THE SENTENCING JUDGE AS IMMIGRATION JUDGE†

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When the alien is before the judge charged with a crime and the time for sentence comes, necessarily the question of whether he shall be deported or not must be presented to the court, and when all the facts are before him, and both sides have been heard by the court, that is the time when that important matter should be decided.†

INTRODUCTION

Noncitizens who commit crimes large and small work their way through two huge bureaucracies: the immigration enforcement and the criminal justice systems. When a noncitizen commits a crime, the event can result in a criminal conviction, which might then trigger removal from the country.

Neither of these bureaucracies wins plaudits for its efficiency or its humane treatment of the people caught up in the cases. One system is profoundly troubled; the other is a disaster. Criminal defense lawyers and immigration attorneys might disagree about which system deserves which label.

However badly these two systems operate by themselves, they work even more poorly when they are haphazardly combined. The two systems duplicate many tasks, gathering many of the same facts about the noncitizen and employing two distinct sets of investigators and judges. Working together, they needlessly lengthen the time a noncitizen must sit in jail and postpone the date when the government can remove the person from the country.

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The criminal enforcement and immigration enforcement bureaucracies are converging as the number of overlapping cases grows each year. Some of this is sociologically inevitable, since the number of convictions and the number of immigration removals are both climbing. Congress created more points of conflict between the systems during the 1990s when it passed several immigration statutes that emphasized the removal of noncitizen offenders.

The attacks of September 11 might also push the two systems together more quickly, without any deliberation or design. As several other contributors to this Symposium point out, criminal and immigration investigations increasingly are being used in mutually reinforcing ways. In response to the September 11 attacks, the government has relied on immigration enforcement tools as a pretext for investigative techniques and detentions that would be suspect under the criminal rules.

For all the controversy surrounding the growing “criminalization” of immigration law, we argue in this article for a closer integration of criminal and immigration adjudications. We explore the “sentencing judge as immigration judge”—asking whether a judge who sentences a noncitizen criminal offender should also determine whether to remove that individual from the country.

Is it possible to merge these two troubled systems in a way that plays to the strengths of each? We acknowledge that there is room for doubt. Our proposal might simply attempt to make a silk purse from two sow’s ears. But there are reasons to believe that both the government and the deportable offender would benefit from the merger of these two decisions that now operate on largely separate tracks.

In the current system, most noncitizens who are removable because of their criminal convictions are never removed. The government would benefit if the sentencing judge functioned as an immigration judge because the sentencing investigation would provide a reliable way to identify more deportable offenders. A merger of sentencing and immigration determinations would also yield less duplication of resources, quicker deportation, and—notably—lower detention costs. Deportable offenders would also benefit from quicker resolution of their claims, shorter detentions, the institutionalized use of

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prosecutorial discretion for immigration decisions, the presence of a neutral judge, and the provision of counsel and the other procedural protections of the criminal system.

This proposal spotlights some of the comparative strengths of the criminal process. In the criminal system, defendants receive legal counsel, and the prosecutor must account for the potential of a truly adversarial hearing before a neutral decision maker. Prosecutors must economize their efforts and pursue only the most worthwhile cases. The defendant typically does not remain in custody while the case grinds along. If sentencing judges could double as immigration judges—in a properly targeted group of cases—we could successfully remove those noncitizens who are removable by law, but only after a more complete and reliable inquiry than the noncitizen receives today.

We start by outlining some of the problems of the present two-track system of deporting criminal offenders. Part II explains the historical and current roles of the sentencing judge in immigration decisions, noting in particular the stumbling blocks that have prevented a more complete integration of the two systems. Part III examines party-driven decisions, and the present obstacles to a greater role for plea bargaining in the immigration system.

Part IV outlines our proposal: What key elements are required for an efficient and fair merger of sentencing and deportation decisions? We think this merger can and should happen if we return judges to the center of immigration status decisions. Our proposal makes the sentencing judge’s decision the exclusive method for determining the immigration status of most federal criminal defendants, and perhaps some state felony defendants as well. The only exceptions would occur when the immigration questions fall into a designated category of especially complex claims that the sentencing judge can transfer over to an immigration judge.

An intelligent merger of the criminal sentencing and immigration systems might bring out the best in both systems. Although this happy outcome is far from certain, the convergence of the two systems is happening now in a haphazard way that undermines liberty and wastes public resources. If convergence is going to happen anyway, perhaps it is best to get in front of the movement and to manage its direction. If we instead allow tragic events and ad hoc practices to determine for us how these two systems will interact, we will only reinforce the worst aspects of both.
I. THE TWO-TRACK SYSTEM FOR REMOVING CRIMINAL OFFENDERS

Our present system for removing criminal offenders from the country is badly broken. No matter what criteria you choose to judge effectiveness—whether you want to see more criminal offenders quickly deported, or you want to see such decisions made only after a full and fair hearing—the existing procedures fail. They do not serve the interests of the government or adequately protect the rights of the individuals. In this Part, we describe how the problems with this system have grown more widespread over the past two decades.

A. From Ineffectual to Unfair: The Recent Rise in Removals

Criminal deportation grounds—most notably conviction for a crime involving moral turpitude or for a drug offense—have long been a part of the immigration statute. The Immigration and Nationality Act (INA) specifies, however, that (with narrow exceptions) noncitizen offenders who are imprisoned can be deported only after they are released from prison. Historically, this meant that criminal and immigration enforcement operated on two separate tracks. Noncitizen defendants would enter and exit the criminal justice system without any investigation of their immigration status. Removal proceedings would come, if they came at all, only after a noncitizen offender had been released into the community.

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5 The fact that most noncitizen offenders were released from criminal supervision before they were identified by the INS caught the attention of Congress in the late 1980s. A series of reports by the General Accounting Office documented this problem. See U.S. GEN. ACCOUNTING OFFICE, CRIMINAL ALIENS: INS’ ENFORCEMENT ACTIVITIES (GAO/GGD-88-3) (1987) ("CRIMINAL ALIENS: INS’ ENFORCEMENT ACTIVITIES"); U.S. GEN. ACCOUNTING OFFICE, CRIMINAL ALIENS: INS’ INVESTIGATIVE EFFORTS IN THE NEW YORK CITY AREA (GAO/GGD-86-58BR) (1986).
In reality, deportation proceedings\(^6\) were rarely commenced, even for the most serious offenses. The INS simply did not have the resources or the infrastructure needed to: (1) identify noncitizens who were in the criminal justice system; (2) detain or keep tabs on those who were placed in deportation proceedings; and (3) enforce removal orders after obtaining them.\(^7\) Most noncitizen offenders instead remained unknown to the INS. In fiscal year 1980, for example, out of an estimated 31,000 noncitizens who were deportable for criminal offenses,\(^8\) fewer than five hundred individuals were removed on criminal grounds.\(^9\)

Things began to change in the 1980s, however. Criminal deportations rose steadily during that decade, so that just over seven thousand noncitizens were deported on criminal grounds in fiscal year 1989.\(^10\) The numbers then increased dramatically during the Clinton Administration. In fiscal year 1995, the INS removed over 33,000 criminal offenders\(^11\)—exceeding in just one year

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\(^6\) Although the terms “deportation” and “removal” have different meanings, which stem from recent revisions in the immigration statute, the distinction between them is not relevant to our analysis. We use the two words interchangeably in this Article to refer to the expulsion of noncitizens already in the country.

\(^7\) These problems are detailed and analyzed in Professor Peter Schuck and John Williams’s comprehensive study of the criminal removal system, Peter H. Schuck & John Williams, Removing Criminal Aliens: The Pitfalls and Promises of Federalism, 22 Harv. J.L. & Pub. Pol’y 367 (1999). They also are discussed extensively in the GAO reports cited supra note 5. See also U.S. Dep’t of Justice, Office of the Inspector Gen., Immigration and Naturalization Service: Deportation of Aliens After Final Orders Have Been Issued 1 (Report No. I-96-03) (1996) (reporting that the INS removed only 11% of those noncitizens who were free from detention when they were ordered deported).

\(^8\) Schuck & Williams, supra note 7, at 381 tbl.2. Schuck and Williams derived this figure by estimating the number of foreign-born inmates in the local, state, and federal prison systems, along with foreign-born parolees and probationers, and further estimating what percentage of these foreign-born populations would in fact be deportable. Id. at 378-80. They conclude that it is “highly noteworthy—because it reflects the nature and causes of the underlying criminal-alien removal problem—that neither the federal government nor the states has developed reliable figures for any of these categories.” Id. at 377.


\(^10\) Id. at 187, tbl.68 (reporting 7,036 noncitizens deported for “convictions for criminal or narcotics violations” and 343 deported for reasons “related to criminal or narcotics violations”). An additional 712 individuals were excluded for criminal or narcotics violations in fiscal year 1989. Id. at 186, tbl.66.

\(^11\) Immigr. and Naturalization Serv., Office of Policy and Planning, Total Criminal Removals, Fiscal Years 1993-2002 (May 10, 2002) (on file with authors) (reporting 33,842 total criminal removals in fiscal year 1995). The INS now includes in its criminal removal statistics those noncitizens who have prior criminal convictions but were removed on other grounds, such as failing to maintain proper status or being present in violation of law. This helps to explain the sharp increases in criminal removals during the 1990s. Telephone Interview with John Bjerke, INS Office of Policy and Planning (May 8, 2002).

When citing data from the years 1993 to 2002, we rely on updated figures provided to us by the INS. Criminal removal statistics can also be accessed via the monthly statistical reports available on the INS
the total for the prior decade.\textsuperscript{12} In fiscal year 1997, over 50,000 criminal offenders were deported.\textsuperscript{13} Criminal removals have hovered around 70,000 for each of fiscal years 1999, 2000, and 2001.\textsuperscript{14}

The increase in criminal deportations over the past two decades is partly a by-product of the steep rise in criminal enforcement and incarceration rates during this period.\textsuperscript{15} But it also results from a flurry of new legislation enacted to make it easier to deport noncitizen criminal offenders. This legislative activity culminated in 1996 in two statutes that together may be “the harshest, most procrustean immigration control measure” in the twentieth century.\textsuperscript{16}

Through a series of enactments,\textsuperscript{17} Congress dramatically expanded the substantive grounds for criminal removal, and restricted just as dramatically the availability of discretionary relief.\textsuperscript{18} A moral turpitude conviction (which includes, for example, a petty theft offense) is now a deportable offense when it is committed within five years after the date of admission if a sentence of more than a year may be imposed.\textsuperscript{19} In addition, in 1988 Congress created a

\textsuperscript{12} Compare U.S. IMMIGR. AND NATURALIZATION SERV., supra note 9, at 187, tbl.68 (reporting 30,630 deportations for criminal or narcotics violations, and 1,972 for reasons “related to criminal or narcotics violations,” during the fiscal years 1981-1990).

\textsuperscript{13} Immigr. and Naturalization Serv., supra note 11 (reporting a total of 53,214 criminal removals for fiscal year 1997, as compared to 38,015 in fiscal year 1996).

\textsuperscript{14} Id. (reporting at 69,970 criminal removals in FY 1999; 71,509 in FY 2000; and 71,555 in FY 2001).

\textsuperscript{15} The rate of imprisonment in the United States has more than tripled since 1980. The number of persons per 100,000 being held by correctional authorities over time were as follows: 117 in 1960; 96 in 1970; 139 in 1980; 202 in 1985; 297 in 1990; 411 in 1995; and 478 in 2000. BUREAU OF JUSTICE STATISTICS, 2000 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, at tbl.6.27 (2001).

\textsuperscript{16} Increased criminal removals also reflect the fact that foreign-born offenders now constitute a larger percentage of the incarcerated population. In 1985, for example, 14% of the Bureau of Prison population was noncitizens. By 2000, the noncitizens accounted for 29% of the federal prison population. BUREAU OF JUSTICE STATISTICS, IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 2000 at 8 (NCJ 191745) (2002). In 1998, foreign-born inmates made up approximately 7.6% of the state prison population overall. That number is higher, however, in immigrant-receiving states such as California, where, in 1998, foreign-born inmates accounted for approximately 21% of the prison population. Schuck & Williams, supra note 7, at 379-80.

\textsuperscript{17} Schuck & Williams, supra note 7, at 371.

\textsuperscript{18} Congress has enacted statutes impacting the deportation of noncitizen criminal offenders in every session since 1986. Id. at 373, n.24 (collecting citations for the amendments).

\textsuperscript{19} For a fuller explanation and critique of recent amendments to the criminal deportation provisions, see Nancy Morawetz, Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms, 113 HARV. L. REV. 1936 (2000).

