to almost entirely dominate the process. In 1932, Official Objectors were introduced to screen private bills after they pass through the Judiciary Committee.¹⁵⁷ The Majority Leader and the Minority Leader each appoint three members to serve as Private Calendar Official Objectors during a Congress.¹⁵⁸ The Official Objectors are responsible for scrutinizing all bills on the Private Calendar and objecting to those that they deem inappropriate.¹⁵⁹ Subsequent to this change if two members of the House oppose the bill it is automatically recommitted to the Judiciary Committee. Official Objectors can recommit a bill before it even reaches the floor for a vote.

Before 1995, the rules stated that Objectors are on the floor “ready to object to any bill which does not adhere to the guidelines established on the Private Calendar.”¹⁶⁰ The current rules allow for even more unfettered discretion. The rules currently state that when the private calendar is called, the objectors are on the floor ready “to object to any Private Bill which they feel objectionable for any reason.”¹⁶¹ Official Objectors are not obligated to announce the specific criteria they are using to object to private bills.¹⁶²

The introduction in 1954 of the requirement that “all administrative avenues” be pursued prior to Subcommittee action also reduced access to private bills.¹⁶³ In 1979 the Committee noted that bills where administrative relief existed would not be favorably reported unless compelling circumstances existed.¹⁶⁴ The current rules are even more restrictive as they state that a private bill cannot be scheduled for Subcommittee action until all administrative and judicial remedies are exhausted. Because it is not clear when judicial and administrative remedies are exhausted, this rule makes it difficult for potential private bill petitioners to know when it is appropriate to pursue a bill. Moreover, Members of Congress often use this requirement to dissuade individuals from pursuing private bills, leading individuals to

157. 75 CONG. REC. 8812 (1932).

158. See U.S. HOUSE OF REPRESENTATIVES, RULES OF THE HOUSE OF REPRESENTATIVES Rule XV (2003).

159. “In practice, instead of objecting, [Official] Objectors will sometimes ask that a bill be ‘passed over, without prejudice,’ thereby giving sponsors an opportunity to discuss concerns with them informally before the next calendar call.” Beth, *supra* note 119, available at <http://www.house.gov/rules/98-628.htm>.

160. 139 CONG. REC. H5666 (daily ed. Aug. 3, 1993) (outlining the Private Calendar Agreement).

161. 147 CONG. REC. H1417-18, (daily ed. July 24, 2001) (statement of Hon. Howard Coble). This language was introduced in the 1995-1996 Congress.

162. See *A Guide to the Rules, Precedents and Procedures of the House, House Practice*, 108th Cong., 1st Sess., Sec. 15 (U.S. Government Printing Office, Wash. D.C. 2003).

163. 100 CONG. REC. 610 (1954).

164. MAGUIRE, *supra* note 3, at 31.

believe that one can only pursue a private bill the day before deportation.¹⁶⁵

B. *The Politics of Private Bills*

Even though politics have always influenced private bills,¹⁶⁶ politics increasingly hindered the use of private bills since the early 1980s. Members of Congress have gradually become unwilling to introduce and advocate for the passage of private bills.

Some Members of Congress complain that private bills take too much time for too little pay off.¹⁶⁷ As Senator Paul Wellstone's press secretary stated, "[a]s a matter of policy, we don't do [private bills]."¹⁶⁸ In the past, Members of Congress have used private bills as a vehicle for support from particular constituencies.¹⁶⁹ Today, however, many Members of Congress consider the potential dangers to outweigh the potential benefits. Although private bills can galvanize support from a particular constituency, they can also be politically costly.¹⁷⁰ In 1999, one of the main proponents of the 1996 immigration laws, Bill McCollum (R-FL), was severely criticized for introducing a private bill on behalf of the son of a Republican party official.¹⁷¹

The scandals surrounding private bills are used as one of the most common explanations for the recent lack of Congressional willingness to introduce private bills.¹⁷² Representative Joe Wilson (R-SC) summed it up, saying,

165. Letter from anonymous member of Citizens and Immigrants for Equal Justice to the author (Apr. 3, 2003) (on file with author).

166. Private bills depend on the strength and willingness of certain members of Congress. The political weight and effort of the sponsor of the private bill will determine its fate. Sidney B. Rawitz, *In the Hands of Congress: Suspension of Deportation and Private Bills*, 57 INTERPRETER REL. 76, 82 (Feb. 14, 1980); Lauren Markoe, *Student Weighs Options to Avoid Deportation*, STATE, Sept. 29, 2002, available at 2002 WL 233326612 (stating that "[Rep] Wilson [R-SC] believes the Senate bill has a better chance of helping the family than a House bill. Because it's sponsored by Thurmond, and because he is leaving the Senate after a record forty eight years, his colleagues might be more likely to grant his wishes.")

167. MAGUIRE, *supra* note 3, at 11.

168. Doug Grow, *We're About to Deport One Fine Human Being; Let's Hope Nyonzele Won't Be in Peril When U.S. Sends Him Back to Congo*, STAR TRIBUNE, June 23, 2002, at 2B.

169. See generally Bailey & Samuel, CONGRESS AT WORK 160-61 (1952).

170. Michael Riley & Mike Soraghan, *Support Grows for Student; Owens Speaks to Bush on Apodaca's Behalf*, DENVER POST, Sept. 29, 2002, at A-01 (stating that a private bill on behalf of Aurora Central High graduate is an "example of the effect of laws preventing illegal immigrants from getting in-state tuition." U.S. Rep. Tom Tancredo (R-CO) contacted the Denver office of the INS and asked the agency to deport Apodaca after reading about the student in the Denver Post. Political analysts say that initial Republican support for the lawmaker has "eroded under a growing sense that the case is damaging the party politically . . . [t]he bill 'carries a lot of symbolic weight,' said Floyd Ciruli, a political strategist in Denver. 'It shows compassion and that the party is interested in issues important to Hispanics'").

171. Tamara Lytle, *McCullum Wants to Help Some Aliens Stay in the U.S.*, ORLANDO SENTINEL, Sept. 28, 1999, at A8; Michael Griffin and Shawn Holton, *McCullum Defends Efforts to Reverse Felon's Deportation*, ORLANDO SENTINEL, Jan. 19, 1999, at C1 (describing controversy over private bill introduced by Rep. Bill McCollum (R-FL), a sponsor of the 1996 immigration laws, to benefit deported son of Republican Party official from McCollum's district).

172. See Rawitz, *supra* note 166, at 80 (arguing that the amount of private bills declined sharply "attributable less to noble legislative motivations than to a perceived need to take cover as an aroma of scandal enveloped the process").

“private bills, because members of Congress from both parties had abused the privilege of filing them in the past, are generally considered with skepticism by Judiciary Committee members.”¹⁷³

There have been three major controversies surrounding private bills that have fueled unwillingness on the part of members of Congress. In 1952, some Members of Congress were investigated for introducing bills on behalf of illegal immigrants. The *New York Herald Tribune* noted that Members of Congress admitted introducing a large number of bills “without hope of obtaining favorable action because of pressure from groups in their home districts or states.”¹⁷⁴ In the 1970s, Members of Congress came under scrutiny for improprieties related to introducing private bills for Chinese shipjumpers.¹⁷⁵ One of the most high profile scandals occurred in 1980. In an FBI “sting” operation (ABSCAM), seven Members of Congress were found guilty of receiving bribes to introduce private bills.¹⁷⁶ For the first time since 1861, a Member of Congress was expelled because of his participation in the ABSCAM scandal.¹⁷⁷ Scandals led to the further decline in Congressional willingness to introduce private bills.¹⁷⁸

IV. CONCLUSIONS AND RECOMMENDATIONS

In the pre-1996 period, increases in private bills as a response to restrictive immigration legislation informed Congress about the inadequacies of existing laws. The historical relationship between restrictive immigration law and private bills, however, has not continued after the 1996 changes. Some have mentioned that the harsh elements of the 1996 immigration laws need to be brought to the attention of members of Congress, “and private bills are one way of sending that message.”¹⁷⁹ Actions by immigrants, immigrant advocates and members of Congress may allow private bills to once again play this informational role.