\textsuperscript{20} INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A) (2000). The original statute required that an individual be “sentenced to confinement . . . for a year or more” to be deportable for a moral turpitude conviction. See 8 U.S.C. § 1251(a)(4) (1952). The amendment means that the moral turpitude ground now reaches those cases
new deportation ground—conviction for an “aggravated felony”—which originally encompassed only a handful of egregious crimes.\textsuperscript{20} The definition of an aggravated felony has since expanded to include a multitude of crimes, including some misdemeanor convictions that the general public would not consider to be particularly serious offenses.\textsuperscript{21} Some of these changes applied retroactively, suddenly rendering deportable noncitizens whose crimes were not deportable offenses when they were convicted many years ago.\textsuperscript{22} Finally, conviction for an aggravated felony is now a complete bar to discretionary relief from deportation, which historically operated to ameliorate the harshness of the immigration statute for long-term residents who could demonstrate rehabilitation and significant ties to the community.\textsuperscript{23}

In addition, Congress sharply curtailed the procedural rights of noncitizen offenders facing removal. One consequence of the traditional separation of criminal and immigration enforcement is that the procedural protections of a criminal trial—including the right to counsel at government expense—do not attach to removal proceedings.\textsuperscript{24} Until recently, however, noncitizens subject to removal were entitled by statute to a hearing where they could present evidence and examine witnesses, and their cases were decided by an immigration judge who was not employed by the INS.

\begin{footnotes}
\item[21] See INS v. St. Cyr, 531 U.S. 289, 296 n.6 (2001) (recounting the present, expansive definition). For example, two convictions for simple drug possession, a statutory rape conviction, or a misdemeanor theft offense for which a sentence of a year is imposed can be considered aggravated felony convictions. See Mugall v. Ashcroft, 258 F.3d 52, 52-54 (2d Cir. 2001); Jafar v. INS, 77 F. Supp. 2d 360, 364 (W.D.N.Y. 1999); In re Yanez-Garcia, 23 I. & N. Dec. 390, 393 (B.I.A. 2002).
\item[22] See generally Morawetz, supra note 19, at 115-18.
\item[23] INA § 240A(a)(3), 8 U.S.C. § 1229a(a)(3). The history of this provision, which resulted in relief from deportation for a “substantial percentage” of applicants, is recounted in St. Cyr, 533 U.S. at 294-97. The Supreme Court held that this bar to relief did not apply retroactively to noncitizens who pleaded guilty before the new provision was enacted. Id. at 326.
\item[24] The Supreme Court has repeatedly held that deportation is not punishment for a crime, but rather is a civil penalty, so that the procedural protections of a criminal trial do not attach in deportation proceedings. Galvan v. Press, 347 U.S. 522, 530-31 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952). The INA provides that noncitizens have the right to counsel "at no expense to the Government" in removal proceedings before an immigration judge. INA § 292, 8 U.S.C. § 1362.
\end{footnotes}
Recent amendments to the INA strip away these hearing rights for many noncitizen offenders. INS officers can now summarily deport aggravated felons who are not lawful permanent residents\textsuperscript{25} and individuals who have reentered illegally after having previously been removed.\textsuperscript{26} In addition, new provisions were enacted to shorten filing deadlines and tighten other procedural requirements for noncitizens who were resisting deportation.\textsuperscript{27} Congress also attempted (but ultimately failed) to deprive federal courts of their authority to review the deportation orders of criminal offenders.\textsuperscript{28}

In sum, the sharp rise in criminal deportations over the last two decades has come at the expense of substantive and procedural fairness in the removal process. As Professor Peter Schuck and John Williams detailed in their extensive study of criminal deportations, Congress cracked down on noncitizen offenders by pursuing "procedural fixes that seemed easy and cheap," but paid relatively little attention to building an effective infrastructure for removal.\textsuperscript{29} Fundamental problems—most notably prolonged detention—continue to plague the system, which now strains under the weight of a much larger caseload. After more than a decade of avulsive change in the immigration laws, the two-track system for removing criminals still does not function effectively, even as it removes many more offenders after summary proceedings.

\textbf{B. But Still Inefficient: Slippage Between the Criminal and Immigration Enforcement Systems}

From the government's perspective, there is an enormous duplication of effort in the two-track system. Sentencing decisions and deportation decisions often turn on the same events and the same equitable factors. Yet probation officers and INS officers conduct separate investigations of a noncitizen's background, and sentencing judges and immigration judges each make separate determinations.

\textsuperscript{25} INA § 238(b), 8 U.S.C. § 1228(b).
\textsuperscript{26} INA § 241(a)(5), 8 U.S.C. § 1231(a)(5).
\textsuperscript{27} For a summary of the procedural changes since 1986, see Schuck & Williams, \textit{supra} note 7, at 388-92.
\textsuperscript{28} INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), provides that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense . . . ." The Supreme Court held in \textit{St. Cyr}, however, that federal district courts retain general habeas jurisdiction under 28 U.S.C. § 2241 to review questions of law arising from the deportation of noncitizen offenders. 533 U.S. at 314.
\textsuperscript{29} Schuck & Williams, \textit{supra} note 7, at 423-24.
Time spent in INS detention is the most costly component of the mismatch between the criminal and immigration enforcement systems. Congress has mandated detention for virtually all noncitizen offenders once they are released from criminal supervision. To comply with this mandate, the agency now routinely interviews foreign-born offenders while they are in prison and places detainers on those who might be deportable so that they are released into INS custody instead of the community. But detention during the pendency of removal proceedings is often prolonged by delays inherent in the immigration system. In fiscal year 1997, the INS incurred over $40 million in detention costs for noncitizens who had completed their criminal sentence but were waiting for resolution of their immigration status.

These detention costs, and the accompanying hardship to deportable noncitizen offenders, can be eliminated if immigration removal proceedings are completed while an individual is still serving the criminal sentence, so that a noncitizen offender is turned over to the INS with a final order in hand. That

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30 INA § 236(c), 8 U.S.C. § 1226(c). This provision requires detention without a bond hearing for noncitizen offenders in the midst of removal proceedings, regardless of whether the individual presents risk of flight or danger to the community. A number of circuit courts have concluded that INA § 236(c) is unconstitutional. See, e.g., Kim v. Ziegler, 276 F.3d 523, 526 (9th Cir.), cert. granted sub nom. Demore v. Kim, 122 S. Ct. 2696 (2002); Hoang v. Comfort, 282 F.3d 1247, 1261 (10th Cir. 2002); Patel v. Zemski, 275 F.3d 299, 310-15 (3d Cir. 2001).

31 See U.S. GEN. ACCOUNTING OFFICE, CRIMINAL ALIENS: INS’ ENFORCEMENT EFFORTS TO REMOVE IMPRISONED ALIENS CONTINUE TO NEED IMPROVEMENT 4-6 (GAO/GGD-99-3) (1998). In a handful of jurisdictions where there is a large population of foreign-born offenders, the INS conducts interviews in local jails—a practice which identifies noncitizens who might be placed on probation instead of being sentenced to prison. Schuck & Williams, supra note 7, at 406. An INS detainer provides notice that the INS seeks custody of an individual that is presently in the custody of another law enforcement agency. Once a detainer is issued, the custodian agency will advise the INS “prior to release of the alien, in order for the Service to arrange to assume custody . . . .” 8 C.F.R. § 287.7(a) (2002).

32 A key component of this delay is the difficulty coordinating the activities of the INS, which initiates deportation proceedings, and the Executive Office for Immigration Review (EOIR), which schedules immigration judge hearings. While the two agencies have moved toward a system of electronic scheduling, until recently it “was not uncommon for the EOIR to receive [a notice] for calendaring more than a year after it had been issued by the INS.” Schuck & Williams, supra note 7, at 411. Delays are also linked to continuances granted to allow more time for a detained noncitizen to find a lawyer. See Margaret H. Taylor, Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform, 29 CONN. L. REV. 1647, 1667-75 (1997). Several courts have criticized the INS for subjecting noncitizen offenders to prolonged detention. See infra note 41 and accompanying text.

is the goal of the INS's Institutional Removal Program (IRP).\textsuperscript{34} Congress has shown strong interest in expanding the IRP. The immigration statute now requires the INS to hold removal proceedings on site at some federal, state, and local prisons and jails; the statute also calls for the INS to complete those removal proceedings, "to the extent possible," before the noncitizen finishes serving the criminal sentence for an underlying aggravated felony.\textsuperscript{35} But the IRP presently reaches fewer than half of the criminal offenders who are removed.\textsuperscript{36} The rest serve out their criminal sentence and then are detained for significant periods at the back end of the two-step removal process.

Lengthy delays and costly detention, moreover, are merely the most visible failures of the criminal removal system. There are many removable criminal offenders who never even enter the system. In fact, the INS still removes only a fraction of the total number of deportable criminal offenders.\textsuperscript{37} The rest—generally those convicted of less serious offenses—slip between the cracks of a two-track system that does not adequately link the criminal and immigration proceedings.

\textsuperscript{34} See U.S. GEN. ACCOUNTING OFFICE, supra note 33, at 5; Schuck & Williams, supra note 7, at 406-08; Institutional Hearing Program, Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 105th Cong. (1997) (containing testimony of federal and state officials detailing the operation of the precursor to the IRP, known as the Institutional Hearing Program).


\textsuperscript{36} U.S. GEN. ACCOUNTING OFFICE, supra note 33, at 9-12. More recent data shows that the percentage of criminal removals completed through the IRP process has remained below 50%, even as the IRP program is being expanded. In fiscal year 2001, the INS removed a total of 71,555 criminal offenders; 30,212—42% of the total criminal removals—were through IRP proceedings. Immigr. and Naturalization Serv., Office of Policy and Planning, Total IRP Removals, Fiscal Years 1993-2002 (on file with authors). As this Article was going to press, the Office of Inspector General of the Department of Justice issued a report evaluating the IRP, noting many shortcomings of the program. The report estimates that the INS spends as much as $200 million annually detaining noncitizen criminal offenders who have been released from incarceration into INS custody to complete deportation proceedings. Office of Inspector General, U.S. Dept. of Justice, Immigr. and Naturalization Serv., Institutional Removal Program, No. 02-41, Sept. 2002, available at http://www.usdoj.gov/oig/audit/o241/index.htm.

\textsuperscript{37} The INS estimates the potential pool of removable noncitizen criminal offenders to be over 300,000. A little over a third of them, approximately 110,000 to 140,000, are in federal or state prisons or local jails, and thus might be subject to screening and removal while they are still incarcerated via the IRP program. The population of removable offenders also includes those who are on probation or parole, and those with final removal orders who have absconded. Immigr. and Naturalization Serv.'s Interior Enforcement Strategy, Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 106th Cong. 7-8 (July 1, 1999) (Testimony of Robert Bach, INS Executive Associate Commissioner for Policy and Planning). See also Schuck & Williams, supra note 7, at 381-85 (estimating 300,000 noncitizens serving prison sentences or under law enforcement supervision, and concluding that fewer than 20% of this population is removed).
Given the harshness of existing law, perhaps this is a good thing. Now that adjudicators have so little discretion, making removal automatic even for long-term residents and for relatively minor convictions, one might applaud this de facto softening of the criminal deportation provisions. We would like to see Congress repeal the foolish excesses of the 1996 statutes. But we also believe that the process for deporting criminal offenders should be revised to better serve the interests, and protect the rights, of those who are being deported.

A key symptom of unfairness is the limited role of defense attorneys in the removal process. The vast majority of noncitizens detained by the INS do not have counsel to represent them, and thus proceed alone through a truncated and severe removal process with its tight deadlines, limited defenses, and countless traps for the unwary. This problem is compounded by the diminishing procedural rights of noncitizen offenders. The concept of an adversarial hearing before a neutral adjudicator is disappearing altogether from the criminal deportation system as an increasing number of noncitizen offenders are summarily removed by the INS. And those who retain the right to a hearing before an immigration judge but who are detained often “appear” via video conferencing that hampers communication and impedes their ability to present their case.

In addition, the detention that is so costly and inefficient for the government also brings real suffering to noncitizen offenders. The INS locks up many deportable offenders for months or even years after they have completed their prison terms. On occasion, district courts have been “inundated” by habeas petitions filed by noncitizen offenders asking to be

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38 In some contexts, this figure is as high as 90%. See Taylor, supra note 32, at 1664 n.60.
39 In fiscal year 2001, over 10,000 non-legal permanent resident (non-LPR) aggravated felons were removed without a hearing via the ministerial removal proceedings described infra note 103. Immigr. and Naturalization Serv., Office of Policy and Planning, Total Administrative Removals, Fiscal Years 1993-2002 (May 10, 2002) (on file with authors). Another 30,000 noncitizens (not all of them criminal offenders) had prior removal orders reinstated against them by an INS officer. Immigr. and Naturalization Serv., Office of Policy and Planning, Reinstatement of Removal Orders, Fiscal Years 1997-2002 (May 10, 2002) (on file with authors). Even as criminal removals are increasing, immigration judges are hearing fewer cases of incarcerated offenders because the INS increasingly relies on these summary removal procedures. INS and the Executive Office for Immigration Review, Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 107th Cong. 13, 16 (2001) (testimony of Peggy Philbin, Acting Director, Executive Office for Immigration Review, Dep’t of Justice).
deported so that they would no longer languish in the custody of the INS. 41  
The policy of detaining deportable offenders during the pendency of removal proceedings is even more problematic when applied, as Congress has said it must be, to nonviolent offenders who do not present a risk of flight or a danger to the community. 42

The Institutional Removal Program obviates the need for INS detention for those criminal offenders whose cases are heard while they are in criminal custody, but it has not fixed all these systemic problems. Indeed, the IRP now contributes to the unfairness of the present system. The IRP has become the main setting for applying the new, streamlined removal processes that supplant traditional deportation hearings. 43

41 Emejula v. INS, 989 F.2d 771, 772 (5th Cir. 1993) (criticizing the INS for lengthy delays that had produced “a flood of habeas petitions being filed by detainees who, by any fair reading of the statute, should long since have been deported”). In 1986, Congress amended the INA to state that the Attorney General to “shall begin any deportation proceedings as expeditiously as possible” for noncitizens who are convicted of a criminal offense. See United States v. Lopez, 940 F. Supp. 920, 922-25 (E.D. Va. 1996) (detailing the history and subsequent revisions of this statutory provision). Many noncitizen offenders who were languishing in INS detention filed habeas petitions seeking to enforce this provision; several courts chastised the INS for its “unconscionable” delays. Nwankwo v. Reno, 819 F. Supp. 1186, 1189 (E.D.N.Y. 1993). See also Giddings v. Chandler, 979 F.2d 1104, 1106-07 (5th Cir. 1992) (discussing split among the circuits on whether INS detainees could sue to enforce this provision); Abreu v. United States, 796 F. Supp. 50, 55 (D.R.I. 1992) (issuing a mandamus to order the INS to conduct deportation hearings “as soon as possible,” and noting that pervasive delay “wastes precious resources” and “serves neither the prisoners nor the government”). Congress later amended the statute to provide that “nothing in section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States,” INA § 238(a)(1), thus precluding further suits seeking to compel the INS to initiate proceedings. Lopez, 940 F. Supp. at 923 n.10.

Around the same time that INS detainees were filing habeas petitions seeking prompt deportation, some federal judges were granting downward departures (reductions in the criminal sentence) for noncitizens to account for the possibility of prolonged detention in INS custody after the criminal sentence was served. See United States v. Restrepo, 999 F.2d 640, 646-47 (2d Cir. 1993) (rejecting downward departures on that basis).


43 In fiscal year 2001, 67% of IRP removals were accomplished by the INS alone, through the streamlined procedures that accompany reinstatement of removal orders under INA § 241(a)(5), see 8 C.F.R. § 241.8 (2002), or the ministerial removal procedures of INA § 238(b), see 8 C.F.R. § 238.1. Immigr. and Naturalization Serv., Office of Policy and Planning, Total IRP Removals, Fiscal Years 1993-2002 (May 10, 2002) (on file with authors) (of the 30,212 IRP Removals in FY 2001, 5,950 were “administrative” removals and 14,345 were reinstatement cases). The INS has also announced its intent to institute a pilot program using expedited removals under INA § 235(b)(1)(a)(iii) for some incarcerated noncitizen offenders. 64 Fed. Reg. 51338 (Sept. 22, 1999). The program will not take effect, however, until the Service publishes an additional notice in the Federal Register; that triggering event has not yet occurred.
We do not believe that deportable offenders should have to pay with the coin of procedural rights to avoid prolonged detention due to INS delay. The two-track system for removing criminal offenders combines the harsh with the random, and the inefficient with the unfair. The failures of the two-track system lead us to imagine a merger that extends the (relative) efficiency and the procedural rights of criminal sentencing into the immigration context.

II. JUDICIAL IMMIGRATION DECISIONS

Our proposed solution to these problems is to have the INS intervene even sooner in the criminal proceeding by handing the removal decision to the sentencing judge. Empowering a sentencing judge to determine a noncitizen offender’s immigration status is not a new idea. Historically, the sentencing judge could foreclose the removal of an otherwise deportable offender if the judge made the recommendation within thirty days of sentencing. Congress repealed that long-standing authority in 1990. The current statute instead permits a federal judge to order removal of a noncitizen offender at the time of sentencing if the U.S. Attorney initiates and the INS concurs in such a request.

Despite this statutory authority going back almost a century, sentencing judges remain unacquainted with their power over immigration matters. They seldom exercise this authority. Instead, the judicial role in immigration decisions has withered from lack of use. From the history and current practice, we find clues about the obstacles to a more widespread use of this judicial power.

A. The Judicial Recommendation Against Deportation

Until 1990, the INA provided that its primary criminal deportation ground—conviction for a crime involving moral turpitude—would not apply if the sentencing judge recommended that the offender not be deported. The statute required the judge to provide “due notice” to the INS and prosecution authorities, who could then respond.\(^{44}\) Judicial Recommendations Against

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\(^{44}\) Former 8 U.S.C. § 1251(b)(2) (1988) read as follows:

The provisions of subsection (a)(4) [the moral turpitude ground] respecting the deportation of an alien convicted of a crime or crimes shall not apply. . . . (2) if the court sentencing such aliens for such crimes shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make
Deportation (known as “JRADs”) were binding on the INS, so that the moral turpitude conviction could not be used as a basis for deportation.\textsuperscript{45} JRADs did not disturb the INS’s authority to deport a noncitizen offender on other grounds.\textsuperscript{46} Notably, the statute empowered state court judges to issue JRADs, thus permitting them to decide the immigration consequences of a state criminal conviction.\textsuperscript{47}

The legislative history of JRADs, enacted in 1917, is filled with statements by Members of Congress that the judge who sentences a noncitizen offender knows best whether that person should be deported.\textsuperscript{48} The House of Representatives rejected an amendment that would have allowed a court to make this determination “at any time before deportation,” instead concluding that the judge should decide the immigration consequences of a criminal conviction “promptly and when the entire matter is fresh.”\textsuperscript{49} The statute granted an additional thirty days from the time of sentencing, however, so that defendants could seek JRADs in those cases where the sentencing judge “may omit or forget to make a recommendation.”\textsuperscript{50}

Although the Congress that enacted JRADs clearly contemplated a close connection between deportation and sentencing, the link was never fully forged

\textsuperscript{45} Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986) (noting that the JRAD provision “has consistently been interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation”).

\textsuperscript{46} United States v. Solano-Ramos, 2000 U.S. App. LEXIS 2219, at *10 n.5 (10th Cir. Feb. 15, 2001) (ruling that JRAD did not preclude the INS from deporting someone for entering without inspection); United States v. Yacoubian, 24 F.3d 1, 6-7 (9th Cir. 1994) (JRAD did not preclude deportation when Congress later amended the statute so that a separate deportation ground encompassed the prior conviction); Oviawe v. INS, 853 F.2d 1428, 1431 (7th Cir. 1988) (JRAD did not preclude deportation for overstaying the time an individual was authorized to remain in the United States); Jew Ten, 307 F.2d at 835 (JRAD granted for crime involving moral turpitude did not preclude deportation where INS did not base proceedings on that conviction).

\textsuperscript{47} See, e.g., People v. Cheung, 718 N.Y.S.2d 575, 580 (N.Y. Sup. Ct. 2000) (setting aside sentence based on sentencing judge’s unfulfilled promise to grant JRAD seventeen years earlier, and noting that “the State Judge had the absolute power to prevent this defendant’s deportation”); In re Ligidikas, 20 I. & N. Dec. 112 (B.I.A. 1989) (California Superior Court’s JRAD precluded deportation based on that crime).

\textsuperscript{48} See supra note 1; 53 CONG. REC. 5171 (1916) (statement of Rep. Powers) (“[A]t the time the judgment is rendered and at the time the sentence is passed, the judge is best qualified to make these recommendations.”).

\textsuperscript{49} 53 CONG. REC. at 5169-71.

\textsuperscript{50} Id. at 5169 (statement of Rep. Sabath).
for two reasons. First, the JRAD provision coexisted alongside traditional judicial doctrine stating that deportation counts as a civil sanction rather than a criminal punishment. Second, the possibility of a JRAD rarely came to the attention of the sentencing judge.

1. An Incomplete Merger

When Congress enacted JRADs, it vested sentencing judges with broad discretion to block the deportation of noncitizen offenders on moral turpitude grounds. Judges could decide the immigration status of noncitizen offenders as part of the sentencing phase of the criminal trial. In this respect, the existence of JRAD authority was in tension with the notion that deportation is a civil penalty.

At the moment when the sentence was imposed, the tension was more theoretical than real. As a practical matter, everyone in the courtroom—judges, prosecutors, defendants, and defense counsel—saw JRADs as an amelioration of the criminal punishment. Recommendations did not hinge on the complexities of immigration law, but rather on considerations such as the defendant’s criminal record, evidence of rehabilitation, and ties to the community. But noncitizen defendants found more than a theoretical connection between the criminal and immigration systems. They pressed courts to rule on whether the procedural protections of a criminal trial attached to JRADs. After some debate, the courts mostly refused, instead reaffirming the formal distinction between the criminal sentence and the immigration consequences that followed.

51 Id. (asserting that deportation may be “too harsh” a penalty for someone convicted of a minor offense, or for a noncitizen who “may have married an American woman and may have children”). See also United States v. Bodre, 948 F.2d 28, 41 (1st Cir. 1991), cert. denied, 503 U.S. 941 (1992) (Bownes, J., dissenting) (“The JRAD decision, like the sentencing decision itself, is based on the judge’s view of the appropriate punishment for the conviction.”); Janvier v. United States, 793 F.2d 449, 453 (2d Cir. 1986) (recounting the legislative history and concluding that JRADs were “designed to make the total penalty for the crime less harsh and less severe when deportation would appear to be unjust”).

The leading treatise on immigration law and crimes advised practitioners that when a trial court judge balked at issuing a JRAD, he or she should be reminded that “the statutory provision for the JRAD was specifically enacted to allow the sentencing court to determine whether or not the crime warrants the harsh penalty of deportation. This allocation of authority was based precisely on the presumption that it is the criminal trial judge who is more qualified to assess the gravity of the circumstances surrounding the crime.” DAN KESSELBRENNER & LORY ROSENBERG, IMMIGRATION LAW AND CRIMES, App. G-17 (Norton Tooby updating ed., 2001).
The constitutional status of JRADs was litigated in two contexts. First, noncitizen offenders facing deportation sometimes claimed ineffective assistance of counsel because their attorneys had misadvised them about the JRAD option. State and federal courts were divided on whether they would reopen a guilty plea in this situation.\textsuperscript{52}

In \textit{Janvier v. United States}, the Second Circuit held that a judicial recommendation against deportation "is part of the sentencing process, a critical stage of the prosecution to which the Sixth Amendment safeguards are applicable."\textsuperscript{53} \textit{Janvier} relied extensively on the 1917 legislative history of JRADs to conclude that the enacting Congress considered deportation to be part of the penalty for a crime, which should be ameliorated "in any case in which the judge who best knew the facts thought the drastic penalty of deportation was unwarranted."\textsuperscript{54} \textit{Janvier} was the strongest judicial endorsement of the view that JRADs, when available, effectively merged the deportation and sentencing determinations.\textsuperscript{55}

But the weight of judicial opinion ultimately went in the other direction. Many decisions invoked the longstanding rule that the right to effective assistance of counsel "does not extend to the collateral aspects of the prosecution," and thus concluded that advice about JRADs was not constitutionally required.\textsuperscript{56}

The relationship between deportation and sentencing also generated a constitutional claim when Congress repealed JRADs in 1990. The statute specified that the repealer took effect immediately and applied "to convictions

\textsuperscript{52} \textit{Retamao v. State}, 874 P.2d 603, 607 (Idaho Ct. App. 1994) (noting disagreement on this question, and collecting citations). For a further discussion of plea-bargaining that incorporates a determination of a noncitizen defendant's immigration status, see infra Part III.

\textsuperscript{53} 793 F.2d 449, 455 (2d Cir. 1986).

\textsuperscript{54} Id. at 453.


entered before, on, or after” the date of enactment.\textsuperscript{57} Noncitizen defendants who would otherwise have been entitled to seek a JRAD contended that this provision violated the ex post facto clause, which prohibits the retrospective application of criminal laws that materially disadvantage the defendant.

The courts were unanimous, however, in rejecting these ex post facto challenges.\textsuperscript{58} Because the JRAD sentencing procedures were “substantively a part of civil deportation measures,” the ex post facto clause did not apply at all.\textsuperscript{59} Thus, there was no constitutional barrier to Congress’s retroactive repeal.\textsuperscript{60}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{57} Immigration Act of 1990, Pub. L. No. 101-649, § 505(b), 104 Stat. 5050 (1990). The INS interpreted this language to render ineffective only those JRADs entered after November 29, 1990, when Congress enacted the JRAD repeal. Any JRAD entered before that date “continues to be valid and continues to have the effect of precluding the use of the conviction to establish deportability.” 56 Fed. Reg. 8906-01 (Mar. 4, 1991) (implementing the JRAD repealer).
\item \textsuperscript{59} United States v. Bodre, 948 F.2d 28, 35 (1st Cir. 1991) (emphasis added). Bodre stressed that the fact that a JRAD motion was issued concurrently with the criminal sentence “does nothing to alter the precept that deportation is not punishment.” Id. at 34. The court also concluded that “partial subject-matter jurisdiction over immigration . . . was but loaned to the judiciary by the Congress,” and that JRAD authority “does not intrinsically render that recommendation a criminal matter.” Id. at 34-35. See also United States v. Yacoubian, 24 F.3d 1, 4 (9th Cir. 1994) (appeal of an injunction to enforce a JRAD order was subject to the time frame for appeals in civil cases, because “[t]he mere fact that the JRAD is part of the sentencing process does not convert it or proceedings enforcing it into criminal proceedings”).
\item Although the courts unanimously upheld the retroactive repeal of JRADs, they divided on whether sentencing judges still had discretion to remedy improper JRAD determinations prior to the repeal. In United States v. Murphy, 931 F.2d 606, 608-09 (9th Cir. 1991), the Ninth Circuit concluded that repeal of the statutory authority for JRADs rendered moot any post-1990 challenges to earlier denials of a JRAD motion. See also People v. Leung, 7 Cal. Rptr. 2d 290, 306 (Cal. App. 1992). Some courts similarly concluded that they no longer had authority to redress ineffective assistance of counsel claims arising from pre-1990 failures to advise of the JRAD option. United States v. LaPlante, 57 F.3d 252 (2d Cir. 1995).
\item But some judges have been persuaded to grant a writ of coram nobis or to vacate a sentence to remedy a pre-1990 defect in sentencing arising from the failure to properly advise the defendant or court about the JRAD option. See United States v. Castro, 26 F.3d at 563 (granting writ of coram nobis and remanding to determine “whether JRAD relief should be granted or denied,” despite the fact that JRAD authority had been repealed); United States v. Khalaf, 116 F. Supp. 2d 210, 214-15 (D. Mass. 1999) (granting writ of coram nobis to vacate guilty plea when defendant and the court were mistakenly advised that a JRAD would prevent deportation for a drug offense); Shushansky v. United States, 1994 U.S. Dist. LEXIS 18589 (E.D.N.Y. Dec. 21, 1994) (granting writ of coram nobis and vacating for resentencing when defendant was denied effective assistance of counsel because his attorney failed to pursue a JRAD within the proper timeframe); People v. Cheung, 718 N.Y.S.2d 578, 582 (Sup. Ct. 2000) (vacating sentence to ameliorate immigration consequences of the conviction, seventeen years after unfulfilled sentencing promise to grant a JRAD, although JRAD was no longer available).
\end{enumerate}
\end{footnotesize}
JRADs represent a long-standing, but incomplete, merger of sentencing and deportation decisions. These cases tell us that even if the sentencing judge settles the immigration question during the sentencing hearing, the procedural protections from sentencing will not automatically apply. Thus, in our proposal, the procedural protections we hope to transplant from the sentencing hearing to the immigration determination must appear specifically in the statute.

2. **Low Visibility of JRADs**

The unsuccessful ex post facto challenges to Congress's repeal of JRADs cast a rare spotlight on this provision. But this awareness was late in coming. In most jurisdictions, judicial recommendations against deportation were "virtually unheard of,"61 despite the fact that they had been part of the immigration statute for over seventy years. Perhaps the most notable feature of JRADs was the extent to which "the existence of this remedy and its tremendous ameliorating effect . . . was neither widely known nor understood."62

JRADs surfaced only rarely in what little was recorded of sentencing determinations and immigration proceedings. The prevalence of plea bargains meant that sentencing judges generally did not explain JRAD determinations on the record. The INS did not keep statistics on JRAD grants and denials.63 Occasionally the parties would ask courts to interpret the scope of JRAD authority,64 or to rule on the collateral effects of a recommendation against

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61 United States v. Sanchez-Guzman, 744 F. Supp. 997, 999 (E.D. Wash. 1990). See also Janvier v. United States, 793 F.2d 449, 456 (2d Cir. 1986) (Bartels, J., concurring) ("[I]n my experience as a district court judge, such requests for a recommendation . . . very seldom have been made in the past.").