Immigrants and immigrant advocates may be able to play an important role in revitalizing the historical relationship between restrictive immigration law and private bills. Advocates for deportable immigrants are often overworked and feel that expending limited resources on the private bill effort is

173. See Markoe, *supra* note 166.

174. *World Racket Smuggles Aliens into U.S. @ \$100-\$1,500 Apiece*, N.Y. HERALD TRIBUNE, May 25, 1952, at 1, 24; *Langer Defends Private Bills to Aid Aliens Illegally in U.S.*, N.Y. HERALD TRIBUNE, May 26, 1952, at 8; *World Ring Forging Passports Helps Smuggle Aliens into U.S.*, N.Y. HERALD TRIBUNE, May 27, 1952, at 14.

175. See S. REP. NO. 911 (1970).

176. MAGUIRE, *supra* note 3, at 227, 230; 126 CONG. REC. 28,966 (1980). For cases related to the corruption see *Helstoski v. Meanor*, 442 U.S. 500 (1979); *United States v. Helstoski*, 442 U.S. 477 (1979).

177. MAGUIRE, *supra* note 3, at 227, 230; 126 CONG. REC. 28,966 (1980).

178. Lee, *supra* note 134, at 3.

179. Hooper & Osuna, *supra* note 6.

not worth the cost.¹⁸⁰ This article suggests, however, that private bills have the potential to be a powerful form of advocacy as they inform Congress about the need to reform restrictive immigration legislation, such as the 1996 immigration laws and the laws enacted in the wake of the September 11, 2001 terrorist attacks. Immigrants and immigrant advocates could help restore the historical role of private bills by working together to convince members of Congress to introduce private bills and by lobbying for reform of the rules and procedures related to private bills.

Members of Congress should change the rules and procedures related to private bills. Changes in the rules may go a long way in signaling Congressional willingness, expressed by Lamar Smith, to use the private bill process to deal with hardship cases arising from the 1996 immigration laws. The current rules and practices (especially the use of precedents, the interpretation of hardship and Congressional unwillingness) are impeding private bills from playing their historical informational role. This conclusion describes some specific changes that should be considered, but this is not an exhaustive list.

Private bills may increase if all historical private bill cases could be used as persuasive precedent and if Congress was obliged to provide an explanation when it diverges from historical precedent. Moreover, the Immigration Subcommittee should be obliged to more specifically define its use (or lack of use) of precedents. In other words, since the current use of precedent does not comport with the traditional legal definition of precedent, the Immigration Subcommittee should provide a definition of “precedent.”

The “extreme hardship” requirement should be returned to a “hardship” requirement to signal to potential private bill petitioners that private bills are not forms of relief, with limited applicability only when a family member is gravely ill. As our immigration law has historically endeavored to keep families together,¹⁸¹ members of Congress should re-institute the primacy of family relationships in its determinations of hardship.

Other reforms could signal a change in the perception of private bills, including a requirement that Official Objectors announce the criteria they use in evaluating a private bill, particularly when the Objectors reject a private bill. Furthermore, the requirement that all administrative and judicial avenues have been exhausted should be altered to more explicitly allow the introduction of private bills earlier in the process. Because it is so difficult to determine when all avenues have been exhausted, members of Congress are

180. Interviews with anonymous members of Citizens and Immigrants for Equal Justice, in Wash. D.C. (Jan. 14, 2003). Some organizations have started to consider the utility of private bills as advocacy tools. *E.g.*, The Urban Justice Center, Citizens and Immigrants for Equal Justice.

181. *See generally* Peggy Cooper Davis, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997) (discussing constitutional jurisprudence protecting family interests); Morawetz, *supra* note 18, at 1951 (stating that the immigration system reflects the law’s assumption that family unity is an important value); COMM. ON THE JUDICIARY U.S. SENATE, *supra* note 43, at 5.

able to use this to shield themselves from private bill petitioners. A more specific and flexible statement about the exhaustion of remedies would help to de-politicize the process and increase transparency.

If Congress truly regards its private lawmaking function as “an essential part” of dispensing justice, it needs to modify the private bill process to once again provide immigrant groups with meaningful, rather than rhetorical, access.¹⁸² These proposed changes, along with others, would foster the continued relationship between immigration law and private bills, allowing private bills to fulfill their historical informational role and help to “perfect” the 1996 immigration laws and their progeny.

182. *Private Bills in Congress*, *supra* note 2, at 1684–88.