62 KESSELBRENNER & ROSENBERG, supra note 51, at G-4.

63 Telephone Interview with John Bjerke, INS Office of Policy and Planning (May 8, 2002). When amending the regulations to implement JRADs in 1990, the INS asserted that a "vast number" of JRAD motions were received annually. Judicial Recommendations Against Deportation; Controlled Substance Violations, 55 Fed. Reg. at 11150, 11151 (March 27, 1990) (codified at 8 C.F.R. pt. 241). For purposes of collecting information for the Paperwork Reduction Act, however, the INS estimated "3,000 annual responses" for Judicial Recommendations Against Deportation. Information Collections Under Review, 57 Fed. Reg. 4481 (Feb. 5, 1992); Information Collections Under Review, 60 Fed. Reg. 25741 (May 12, 1995). When publishing these estimates, the INS gave no explanation as to why or how it was estimating JRAD responses after JRAD authority had been repealed.

64 See Jew Ten v. INS, 307 F.2d 832, 834 (9th Cir. 1962) (noting ambiguity over the scope of the statutory exclusion for narcotics convictions); United States v. Probert, 737 F. Supp. 1010, 1011-12 (E.D. Mich. 1989) (noncitizen convicted of aggravated felony for importation of cocaine may move for JRAD), aff'd, 902 F.2d 35 (6th Cir. 1990); Yacoubian, 24 F.3d at 6 (concluding that JRAD was initially effective to
deportation. Occasionally the INS would contend that a JRAD was not valid because it had not received “due notice” of the request, or because the JRAD was not entered “at the time of first imposing judgment or passing sentence, or within thirty days thereafter.” For the most part, however, judicial recommendations against deportation were seldom requested and seldom granted.

JRADs operated on the periphery of immigration law and criminal defense practice for several practical reasons. Historically the overall level of criminal deportations was very low. Fewer than one thousand noncitizen offenders were deported each year for most of the period that JRADs were available.

preclude deportation for possessing and transporting explosive materials, but became ineffective when Congress amended the statute to create a new deportation ground that covered the underlying offense).

Some courts concluded that a valid JRAD not only precluded deportation for the criminal offense, but also prevented immigration authorities from considering the conviction when assessing whether the offender should be granted discretionary relief. Gianbano v. INS, 531 F.2d 141, 149 (3d Cir. 1976). Other decisions held that a JRAD was effective only to prevent deportation, and did not preclude the conviction from being assessed as an adverse factor when evaluating a request for discretionary relief. Hassan v. INS, 66 F.3d 266, 269 (10th Cir. 1995); Delgado-Chavez v. INS, 765 F.2d 868 (9th Cir. 1985); In re Gonzalez, 16 I. & N. Dec. 134, 134-35 (B.I.A. 1977).

In re Ligidakis, 20 I. & N. Dec. 112, 114-15 (B.I.A. 1989) (finding that when INS had actual notice of a pending JRAD motion and appeared telephonically to oppose the request, it could not argue later that the notice was insufficient). At first, the implementing regulations designated the district director as official to be notified of JRAD requests but did not establish a time frame for “due notice.” See 19 Fed. Reg. 5103 (Aug. 13, 1954). From 1967 to 1990, the regulations provided that “notice shall be transmitted to the district director by the court, a court official, or by counsel for the prosecution or the defense, at least 5 days prior to the court hearing on whether a recommendation against deportation shall be made.” See 32 Fed. Reg. 11517 (Aug. 10, 1967). Shortly before JRADs were repealed, the INS amended the governing regulations to require 15 days’ notice to the INS; the new regulations also required that extensive background information be included in order to “ensure that the Service will be given sufficient information necessary to identify the alien who is the subject of a JRAD motion . . . and to permit the Service sufficient time to obtain any file relating to the alien and to prepare a response.” Judicial Recommendations Against Deportation; Controlled Substance Violations, 55 Fed. Reg. at 11151 (codified at 8 C.F.R. pt. 241). One leading commentator, reconstructing how JRADs operated before they were repealed, suggested that “[t]he best way to generalize, but I think that what made the biggest difference in the outcome of a JRAD request was whether the INS showed up to oppose it.” E-mail from Dan Kesselbrenner, Director, National Immigration Project, to Margaret Taylor, March 11, 2002 (on file with authors).

See United States v. Sanchez-Guzman, 744 F. Supp. 997, 1002 (E.D. Wash. 1997) (finding that the statutory requirement that a JRAD be entered within 30 days of imposing judgment or passing sentence is impliedly modified by the term “whichever is later”). The courts generally held that if a conviction or sentence was vacated for the sole purpose of enabling the court to enter a JRAD upon resentencing, the JRAD is ineffective. See Zaitona v. INS, 9 F.3d 432 (6th Cir. 1993). JRADs could be granted upon resentencing, however, if additional reasons supported vacating the original sentence. See Rashatabadi v. INS, 23 F.3d 1562, 1568-70 (9th Cir. 1994) (ruling that JRAD granted upon resentencing was valid when accompanied by a significant change in the sentence itself, even if the resentencing judge failed to specify reasons).

See IMMIGR. AND NATURALIZATION SERV., supra note 9, at 187, tbl.67. In fiscal year 1971, for example, 286 noncitizens were deported for criminal violations, and another 232 for narcotics violations.
With this level of enforcement, the JRAD option was not widely known among criminal defense attorneys.

In addition, during most of the seven decades that JRADs were available, the INS had no procedures in place to identify deportable offenders. Many noncitizens convicted of crimes simply served out their sentences and returned to the community without ever being placed in deportation proceedings.\(^69\) In some cases, defense attorneys who \textit{did} know about JRADs decided not to request one from the sentencing judge, because to do so would also mean flagging their client for the INS.\(^70\)

Finally, even when defendants sought JRADs, the judges were often reluctant to delve into the unfamiliar realm of immigration law or to intrude on the authority of immigration officials.\(^71\) Defense attorneys could sometimes sidestep this concern by arguing the equities of the case. They could assert, for example, that the criminal penalty was punishment enough for a long-term resident who in the absence of a JRAD would also be torn apart from his family. Still, the INS opposed JRADs on the principle that sentencing judges did not know enough about immigration law to make deportation decisions. The INS saw the ability of \textit{state} court judges to bind the Attorney General as particularly problematic.

In sharp contrast to the legislative debate that marked the enactment of JRADs in 1917, Congress eliminated this provision without much discussion at all. In the crime control bill that became part of the Immigration Act of 1990, the House of Representatives originally proposed to limit JRADs by excluding convictions for the recently enacted aggravated felony deportation ground.\(^72\)

\(\text{These figures varied somewhat, but did not increase appreciably, in the decade from 1971-1980. Id. at tbl.68. Criminal deportations began to increase during the late 1980s, but were still quite low when compared to today's figures. See supra notes 8-14 and accompanying text.}\)

\(\text{69 See supra notes 5-9 and accompanying text.}\)

\(\text{70 See KESELBRENNER & ROSENBERG, supra note 51, at G-18-G-20 (discussing tactical considerations surrounding the decision to file a motion for a JRAD).}\)

\(\text{71 See, e.g., Santos v. Kolb, 880 F.2d 941, 943 n.4 (7th Cir. 1989) (noting that the trial judge declined to issue a JRAD, stating that "[t]he policy of this Court is not to make recommendations to the Immigration and Naturalization Service in any case. My belief is that the Immigration and Naturalization Service should make its determination based upon all the facts").}\)

\(\text{72 See Rep. Morrison Introduces Immigration Reform Bill, 67 INTERPRETER RELEASES 349, 352 (1990) (noting that Chairman of House Immigration Subcommittee introduced a bill that would prevent JRADs from protecting aggravated felons from deportation, and would also provide that JRADs could not be used to reduce the number of convictions for crimes involving moral turpitude).}\)
The bill was amended, however, to repeal JRADs altogether. Proponents of JRADs (including some state court judges) lobbied for Congress to retain this provision, but the issue was never addressed in congressional debates. Instead, JRADs were simply washed out of the statute among the waves of increasingly harsh congressional measures intended to crack down on noncitizen criminal offenders.

B. Judicial Removal Orders

Around the same time that Congress eliminated JRADs, there was growing interest in empowering judges to order deportation as part of a criminal sentence—the "flip side" of a judicial recommendation against deportation. Until very recently, sentencing judges were not authorized to issue deportation orders. Appellate courts routinely corrected judges who mistakenly believed that they had such authority, or who issued de facto orders by requiring a noncitizen defendant to depart and remain outside the country as a condition of parole.

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74 See id. (reporting that "[p]ractitioners reacted with outrage to this amendment," and noting the objections raised). See also Letter from Dale B. Ramerman, Judge, Superior Court, Seattle, Washington to Thomas Foley, Speaker, U.S. House of Representatives (Aug. 29, 1990); Letter from Jack Brooks, Chairman, Committee on the Judiciary, U.S. House of Representativ to Michael J. Fox, Judge, Superior Court, Seattle, Washington (Sept. 5, 1990) (on file with authors).

75 The Committee Report for the Comprehensive Crime Control Act of 1990, where the JRAD repeal was initially proposed, simply stated that "[b]ecause the Committee is convinced that it is improper to allow a court that has never passed on immigration related issues involved in an alien's case to pass binding judgment on whether the alien should be deported, section 1504 states that judicial recommendations will no longer protect aliens from deportation . . . ." H.R. REP. NO. 101-681, pt. 1, at 149 (1990). A search of the Congressional Record does not reveal any debate on the floor over JRAD repeal.

76 Prior to the repeal of the Chinese Exclusion Act in 1943, federal judges could order the deportation of Chinese immigrants deemed to be unlawfully present. But this authority was exercised pursuant to the special procedures of that statute; it was not part of the criminal sentencing process. See Gerald L. Neuman, Federal Court Issues in Immigration Law, 78 TEX. L. REV. 1661, 1687 (2000).

77 See United States v. Olvera, 954 F.2d 788, 793-94 (2d Cir. 1992), cert. denied, 505 U.S. 1211 (1992) (holding that a sentencing judge's order that defendant be deported cannot bind the Attorney General, who has sole discretion to institute deportation proceedings); United States v. Julliant, 896 F.2d 447, 448-49 (10th Cir. 1990) (requiring defendant to leave the country as a condition of probation is a de facto deportation order that exceeds the authority of the sentencing judge); United States v. Abushara, 761 F.2d 954, 959-60 (3d Cir. 1985) (requiring that a noncitizen defendant serve his probation outside the United States "circumvents the laws and regulations relating to deportability of aliens"); United States v. Hernandez, 588 F.2d 346, 350-51 (2d Cir. 1978); United States v. Castillo-Burgos, 501 F.2d 217, 220 (9th Cir. 1974) (finding no statutory authority for a sentencing judge to deport noncitizens sua sponte).
Prosecutors and judges became interested in judicial orders, however, when Congress enacted the Sentencing Reform Act of 1984, which stated that a court could “provide” as a condition of supervised release that a noncitizen defendant “be deported.” Doubts about whether this statute really authorized a sentencing judge to mandate deportation were put to rest in 1994, when Congress enacted an explicit scheme for judicial deportation as part of the INA. Despite this clear statutory authority, judicial orders of deportation are even rarer than the JRADs that preceded them. No incentives are in place to encourage prosecutors, the INS, and sentencing judges to use this optional procedure.

1. A Spark of Interest: The Controversy over Judicial Deportation as a Condition of Supervised Release

With the Sentencing Reform Act of 1984, Congress forged a closer link between sentencing and deportation as a byproduct of a broader restructuring of the federal sentencing system. The statute transferred the authority to impose conditions of supervised release from the United States Parole Commission to the sentencing judge. The former statutory language had authorized the Parole Commission to release a prisoner “on condition that such person be deported and remain outside the United States.” A slight modification of the language raised the question of whether a court could now order the deportation of a noncitizen defendant. As amended, the statute provides that: “[i]f an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain

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79 The Sentencing Reform Act (SRA) repealed the Parole Commission and Reorganization Act of 1976. Under the prior statute, a parole board could release a prisoner on supervised release before his sentence was fully served. Under the SRA, a prisoner must serve the actual length of his sentence and an additional term of supervised release, if imposed by the judge. See generally Ronald F. Wright, Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission, 79 CAL. L. REV. 1 (1991); Todd G. Bissett, Supervised Release, 88 GEO. L.J. 1549 (2000).
80 The repealed provision stated:

When an alien prisoner subject to deportation becomes eligible for parole, the Commission may authorize the release of such prisoner on condition that such person be deported and remain outside the United States. Such prisoner when his parole becomes effective, shall be delivered to the duly authorized immigration official for deportation.

outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.\footnote{18 U.S.C. § 3583(d) (2000).}

This language prompted disagreement among the Circuit Courts. Initially, the First Circuit concluded that the statute merely allows a sentencing judge to order that a noncitizen defendant be transferred to the custody of the INS, but does not supplant administrative deportation proceedings.\footnote{United States v. Sanchez, 923 F.2d 236, 237-38 (1st Cir. 1991).} In contrast, the Eleventh Circuit held that the SRA unequivocally “authorizes the district court to order deportation.”\footnote{United States v. Chukwura, 5 F.3d 1420, 1423 (11th Cir. 1993), cert. denied, 513 U.S. 830 (1994).} Over time, the other circuits fell into line behind the First, concluding that the SRA simply “paves the way for Executive Branch deportation proceedings; it does not permit courts to order deportation alone.”\footnote{The Eleventh Circuit adhered to this interpretation even after Congress amended the INA to provide explicit authority and special procedures for judicial deportation, which seemed to supersede the supposed ad hoc authority under the SRA. United States v. Oboh, 92 F.3d 1082, 1088 (11th Cir. 1996). See also United States v. Phommachanh, 91 F.3d 1383, 1385-88 (10th Cir. 1996); United States v. Xiang, 77 F.3d 771, 773 (4th Cir. 1996); United States v. Kassar, 47 F.3d 562, 568 (2d Cir. 1995). For an analysis critical of the majority approach, see Arns, supra note 79, at 664-72 (arguing that the SRA provision should be interpreted as authorizing judicial deportations).}

The federal courts rejected implied authority for a sentencing judge to order deportation as a condition of supervised release on several grounds. First, the courts concluded that “a natural reading” of the statutory language—a court could “provide” that an alien defendant be deported but could “order” that he be delivered to the INS—suggested that Congress did not intend sentencing judges to order deportation.\footnote{Xiang, 77 F.3d at 771. See also Phommachanh, 91 F.3d at 1386 (concluding that Congress’s choice of the verb “provide” connotes a different meaning than the word “order” used later in the same provision).} This conclusion was reinforced by “Congress’s long tradition of granting the Executive Branch sole power to institute deportation proceedings against aliens.”\footnote{Quaye, 57 F.3d at 449-50. The Fifth Circuit reasoned that “w[e] are unwilling to conclude that Congress intended to undermine that executive prerogative sub silentio . . . . We insist on greater clarity of purpose when a statute would be read to upset a status quo long in place.” Id. at 450.} The courts were also concerned that interpreting the statute to permit judges to order deportation \textit{sua sponte} at sentencing would undermine the procedural protections embodied in administrative deportation proceedings,\footnote{Phommachanh, 91 F.3d at 1384 (interpreting the statute not to permit judicial orders, and thus avoiding the question of whether a \textit{sua sponte} judicial order violated due process because it deprived the}
Congress spoke to these concerns in 1994 when it amended the INA to explicitly grant federal courts jurisdiction to issue removal orders.\textsuperscript{89} Two years later, Congress expanded this authority. The 1996 amendment repealed a previous limitation that judicial orders could only be entered against noncitizens deportable for crimes involving moral turpitude or aggravated felonies. The statute now provides that a federal district judge may enter a removal order “at the time of sentencing against an alien who is deportable.”\textsuperscript{90} The amended statute also provides that the removal procedures in the immigration statute “shall be the exclusive and sole procedure[s]” for determining whether a noncitizen may be removed from the United States.\textsuperscript{91} This provision sounded the death knell for judicial deportation orders issued under the SRA by limiting judicial deportation to the procedures of section 238(c) of the INA.\textsuperscript{92} But the SRA still authorizes a court to provide as a condition of supervised release that a noncitizen defendant “be delivered” to the INS and “remain outside the United States” if he is removed.\textsuperscript{93}

The short-lived controversy over deportation through supervised release sparked debate over the ability of sentencing judges to understand the complexities of immigration law and the risks of short-circuiting a traditional deportation hearing. Our proposal to put the sentencing judge at the center of immigration adjudication must respond to these concerns about the relative competence of judges on immigration matters.

2. \textit{The Spark Dies: Contested Judicial Orders Under INA § 238(c)}

When judicial orders first appeared on the horizon, it seemed that they might become a key component of more effective, streamlined removal
procedures. But then a curious thing happened. Once Congress resolved the question of statutory authority by granting federal courts jurisdiction "to issue a judicial removal order at the time of sentencing," this budding interest quickly died.

From the outset, the Executive Branch greeted the new judicial removal procedures with caution. In February 1995, INS Commissioner Doris Meissner issued an implementation memorandum to federal prosecutors and INS district directors authorizing limited use of judicial deportation procedures. These instructions permitted the INS to pursue judicial orders "only in the least complicated cases," and stressed that an administrative hearing before an immigration judge remained "the preferred procedure for contested deportation hearings."

The 1995 Meissner Memo was the last word from INS headquarters on the subject of contested judicial orders. This silence reflects INS disinterest in judicial removal under section 238(c) and (as a corollary) this procedural option has rarely been used. Instead of becoming a routine component of

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94 See Arms, supra note 80, at 676-79.
95 The INS had opposed the enactment of judicial removal procedures, on the grounds that it: (1) "would require a commitment of INS resources at an earlier stage of the criminal process;" (2) could increase the burdens on federal courts and prosecutors; (3) could result in a lack of uniformity in granting discretionary relief; and (4) could expand the procedural rights of noncitizens by merging the deportation determination with the criminal process. Criminal Aliens, Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary, 103d Cong. 174, 178 (1994) (testimony of Chris Sale, Deputy Comm'r, Immigration and Naturalization Serv., U.S. Dep't of Justice).
97 See Meissner Memo, supra note 96, at 463. The Meissner Memo suggested that technical corrections to the judicial removal provision would be forthcoming. Id. In fact, the statute still contains significant technical errors. When Congress enacted IIRIRA, it expanded the grounds for judicial orders, so that a sentencing judge can now enter an order against an alien "who is deportable" for any reason. See supra notes 89-90. But the procedural section of the statute was not amended to conform with this change; the statute still requires the prosecutor to identify the "crime or crimes which make the defendant deportable under section 237(a)(2)(A)." INA § 238(c)(2)(B) (1997) (emphasis added). The judicial order provision also refers to INA § 242B, which no longer exists because it was amended and recodified by IIRIRA. Id. Finally, after the IIRIRA amendments, INA § 238 has two clause (c)'s, so that the provision authorizing judicial orders has the same citation as the provision establishing a presumption of deportability for aggravated felons.

These technical errors — and especially the retained language suggesting that prosecutors are required to establish deportability under INA § 237(a)(2)(A) — would be confusing to anyone who tried to invoke the procedures for judicial removal. But the errors seem to have gone unnoticed, which is further testimony that judicial orders are simply not part of the regular arsenal of removal procedures used by the INS.
stream-lined deportation procedures, removal orders issued by a sentencing judge have all but disappeared from the landscape of immigration practice.\textsuperscript{98}

Some of the obstacles to judicial orders arise from the statute itself. A judge can grant a removal order only “if such an order has been requested by the United States Attorney with the concurrence of the Commissioner, and if the court chooses to exercise such jurisdiction.”\textsuperscript{99} The consultation requirement is a hurdle because U.S. Attorneys and the INS do not routinely confer with each other on the question of deportation at the time of sentencing a noncitizen criminal offender. In addition, as was true with JRADs, prosecutors and sentencing judges do not want to get bogged down in complicated immigration questions.\textsuperscript{100} The entire process rests in the hands of officials who have no desire to use it.

An additional drag on enthusiasm within INS is that Congress provided alternative—and in some cases far more streamlined—procedures to remove criminal offenders. In 1994, when Congress expressly authorized judicial deportations, it also enacted expedited procedures for the removal of aggravated felons who are not lawful permanent residents.\textsuperscript{101} This is precisely the same category of offenders for whom the INS can use judicial removal under the Meissner Memo.\textsuperscript{102} The so-called “administrative removal” process

\textsuperscript{98} The peak number of judicial removals came in fiscal year 1998, when—out of a total of almost 61,000 criminal removals—130 were by judicial order. In fiscal year 2001, 68 noncitizen offenders were removed by judicial order. Office of Policy and Planning, Immigr. and Naturalization Serv., Total Judicial Removals, Fiscal Years 1993-2002 (May 10, 2002) (on file with authors).

\textsuperscript{99} Another indication of the scarcity of judicial removal orders is the fact that only a handful of reported cases have been decided under INA § 238(c). See United States v. Nguyen, 255 F.3d 1335, 1345-46 (11th Cir. 2001) (concluding that a judicial removal order was invalid when issued as a condition of supervised release, but could be upheld pursuant to INA § 238(c)); United States v. Soueiti, 154 F.3d 1018, 1019-20 (9th Cir. 1998) (refusing to award Equal Access to Justice Act attorneys fees, which are available only for civil actions, to an attorney who successfully defended against judicial removal, because sentencing is a criminal proceeding); United States v. Flores-Uribe, 106 F.3d 1485, 1487-88 (9th Cir. 1997) (holding that district court lacks authority to issue a stipulated judicial removal order absent a request from the United States Attorney).

\textsuperscript{100} INA § 238(c)(1), 8 U.S.C. § 1228(c)(2000) (emphasis added).

\textsuperscript{101} Gerald L. Neuman, Admissions and Denials: A Dialogic Introduction to the Immigration Law Symposium, 29 CONN. L. REV. 1395, 1407-08 (1997) (noting that the court may be reluctant to exercise removal authority because it lacks familiarity with immigration issues).


The Meissner Memo directed that the INS should pursue judicial deportation only in “the least complicated cases, i.e. aggravated felony cases where the alien is not a lawful permanent resident. Exceptions to this policy shall be approved by the Regional Director.” Meissner Memo, supra note 95, at 463.
(which is more accurately described as "ministerial removal")\textsuperscript{103} permits deportation officers to unilaterally remove non-LPR aggravated felons.\textsuperscript{104} In addition, Congress provided in 1996 for the automatic reinstatement of removal orders against individuals who reenter the United States illegally after having been removed—again without a hearing before an immigration judge.\textsuperscript{105} These new procedures quickly supplanted the early, tentative efforts to implement judicial removal.

The allure for the INS is obvious; the agency would rather enter a removal order by itself than invoke a process that requires it to coordinate with federal prosecutors and to educate sentencing judges. When these streamlined options are not available, the INS continues to embrace the familiar—a traditional removal hearing before an immigration judge.

In sum, the procedures that Congress enacted virtually assured that court-ordered deportation would never get off the ground. There are two major flaws in the present judicial removal statute. First, the process is controlled by prosecutors and sentencing judges, who have no incentives to pursue or grant removal orders. Second, both existing removal procedures and the new streamlined options are more attractive to the INS. We will address these defects when we propose a package deal to make judicial removal proceedings a reality for far more noncitizen criminal offenders. But first we consider how these same obstacles—coupled with the difficulties of coordinating the disparate agendas of federal prosecutors and the INS—thwarted a national policy that was meant to encourage plea bargaining over immigration matters.

\textsuperscript{103} See Lenni B. Benson, \textit{Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings}, 29 CONN. L. REV. 1411, 1446 n.167 (1997) (proposing the term "ministerial removal" to describe the streamlined procedures). This label avoids confusion with other "administrative" and "expedited" proceedings under the INA, and conveys the key feature of this innovation: that the INS has \textit{unilateral} authority to issue the removal order.

\textsuperscript{104} Under these procedures, an INS officer can issue a Notice of Intent to Issue a Final Administrative Deportation Order if he concludes that a noncitizen has been convicted of an aggravated felony and is not an LPR. 8 C.F.R. § 238.1(b) (2001). The noncitizen has a mere 10 calendar days to respond in writing to the notice. \textit{Id.} § 238.1(c). A second officer can then adjudicate deportability on the written record and can issue a removal order, bypassing an administrative hearing before an immigration judge and an administrative appeal. \textit{Id.} § 238.1(d). And the deciding officer’s task is made easy by a statutory presumption that “an alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.” INA § 238(c). For a critique of these procedures prior to their amendment by IIRIRA, see Lory D. Rosenberg, \textit{Administrative Deportation Proceedings: Accomplishment or Abomination?}, 72 INTERPRETER RELEASES 721 (1995).

\textsuperscript{105} INA § 241(a)(5). 8 U.S.C. § 1231(a)(5). The reinstatement procedures apply to any noncitizen who was removed or departed voluntarily while under an order of removal; a prior criminal conviction is not necessary to invoke these procedures. See 8 C.F.R. § 241.8 (2001).
III. BARGAINING FOR IMMIGRATION STATUS

Our discussion so far has focused on the sentencing judge, who has long held the power to decide immigration issues but rarely exercises this authority. Experience tells us, however, that the litigants (and particularly the prosecutor) will be just as important as the judge.  

The parties can take legal options away from the judge through their selection of charges. Once the defendant agrees to plead guilty to a particular crime, the statute defining that crime will specify the maximum prison sentence that the judge can impose. The crime of conviction also determines whether nonprison sanctions are available. And, of course, the crime that is the basis for the guilty plea also has an impact on the defendant’s immigration status.

By plea bargaining, the parties not only limit the legal options available to the judge; they can also powerfully influence the judge’s choice among the remaining options. Parties negotiating a guilty plea might agree to recommend a particular sentence to the judge. They could also agree how to characterize the still-disputed facts in the case, facts that often have some bearing on the sentence. Given the time constraints and habits of criminal courts, judges usually endorse any consensus among the parties about the proper sentence. The judge also knows that if the sentence conforms to the recommendation of the parties, there will likely be no appeal. Sentencing decisions based on murky legal authority can go untested.

Thus, if the parties in general (and prosecutors in particular) do not make it happen, immigration decisions will not become a routine part of the sentencing process. We now explore the past and potential influence of the parties on the sentencing judge’s immigration decisions.

A. The Growing Importance of Immigration Issues in Plea Negotiations

Because so much of the plea bargaining process is hidden from public view, it is difficult to know how long ago prosecutors started bargaining with defendants about immigration issues, or how often it happens today. The

106 American jurisdictions have experimented for the past generation with many different sentencing systems. One of the most basic insights to come out of these experiments is that any rules for sentencing judges must account for strategic behavior by prosecutors and defense lawyers. See generally Michael Tonry, Sentencing Matters 59-64 (1996).
negotiations are not recorded. The final settlement, embodied in a written plea agreement, is a public document but most of its provisions are not tabulated in any central location. Those hoping to learn about the details of the charge selected or the sentence recommended must consult the case file, and perhaps interview the participants. These scattered records are a major barrier to learning about the role of immigration status in plea bargains.

In the absence of centralized data on the terms of plea agreements, it is difficult to know how often the parties discussed or resolved immigration issues during plea bargaining in the past. But even though the prevalence of immigration issues in plea negotiations remains unknown, other sources at least reveal the presence of immigration issues. In both the federal and state criminal courts, the appellate cases offer fleeting glimpses of bargaining on the subject of immigration.

Starting in the 1980s, an occasional appellate opinion would mention that the defendant agreed not to resist deportation in exchange for more lenient treatment in the criminal process. Take, for example, the 1989 decision in United States v. Janko.\textsuperscript{107} Ivanov Janko was arrested and charged with a felony violation of the immigration laws.\textsuperscript{108} The Government and defense counsel negotiated a plea agreement: the defendant pled guilty to a reduced charge of conspiracy to enter the United States improperly, a misdemeanor.\textsuperscript{109} Under the agreement, the parties recommended that the judge sentence Janko to six months in the Attorney General’s custody; the judge would then suspend the sentence, and place Janko on probation on the special condition that he leave the United States by a certain date and not return unlawfully. Janko’s waiver of immigration defenses reduced his criminal sentence.\textsuperscript{110}

Although it is hard to say how many cases are involved,\textsuperscript{111} both federal and state courts continue to decide cases like these to the present day.\textsuperscript{112} Indeed, as

\textsuperscript{107} 865 F.2d 1246, 1246-47 (11th Cir. 1989).
\textsuperscript{108} Janko was prosecuted for using counterfeit visas to enter the country illegally. Id. at 1247.
\textsuperscript{109} Id. See also 8 U.S.C. § 1325 (2000).
\textsuperscript{110} Janko, 865 F.2d at 1247.
\textsuperscript{111} See U.S. SENTENCING COMM’N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 96, tbl.25 (2001) (noting that 6.9% of all “downward departures”—that is, reductions in sentence below the designated guideline range—explained on basis of “deportation”); CRIMINAL ALIENS: INS’ ENFORCEMENT ACTIVITIES, supra note 5, at 31 (1987) (explaining that prosecutors believe most noncitizens unwilling to agree to removal as part of plea bargain).
\textsuperscript{112} See Rafael Prieto Zartha, Illegal Immigrants Arrested at U.S. Airport May Be Deported, EFE NEWS SERVICE, Mar. 29, 2002 (proposed plea bargain exchanging waiver of immigration defenses for no active prison sentence); United States v. Balogun, 971 F. Supp. 775, 779 (E.D.N.Y. 1997) (awarding downward
we will see, a 1995 directive from the Attorney General encourages federal prosecutors to give noncitizen defendants more favorable treatment in the criminal system, in exchange for an agreement to concede deportability and waive procedural rights in immigration court.\(^\text{113}\)

Plea bargains also sometimes embodied the opposite immigration outcome: agreements by the government not to deport a noncitizen defendant (or agreements not to oppose a motion for relief from deportation), in exchange for the defendant’s waiver of a trial on the criminal charges or his cooperation in the investigation of some other person. In cases where the government reneged on its promise, the defendant sometimes sued to enforce the bargain. The earliest of these cases held that the criminal prosecutor could enter an agreement that was binding on the entire federal government, including the INS.\(^\text{114}\) Other courts in more recent cases refused to block deportation proceedings that allegedly violated plea agreements, either because the agreement did not truly promise not to deport the defendant, or because the prosecutor did not have authority to bind the INS.\(^\text{115}\)

\(^{113}\) Despite the Attorney General’s endorsement in 1995, federal prosecutors now routinely oppose such requests. See infra note 134 and accompanying text.

\(^{114}\) Thomas v. INS, 35 F.3d 1332, 1338 (9th Cir. 1994). Unlike the other categories of cases discussed in this section, there are no state court opinions worth mentioning here because state actors have no authority to offer immigration benefits under existing law.

\(^{115}\) United States v. Igbonwa, 120 F.3d 437, 442-45 (3d Cir. 1997); San Pedro v. United States, 79 F.3d 1065, 1067 (11th Cir. 1996); United States v. Camacho-Bordes, 94 F.3d 1168, 1171 (8th Cir. 1996). See also United States v. Valenzuela, 1994 WL 55509, at *6 (9th Cir. Feb 24, 1994) ("[D]efense counsel got the informant to admit that he had received money and other favorable treatment (such as a plea bargain and suspension of deportation) in exchange for his work, and that he had to keep the police and prosecutors happy with him."); Victor C. Romero, Expanding the Circle of Membership by Reconstructing the "Alien": Lessons from Social Psychology and the "Promise Enforcement" Cases, 32 U. Mich. J.L. Reform 1, 1 (1998) (placing
These “promise-enforcement” cases function primarily as legal archeology rather than a live issue in criminal court. The cases reveal the presence of immigration issues in plea negotiations, but they do not arise frequently today—in part because a regulation now requires federal prosecutors to obtain the written consent of the INS before entering into a plea agreement that promises favorable immigration treatment.116

A third line of state and federal cases, however, does remain relevant today. The “deportation advisement” cases show the growing importance of immigration matters during the plea negotiations in ordinary criminal litigation throughout the 1990s. In the earliest of these cases, courts declared that a defendant could enter a “knowing” plea of guilty even without knowing about the immigration consequences of a conviction. The judge had no obligation to inform the defendant about immigration status during the guilty plea hearing.117 Further, when a defense lawyer failed to discuss the immigration angle with the client, the failure did not amount to ineffective assistance of counsel.118 These cases suggest that silence on immigration matters was common in criminal plea negotiations.

Later developments, however, reveal a shifting attitude about criminal attorneys who fail to advise clients about immigration consequences. State courts more often declared that attorneys have a duty to discuss these issues with clients.119 The cases also encouraged judges to mention immigration

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116 61 Fed. Reg. 48405 (Sept. 13, 1996) (codified at 28 C.F.R. § 0.197). This regulation is part of a growing body of Department-wide policies dealing with immigration matters during plea negotiations. See infra notes 126-28 and accompanying text.


issues before accepting guilty pleas (although they stopped short of invalidating guilty pleas on this basis). Amendments to procedure rules in many jurisdictions now require deportation advisements as part of the plea colloquy. Over time, it seems, advice about immigration questions has become a routine and required part of the plea bargaining process.

B. Centralized Policy in 1995

This shift toward addressing immigration status during the plea negotiations happened without much direction from the Department of Justice. Officials in Washington who supervised the U.S. Attorneys had little to say about how prosecutors addressed immigration matters. The 1988 edition of the U.S. Attorneys' Manual (the repository for Department-wide prosecution policies) paid scant attention to plea bargaining with noncitizens or the determination of immigration questions.


122 The Supreme Court has recognized this profound shift, recently concluding that "there is little doubt that alien defendants considering whether to enter into such agreements are acutely aware of their convictions' immigration consequences." INS v. St. Cyr, 533 U.S. 289, 322 (2001).


124 One section treated deportation as an extraordinary issue, requiring the U.S. Attorney to obtain the prior approval of the Criminal Division before making a plea agreement which "promise[d] an alien that he/she will not be deported." See id. § 9-73.510.
Congress disrupted this pattern of benign neglect during the 1990s when it signaled in many ways, large and small, that it wanted the government to increase and to speed up its removals of noncitizen criminals.\textsuperscript{125} The enactment of procedures for judicial removal in 1994 spurred the Department of Justice to issue guidelines on the role of prosecutors and sentencing judges in deporting noncitizen offenders. Soon after the INS Commissioner issued instructions on judicial removal, Attorney General Janet Reno issued her own implementation memo to all federal prosecutors addressing the recent statutory changes.

The 1995 Reno Memo, like the Meissner Memo, generally cautioned against pursuing contested judicial deportation orders.\textsuperscript{126} But the new directive was more enthusiastic about a new role for federal prosecutors in the criminal removal process. The Reno Memo told prosecutors to seek removal of noncitizen defendants in the normal case, and not just those involving immigration crimes. It stated that "[f]ederal prosecutors should seek the deportation of deportable alien defendants in whatever manner is deemed most appropriate in a particular case."\textsuperscript{127} The directive placed an extra burden on a prosecutor who did not plan to pursue deportation of a noncitizen offender, requiring her to obtain written approval for any exceptions to this policy.\textsuperscript{128}

The Reno Memo also created a template for securing removal for noncitizen defendants through the plea negotiations. In the ordinary case, the government would ask for a "stipulated administrative deportation." Under this sort of agreement, a noncitizen offender would admit alienage and deportability and would waive the right to a hearing before an immigration judge, an administrative appeal, and judicial review of the deportation order. The defendant would accept the deportation order at the time of sentencing, after a plea colloquy confirmed these details. The INS would execute the order

\textsuperscript{125} See Schuck & Williams, supra note 7, at 370-79.
\textsuperscript{126} The 1995 Reno Memo now appears at U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 1921 (2000), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01921.htm ("Reno Memo"). The Reno Memo directed that prosecutors were not to pursue contested judicial orders when the defendant was a lawful permanent resident or had a colorable claim for relief. \textit{Id.} at 9, 10, 12. It also advised them not to seek judicial deportation "if the district courts necessarily will become involved in contentious immigration issues." \textit{Id.} at 9. The Attorney General concluded that "[i]n order to maintain a consistent national immigration policy, close questions relating to alienage, deportability, and particularly relief from deportation should be initially decided in immigration proceedings . . . rather than having these issues addressed first in criminal cases." \textit{Id.} at 9.
\textsuperscript{127} \textit{Id.} The Reno Memo went on to say that "all deportable criminal aliens should be deported unless extraordinary circumstances exist." \textit{Id.}
\textsuperscript{128} See UNITED STATES ATTORNEYS’ MANUAL, supra note 122, § 9-73.520.
after the defendant served the criminal sentence. The Memo further specified the price the government was willing to pay for these concessions from the defendant: a reduction of one or two “offense levels” under the sentencing guidelines. In such cases, the prosecutor could recommend that the sentencing judge “depart” from the ordinary sentence specified under the guidelines and impose a shorter prison term.

The Reno Memo further encouraged prosecutors to ask the sentencing judge to insert deportation conditions into the supervised release orders of deportable defendants. These conditions generally track the language of the sentencing statute, which permits a judge to order that a noncitizen defendant “be delivered to a duly authorized immigration official” for deportation, and “remain outside the United States” if he is removed.129

In sum, official DOJ policy in 1995 encouraged federal prosecutors to pursue deportation of noncitizen offenders, generally through plea negotiations that reduced the sentence in exchange for a stipulated removal that circumvented administrative proceedings. This directive was a departure from the decentralized practices that prevailed in earlier decades. But it was consistent with the general trend toward incorporating immigration status questions into the plea bargaining process. And it furthered Congress’s goal of finding quicker ways of removing many more noncitizen offenders.

C. Obstacles to Implementation: The Path of Least Cooperation

As is often the case when centralized policies are transmitted to the field, the 1995 Reno Memo urging federal prosecutors to pursue stipulated deportations received mixed reactions. It got some attention right away in districts with large numbers of removable noncitizens in the pool of criminal defendants, such as the Eastern District of New York.130 Elsewhere, it is hard to find any indication that the new policy had any impact. Federal prosecutors say that they rarely pursue deportation of noncitizen offenders, preferring to leave the matter in the hands of the INS.131 Officials at the INS and defense

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131 Telephone interview with John Morton, Special Assistant to the Deputy Attorney General, July 13, 1999. See also United States v. Prince, 110 F.3d 921, 926 (2d Cir. 1997) (finding that it is not ineffective
attorneys give the same account. Indeed, there are signs that some prosecutors are working actively to keep immigration matters out of the guilty plea negotiations.

There are several reasons that prosecutors have failed to embrace stipulated deportations, despite the endorsement of this technique in the 1995 Reno Memo. We saw earlier that the availability of super-streamlined procedures, which permit the INS to issue some removal orders on its own, quickly supplanted early efforts to implement judicial removal. That same dynamic operated in the plea bargaining context. The Reno Memo appeared before the INS issued regulations fleshing out these alternative procedures. When the regulations took effect in 1996, the ease of these new procedures reduced the incentives for the INS to build the cooperative arrangements with prosecutors needed to pursue stipulated deportations. They also left many defendants with a smaller collection of procedural protections to offer as bargaining chips in the plea negotiations.

In fact, as removal became quicker and more automatic, some prosecutors concluded that the government gains very little when a noncitizen defendant waives his procedural rights on the immigration side and stipulates to deportation. For this reason, they oppose requests to the judge from defendants for a downward departure (a sentence reduction) based on their willingness to accept removal—despite the fact that the Reno Memo clearly endorsed such departures. Defendants in these cases offer to concede deportation, but the criminal prosecutors offer nothing in exchange. Then the defendants appeal to the sentencing judge, asking for a sentence reduction over the objections of the prosecutors who argue that the concession offers no real advantage to the government. Most courts reject the defendant’s request.

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133 See 8 C.F.R. § 238.1 (2001) (procedures for removal under INA § 238(b)).

134 This is not to say that such departures never occur. See U.S. SENTENCING COMM'N, supra note 111, at tbl.25 (2001) (6.9% of all downward departures explained on basis of “deportation”). Rather, our point is that stipulated administrative removals have never become standard practice as the Reno Memo envisioned. See also United States v. Montez-Gaviria, 163 F.3d 697, 704 (2d Cir. 1998) (departures granted on this basis); United States v. Ranath, 958 F. Supp. 99, 102 (E.D.N.Y. 1997) (downward departure over government’s objection).

135 Some courts hold that the sentencing judge has no authority to depart (in the absence of a government recommendation) unless the defendant can demonstrate a “non-frivolous” immigration defense that she
The Department of Justice no longer endorses the practice of offering criminal justice benefits to noncitizen defendants who are willing to stipulate to deportation as part of the plea bargaining process. The Criminal Division issued a memo to U.S. Attorneys in 1997, noting that 1996 statutory changes streamlined the removal process and “substantially reduce[d] the benefit the Government derives solely from an alien’s concession of alienage and stipulation to removal.” Thus, the Department now discourages trial attorneys from offering any concessions to defendants willing to waive immigration defenses.

There is another reason that many prosecutors now assign little value to a defendant’s offer to accept removal without a struggle. In addition to questioning whether the government gains any benefit when a noncitizen defendant has few procedural rights or valid defenses to waive in his immigration proceeding, prosecutors also overlook the real savings that accrue to some other government entity—the INS. If federal prosecutors routinely pursued stipulated deportations, immigration status would be settled in many cases before the offender arrives in prison. The INS could devote fewer resources to screening the prison population, and would have fewer cases to process through its Institutional Removal Program. The INS would also save on detention costs for noncitizens who are released from prison into INS custody and then detained while removal proceedings are pending. And finally, the INS could deport many more criminal offenders. But federal proposes to waive. United States v. Marin-Castaneda, 134 F.3d 551, 555-56 (3d Cir. 1998); United States v. Clase-Espinal, 115 F.3d 1054, 1059 (1st Cir. 1997). In other cases, courts say that the judge could grant such a downward departure in an individual case, but would ordinarily not do so because a defendant waiving a weak or worthless defense is not meaningfully different from defendants with no immigration issues at all. See United States v. Rodriguez-Lopez, 198 F.3d 773, 777 (9th Cir. 1999); United States v. Hernandez-Reyes, 114 F.3d 800, 802-03 (8th Cir. 1997); United States v. deLeon, 1 F. Supp. 2d 108, 108 (D.P.R. 1998).

We think these cases are wrongly decided. First, they overlook the very real potential savings to the INS when deportation decisions are pushed back to the sentencing stage. The agency clearly benefits when deportable offenders enter the penal system with their immigration status already decided. In addition, the courts incorrectly interpret the law governing downward departures in sentencing. The relevant standard is not whether the defendant has offered something of value. Rather, the judge may depart when the case presents a factor “of a kind, or to a degree” not “adequately considered” in the drafting of the sentencing guidelines. 18 U.S.C. § 3553(b) (2000). These cases confuse the prosecutor’s reasons to enter a plea bargain with the judge’s reasons for imposing a sentence outside the guidelines.

prosecutors have no incentive to routinely seek stipulated removal of noncitizen defendants—with all the change in habits that would entail—because these results do not directly affect their mission or their bottom line.

The INS does not fully appreciate these benefits, either. To the INS, the costs of intervening far earlier in the criminal process seem insurmountable. Fully implementing the Reno policy on stipulated removals would require regular consultations between the INS and U.S. Attorneys; in many jurisdictions the INS has no staff available for this work. More fundamentally, to date the INS’s criminal removal strategy has focused on screening incarcerated offenders and building an infrastructure for removals in the prison setting. It would take an enormous reallocation of personnel and resources to shift these efforts to the sentencing stage.

Given all of these obstacles, it is not surprising that the federal prosecutors and the INS have chosen the path of least cooperation. The Reno Memo endorsing stipulated deportations has evolved into a policy that discourages prosecutors from pursuing removal of noncitizen offenders. There is, however, one area where prosecutors do routinely inject deportability into the sentencing determination. After obtaining convictions against noncitizens, prosecutors can request that the judge impose a deportation condition of supervised release, to be carried out at the end of the criminal sentence. The judge’s order tracks the language of the supervised release statute noted above. Under this condition, the judge orders the defendant to “be delivered” to the INS for removal proceedings and to “remain outside the United States” if the INS issues such an order.

The growth of this technique confirms that prosecutors and sentencing judges will address the immigration status of the defendant when the costs are low and the potential payoff is high. The conditions inserted into supervised release orders do not require the sentencing judge to decide deportability and do not prohibit the defendant from presenting any available defense. Unlike

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137 See 8 U.S.C. § 1228(c)(1) (2000) (requiring consent of INS for judicial removals); 28 C.F.R. § 0.197 (2001) (INS “shall not be bound, in the exercise of its authority under the immigration laws, through plea agreements, or other agreements . . . except by the [written] authorization” of the INS); Reno Memo, supra note 126, at 2 (requiring consent of INS for other stipulated removals).

138 Telephone Interview with Bo Cooper, General Counsel, INS (Jan. 8, 2002) (noting that INS has routinely requested, and been denied, money to hire more INS attorneys to provide litigation support to U.S. Attorneys).

139 See supra notes 78-93 and accompanying text; United States v. Cuero-Flores, 276 F.3d 113 (2d Cir. 2002); United States v. Akinyemi, 108 F.3d 777 (7th Cir. 1997); United States v. Brown, 54 F.3d 234 (5th Cir. 1995).
stipulated deportations secured through the plea bargaining process, judges can impose supervised release conditions without cooperation from the defendant or input from the INS. The potential payoff for the government is easiest to see when a noncitizen offender who was deported illegally returns to the country later. When a "no return" condition is violated, the government can ask the court to revoke the supervised release and to impose additional jail time for the defendant. Alternatively, a prosecutor can seek to enhance the criminal sentence imposed for any later crime that was committed while the defendant was subject to supervision. Prosecutors who request deportation surrender conditions can readily appreciate these benefits in their own work. In addition, the prosecutor and judge feel as if they have already "covered" the immigration issues in the supervised release order without ever addressing the merits of the removal.

We take away two lessons from the chilly reception that the 1995 Reno Memo received. First, the Department of Justice and the INS have no established way of coordinating at the retail level the work of the U.S. Attorney's offices in routine criminal cases. Both agencies remain content to process their cases on separate tracks, where each maintains full control. The savings to the government must be substantial before the agencies will invest in an integrated system. Reminders to prosecutors in the field from the policymakers in Washington will not be enough.

Second, under the current system, the INS has too many procedural options. The statute must cut off some of those other options to make the sentencing judge the exclusive procedural route for resolving certain immigration questions. In the next Part, we explore the changes to the system that will force prosecutors, defense attorneys, and sentencing judges to

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142 The one exception on this score would be criminal immigration matters (as opposed to nonimmigration federal crimes committed by noncitizens), where there is regular consultation.
overcome their inertia and realize the benefits of an integrated removal process.

IV. A PACKAGE DEAL

We can now sketch an integrated package of statutory amendments that might correct some of the waste and unfairness of the existing process, while preventing the bargaining parties from ignoring the procedure. If these package components seem overly ambitious, remember that we now face a time of major upheaval in immigration law, when the continued existence of the INS is called into question. It is a time to rethink the fundamentals—including the notion that deportation is a civil sanction that should be separated from the criminal sentence imposed on noncitizen offenders.

A. Something for Everyone

A thoughtful merger of the sentencing and immigration processes for criminal noncitizens creates something for everyone. That is, changes to the law can leave both the government and the noncitizen in better positions than each occupies under current law.\(^{143}\)

A well-executed merger of the immigration and sentencing process begins with potential benefits for the government. If noncitizen defendants routinely entered the prison system already subject to a deportation order, the cost savings would be considerable. By resolving immigration matters at the time of sentencing, a combined system saves on the costs of detaining noncitizens during the period between the end of their criminal sentence and the completion of removal proceedings. The merger could also reduce the duplication of resources, requiring only one investigation of relevant facts and one decision maker to become familiar with the file. Moreover, a well-designed merger can unify under one budget the processing costs that are now scattered among different units of the federal government and between the federal and state governments.

An additional benefit to the government is that the sentencing judge could require a defendant to cooperate in one of the most nettlesome steps in the

\(^{143}\) Dan Kowalski has noted that “folding deportation into the sentencing mix can often benefit all the parties,” and has urged practitioners to consider invoking the newly-enacted judicial and stipulated deportation provisions. Daniel M. Kowalski, Sentencing Options for the Deportable Noncitizen, 8 FED. SENTENCING REP. 286 (1996).
immigration removal process: the procurement of travel documents from the receiving country. Before deporting a noncitizen, our government must verify her identity and ascertain where to send her. This process requires the cooperation of the potential deportee, who must petition her country of origin for the appropriate travel documents to authorize her return.\textsuperscript{144} When either the noncitizen or the destination country refuses to participate in this process, it can delay removal indefinitely. Increasingly the INS is seeking to impose sanctions on individuals who refuse to cooperate in their own deportation. A sentencing judge could reinforce these efforts by incorporating a requirement to petition for travel documents into the judicial order, and employing the court's enforcement mechanisms against those who refuse to comply.

A merger of the two systems can also improve on the current situation of noncitizens who go through the two processes separately. It offers greater access to the procedural benefits built into the criminal system. Topping the list of those benefits would be access to counsel. Under current law, most noncitizens do not have legal counsel to represent them during immigration proceedings.\textsuperscript{145} On the criminal side, however, both the constitutional right to counsel and federal and state statutes commit the government to provide defense counsel to indigent defendants, both at trial and at sentencing.\textsuperscript{146} If the noncitizen's immigration status were to be determined during the criminal proceedings, the attorney provided for the criminal representation would also represent the defendant on the immigration question.

In an environment of shrinking immigration defenses available to noncitizens convicted of crimes, access to counsel might be the single most important benefit the noncitizen could receive. Granted, criminal defense lawyers would have to learn more of the basics of immigration law and consult more frequently with immigration attorneys. But this effort is already underway as attorneys recognize that they must advise their clients about the immigration consequences of different criminal convictions. Our proposal would simply underscore what any competent defense lawyer already knows:

\textsuperscript{144} See INA § 243(a)(1)(B) (1997) (authorizing criminal prosecution against an alien with a final removal order who "willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure"); INA § 243(d) (authorizing the Secretary of State to discontinue granting visas to intending immigrants and visitors from a country that "denies or unreasonably delays" accepting a deportee). For a discussion of the travel document problem, see Schuck, supra note 33, at 695-96; Taylor & Aleinikoff, supra note 4.

\textsuperscript{145} See supra note 24 and accompanying text.

\textsuperscript{146} See M\textsc{arc} M\textsc{iller} & R\textsc{onald} W\textsc{right}, C\textsc{riminal} P\textsc{rocedures: C\textsc{ases}, S\textsc{tatutes and E\textsc{xecutive}} M\textsc{aterials} 807-36 (1998).
representing a noncitizen defendant requires an attorney to address the immigration consequences of a criminal conviction.\footnote{Already, sentencing judges in many states are required to inform defendants of the immigration consequences of criminal convictions. See supra note 120 and accompanying text. This conveys a concomitant obligation on criminal defense attorneys to ascertain the immigration status of their clients, and to understand the immigration issues inherent in the criminal representation. See Brief of Amici Curiae National Assoc. of Criminal Defense Lawyers et al., INS v. St. Cyr, 2001 WL 306179 at *12 ("In recognition of the severity of the penalty of deportation as a consequence of a criminal case, various ethical and professional standards require defense lawyers to advise noncitizen defendant clients about the immigration implications of pleading guilty."); id. at app. B (listing of resources available to educate criminal defense attorneys about immigration issues); id. at app. C (listing of training sessions provided to teach basic immigration law to criminal defense attorneys). See also Manuel D. Vargas, REPRESENTING CRIMINAL DEFENDANTS IN NEW YORK STATE (1998) (training manual published by the Criminal Defense Project, New York State Defenders Association); Maryellen Fullerton & Noah Kingstein, Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys, 23 AM. CRIM. L. REV. 425 (1986).} Another benefit of the criminal process that could transfer over to the immigration setting is the pretrial release structure. In the immigration context, detention of noncitizen offenders while their removal proceedings are pending is the norm—and indeed, it is presently mandated by Congress. On the criminal side, the presumption switches; the norm is to release criminal defendants pending trial. Pretrial detention occurs only if a prosecutor convinces a judge that the criminal defendant presents a special risk of flight or of committing future crimes. Most defendants are instead subject to supervision via programs that track their whereabouts and require them to report periodically to court personnel. The programs are impressive and successful. The vast majority of criminal defendants are released into the community pending trial and later appear at their scheduled criminal proceedings.\footnote{See generally Brian A. Reaves & Jacob Perez, Pretrial Release of Felony Defendants, 1992, BUREAU OF JUSTICE STATISTICS BULL. 10, at tbl.14 (Bureau of Justice Statistics Bull., NCJ-148818) (Nov. 1994) (75% of released defendants make all court appearances; 8% ultimately remain fugitives).}

Both the presumption of pretrial release and the institutions designed to assure appearance in court would continue to operate when immigration status decisions are folded into criminal proceedings. Under our proposal, there is no need to design and implement a separate supervision program to suit the idiosyncrasies of the present administrative removal system, which is characterized by multiple hearings, long delays, and a culture of noncompliance.\footnote{The Vera Institute of Justice encountered these obstacles when it conducted a demonstration project to apply the supervised release model to the administrative removal process. Still the program, which ran in New York City from 1997-2000, yielded promising results. See generally Christopher Stone, Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project, 14 GEO. IMMIGR. L.J. 673 (2000). Vera’s Appearance Assistance project was also impeded by resistance to the...} Instead, once sentencing judges are empowered to resolve
immigration status in most cases, the same pretrial supervision that already ensures a noncitizen's appearance at a criminal trial or plea colloquy will function for immigration purposes as well. Criminal court judges and magistrates—rather than immigration judges or INS officers—will decide whether a noncitizen defendant should be detained. And judges would authorize pretrial detention only when the government makes a special showing about a risk of flight or danger to the community.\footnote{By cutting out the removal proceedings at the back end of the process, we would eliminate the special rules that now govern the detention of noncitizen offenders who have served out their criminal sentence and must then await resolution of their immigration status. Mandatory detention under INA § 236(c) would be repealed.}

Granted, many noncitizens fail to appear for immigration proceedings; the heavy use of detention in the current system responds to this problem. But the large number of no-shows in the immigration system might result from the absence of any government agents to monitor the noncitizens and remind them about upcoming proceedings. The noncitizens convicted of crimes making them removable are already appearing for their criminal sentencing hearings. Because the immigration and criminal outcomes would be resolved together at this hearing, the successful rates of appearance in the criminal context should carry over to our proposed merger of these determinations. Thus, a merger of immigration and sentencing determinations would eliminate the needless hardship that noncitizens routinely experience today, as they complete their criminal sentences and then transfer into INS detention, often waiting many months for the completion of routine administrative proceedings.

An additional set of habits from the criminal process might also benefit noncitizens who face possible removal: prosecutorial discretion. Criminal prosecutors have nearly complete authority to decide whether to file criminal charges. Even in cases where the evidence could support a conviction, prosecutors sometimes decline to file charges because of limited resources or a belief that a conviction would not serve the purposes of the criminal law.\footnote{See Dep't of Justice, Authorization and Oversight 1981, Hearings Before the S. Comm. on the Judiciary, 96th Cong. 948-69 (1980) (statement of Philip B. Heymann, Assistant Attorney General, Criminal program within the local INS office, which did not allow Vera to screen portions of the target detained population and often refused to release those detainees recommended by Vera into the supervision program. See Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program (Aug. 1, 2000), available at http://www.vera.org/publication_pdf/aapfinal.pdf. The problem of INS resistance would be circumvented in our proposal because judges would make custody determination according to the substantive and procedural rules that apply to pre-trial detention in the criminal context. The INS would be required, in other words, to play by the rules that already govern prosecutors seeking pre-trial release of criminal defendants.}
Indeed, criminal codes in the United States tend to be drafted broadly, built around the assumption that prosecutors will only charge cases where the defendant is truly blameworthy.

The tradition of prosecutorial discretion does not run nearly so deep in the immigration context. The INS, of course, faces far more potential cases than it could possibly investigate or prosecute. It exercises prosecutorial discretion in a de facto sense all the time through its allocation of enforcement resources, especially along the border. But unlike criminal prosecutors, INS trial attorneys traditionally have not recognized the legitimacy of prosecutorial discretion. Instead, the removal system has long operated with skewed enforcement priorities: almost all eligible cases are prosecuted up to the point where a removal order is entered, while relatively few removal orders are actually enforced once they are obtained.152 Once an arrest has been made, the INS chooses not to file charges against deportable noncitizens only in the rarest of circumstances.153

After Congress expanded the criminal deportation grounds and sharply limited discretionary relief, the INS re-examined its policies on prosecutorial discretion.154 This prompted new guidance to field officials on the topic, explaining that INS officers, like U.S. Attorneys, may in some instances decline to prosecute a legally sufficient case “if no substantial Federal interest

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152 Individuals who are in the custody of the INS when they are ordered deported are routinely removed from the country. In 1995, however, the DOJ Inspector General reported that only 11% of non-detained individuals who are ordered deported are ever actually removed. See U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., supra note 7. The INS has recently estimated that over 300,000 noncitizens who have been ordered deported remain inside the United States. Dan Eggen, Deportee Sweep Will Start with Mideast Focus, WASH. POST, Feb. 8, 2001, at A1.

153 An INS decision not to prosecute for humanitarian reasons is known as granting “deferred action status.” Deferred action (previously known as “nonpriority status”) is considered to be an unusual form of relief; for many years the INS denied the existence of this authority. See Leon Wilde, The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act, 14 SAN DIEGO L. REV. 42 (1976).

154 See Paul W. Virtue, Restoring Fairness: A Look at Prosecutorial Discretion, 12 BENDER’S IMMIGR. BULL. 555 (June 15, 2000) (arguing in favor of expanded prosecutorial discretion to ameliorate the harshness of newly-enacted criminal deportation provisions); Memorandum from Bo Cooper, INS General Counsel, to the Commissioner, INS Exercise of Prosecutorial Discretion, reprinted in 77 INTERPRETER RELEASES 961 (2000) (explaining legal basis and extent to which INS may exercise prosecutorial discretion in its enforcement activities).
would be served by the prosecution.\footnote{See Meissner Issues Prosecutorial Discretion Guidance on Her Last Day as INS Commissioner, 77 Interpreter Releases 1661 (2000).} There is no evidence, however, that this policy (issued in the waning days of the Clinton Administration) has taken root to change the habits of INS district directors, who are accustomed to full-throttle prosecution of virtually all cases, regardless of the humanitarian interests at stake.\footnote{INS enforcement efforts against unaccompanied children provide numerous examples where strong humanitarian claims are trampled by this "prosecute all cases" approach. See Chris L. Jenkins, Children Languish as INS Wards: Some Jailed for Months Without Asylum Hearing, WASH. POST, May 6, 2002, at B1; Florangela Davila, Groups Sue INS Over Youths’ Lack of Legal Help: Judge Orders Aid for Boy Near Spokane, SEATTLE TIMES, Mar. 16, 2002, at B4.}

By placing more responsibility for immigration matters in the hands of ordinary criminal prosecutors, a merged system could graft the habits of prosecutorial discretion onto immigration matters. Criminal prosecutors will bring to bear their long tradition of rejecting some cases affirmatively, and will decide in some cases that immigration removal is a sanction not worth pursuing.\footnote{A New York prosecutor might conclude, for example, that a noncitizen who was arrested for turnstile jumping should not be charged with a petty theft offense, because a conviction would render the defendant deportable. \textit{See supra} notes 20-23 and accompanying text. A prosecutor might also seek a sentence (or multiple sentences) of \textit{less} than a year to avoid an aggravated felony conviction. Already prosecutors sometimes make these sorts of determinations, often at the request of a defense attorney who is cognizant of immigration consequences. Our proposal would ensure that prosecutorial judgments routinely account for the possibility of deportation.} Thus, the criteria used to prioritize cases in the criminal arena could enhance the fairness of the immigration enforcement system.

Finally, on a more theoretical plane, a merger of the sentencing and immigration determinations counters the prevailing view—really a judicially-created myth—that deportation is not punishment for a crime.\footnote{See generally Robert Pauw, \textit{A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply}, 52 ADMIN. L. REV. 305, 307-10 (2000).} Courts have adhered to this doctrine precisely because they are wary of importing the procedural protections of a criminal trial into the immigration setting.\footnote{United States v. Bodre, 948 F.2d 28, 34 (1st Cir. 1991). \textit{But see} United States v. Soueiri, 154 F.3d 1018 (9th Cir. 1998) (holding judicial deportation at sentencing is a criminal proceeding and thus not eligible for fees under Equal Access to Justice Act); Janvier v. United States, 793 F.2d 449, 455 (2d Cir. 1986).} We know from the constitutional litigation surrounding JRADs that even when a judge decides immigration status at the time of sentencing, some courts will still conclude that deportation remains on the civil side of the ledger.\footnote{See \textit{supra} note 24.} Thus we would insist that Congress confirm in any statute granting immigration authority to a sentencing judge that the procedural rights of a criminal trial
attach to the immigration determination. Our proposal would accomplish by statute what has not (yet) been widely accepted by the courts.\textsuperscript{161} And a statutory merger of immigration and sentencing determinations would counteract the trend toward cheap procedural fixes (known in government circles as “streamlining”) that has undermined the fairness and accuracy of many immigration proceedings.

\textit{B. The Proposal}

In Parts II and III we uncovered many neglected opportunities. Over the years, the actors in criminal sentencing had the power to resolve immigration questions, but the power remained largely untouched. Simply granting the sentencing judge authority to resolve immigration matters will produce no results. Nor is it sufficient to issue directives encouraging INS officers and prosecuting attorneys to pursue removal options at the time of sentencing. What we need instead is a package of statutory changes that not only creates powers but also limits alternatives and shifts incentives so that the parties \textit{will actually use} this procedural option. We think the benefits that flow to the government and to noncitizen offenders justify this fundamental restructuring of the process of removing criminal offenders.

Our proposal contains five essential components. First, the package would keep the current substantive authority for judicial removal orders, but would restore the historical power of the sentencing judge to order that a noncitizen not be removed. Second, the decision of the sentencing judge must become the exclusive route for resolving the immigration status of most noncitizen criminals who appear before a qualified judge for criminal sentencing. Third, the system should encompass only the most straightforward immigration claims, leaving a minority of more sophisticated claims for immigration specialists to resolve within the administrative system. Fourth, the merger of sentencing and immigration determinations should extend to any federal criminal prosecution and might also apply to state felony convictions if a state chooses to opt into this program. Fifth, some form of judicial review must be

\textsuperscript{161} We recognize an irony in our proposal: it provides more attractive procedures for criminal noncitizens than for other noncitizens facing possible removal. But this is a byproduct of the fact that the criminal justice and immigration systems are already converging, and we hope to exploit the strong points (relatively speaking) of the criminal process. If our new statute prompts courts to declare that immigration removal is, after all, “punishment” for constitutional purposes, so that the procedural rights we hope to import from the criminal arena spread to other immigration contexts, so much the better.
available to check the quality of the sentencing judge’s choice in the immigration matter.

The paragraphs below do not resolve all the necessary legislative details. For now, we hope to address the most basic dilemmas that would arise from a merger of sentencing and immigration adjudication.

1. Symmetrical Powers for Judges

Judges had the power to prevent deportation at times in our history, and they now hold the authority to require removal. But sentencing judges have never held symmetrical power: the ability to say either “Yes” or “No” to a noncitizen’s removal. The first component of our legislative package would grant judges this symmetrical power. We would retain the current statutory authority for judicial removals, and restore something equivalent to the old JRAD power.

A meaningful judicial power over immigration questions must place both parties at risk if it is to create an appropriate balance of power between the prosecution and defense in plea negotiations. It used to be that the government had nothing to gain by involving sentencing judges who were only empowered to issue a JRAD. Under the present judicial removal scheme, the noncitizen is disadvantaged because a sentencing judge is only empowered to order removal. Our proposal unites these two approaches. For both the government and the noncitizen offender, the benefits and burdens that were once divided between immigration and criminal proceedings would be merged into a single negotiation. Where each party once had two separate currencies to spend in two separate marketplaces, our proposal creates a single transaction.

Giving the judge symmetrical power over immigration status determinations will mean that a noncitizen defendant can offer to waive immigration defenses during a plea negotiation knowing that the prosecutor is now in a position to appreciate the value of the offer. Under our proposal, a prosecutor must weigh this concession against the possibility that the sentencing judge might decide against removal. We would expect many more downward departures under the sentencing guidelines in exchange for deportation concessions once JRAD authority is restored to sentencing judges.
2. **Exclusive Route**

Current practice indicates that if other procedural options are open to the INS, it will not involve the sentencing judge in the immigration decision. Thus, the centerpiece of our statutory package would be its exclusive feature. Once the sentencing judge speaks to the immigration question, the matter is treated as res judicata. Neither the government nor the noncitizen can seek a different answer in some other administrative forum.  

Not only would the judge’s order regarding removal preclude any other administrative proceedings, but the government’s silence would have preclusive effect as well. If the prosecutor fails to seek a removal order against a qualifying noncitizen defendant at sentencing, removal on the basis of the criminal conviction cannot occur elsewhere in the administrative process. The statute will say to the prosecutor and the INS, “Speak now or forever hold your peace.”

This preclusive effect would eliminate existing procedures for some categories of noncitizens. Sentencing hearings would replace the ministerial removal option for non-LPR aggravated felons under INA § 238(b), and INS proceedings before an immigration judge for other noncitizen offenders. If the INS or the prosecutor fail to raise an immigration claim at the sentencing hearing, the criminal basis for removal will be barred as res judicata. However, the government could still raise any ongoing immigration violations (such as noncitizens who are out of lawful status) or violations not based on the criminal conviction itself as a new claim in later immigration proceedings.

Under this exclusive procedure, we can rely on existing and prior statutes for the procedural framework needed to merge sentencing and removal determinations. The procedures appearing now in the judicial removal statute provide notice to the noncitizen offender and adversarial testing of information presented to the sentencing judge. The timing provisions of the old JRAD statute—which provided for an immigration determination “at the time of sentencing or within thirty days thereafter”—would allow the government

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162 The current judicial removal statute states that the judge’s denial of a request for a removal order “shall not preclude” the INS from initiating its own removal proceedings on the same removal ground. 8 U.S.C. § 1228(c)(4) (2000). Giving judges the final authority over this question might be constitutionally necessary if judges are to decide the question in the first instance. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995); Hayburn’s Case, 2 U.S. (2 Dall.) 408 (1792); Gerald L. Neuman, Federal Courts Issues in Immigration Law, 78 Tex. L. Rev. 1661, 1687-94 (2000).

enough time to prepare the immigration question while ensuring that the sentencing judge hears all the relevant facts within a reasonably short time frame. We would also carry forward the burden of proof and standard of proof provisions applicable in removal proceedings before an immigration judge.\footnote{INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (holding an alien not applying for admission must first establish prior lawful admission; INS then has burden of establishing by clear and convincing evidence that alien is removable). See also Woody v. INS, 385 U.S. 276 (1966).}

3. Easiest Claims

One difficulty with our proposal is that it forces criminal practitioners to develop a true working knowledge of some immigration law questions. Defense attorneys now advise their clients on the immigration consequences of criminal plea negotiations, but they do not represent the client during the immigration matter. Prosecutors now make decisions about charges and plea bargains with important immigration consequences, but they do not themselves obtain the removal order.

If the law converts the sentencing hearing into the exclusive forum for assessing deportability of noncitizen offenders, the incentives change. Defense attorneys and prosecutors would need to learn about some immigration law issues in more detail. But these criminal justice professionals can certainly rise to this challenge. Once the parties have reason to tackle these issues, we can expect basic competence on routine immigration claims, just as we have seen attorneys master new and complex sentencing rules in many jurisdictions.\footnote{See Douglas A. Berman, From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing, 87 IOWA L. REV. 435 (2002). Competent criminal defense attorneys already advise their noncitizen clients on immigration consequences. Furthermore, the immigration bar offers resources and training for criminal practitioners. See supra note 147.}

We understand that this task would be easier if immigration law were more stable and less complicated. We also wish that we could offer narrower criminal deportation grounds and far more avenues of relief for criminal defense attorneys to master. Nevertheless, the harshness of existing law makes it realistic to expect criminal practitioners to learn the ropes quickly because so many of the removal grounds for noncitizen offenders are automatic, or close to it.\footnote{See generally Schuck & Williams, supra note 7, at 386-88, 392-94 (summarizing criminal deportation grounds and new restrictions on relief from removal). The probation officer, another key participant in federal sentencing, should also become familiar with the relevant immigration removal grounds and the limited available defenses. By comparison to learning the federal sentencing guidelines, probation officers should find this job relatively easy.}
That is not to say that complex interpretive questions do not exist at the margins. Certainly there are some cases where it is difficult to ascertain whether a particular conviction might be an “aggravated felony” or a “crime involving moral turpitude,” and interpretation of these provisions changes over time. But criminal defense attorneys should already be consulting with knowledgeable immigration practitioners on these questions. Frequently these consultations do not happen, and noncitizen offenders must later appear pro se in immigration proceedings. The merger of immigration and sentencing determinations means that counsel will be appointed at government expense, a lawyer who must consider the immigration questions. Although the criminal defense attorney might not appreciate all the subtleties that an immigration expert would notice, the immigration expert is usually not advising criminal noncitizens who are sentenced under the current system. Our proposal makes it less likely that a noncitizen offender with a valid reason to contest removal will inadvertently sacrifice his claim.

Although criminal practitioners should be able to master the relevant law for the routine immigration questions that arise in the criminal setting, some very difficult claims will remain. When these more difficult issues do arise, our statutory package would require the sentencing judge to refer the case to the INS for resolution in administrative proceedings. The appointed attorney would remain assigned to the case, although the judge in the criminal case could replace or supplement this representation by appointing experienced immigration counsel for the removal proceedings. The governing statute or implementing regulations would need to specify which claims are eligible for this process, since sentencing judges might have an incentive to rid themselves of too many cases after the law imposes this new and unwelcome immigration duty on them.

We will not develop here a complete list of the claims that should be heard by an immigration judge, but we can offer two illustrations. Claims for political asylum are especially difficult and could benefit from the expertise available in the administrative process. The sentencing judge should refer to an immigration judge any criminal offender who makes a colorable claim for

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167 *Cf.* United States v. Qadeer, 953 F. Supp. 1570 (S.D. Ga. 1997) (declining to deport pursuant to language in supervised release act because the defendant had previously been granted asylum and might have been eligible for withholding; judge discussed “hornet’s nest” and separation of powers concerns that would arise if a judge ordered deportation of someone to whom the Attorney General might be required to grant relief).
asylum. Claims of citizenship are also tricky. Any criminal defendant who asserts a viable claim of citizenship despite the INS’s efforts to remove her from the country should be referred for an immigration judge hearing.

As the landscape of immigration law changes over time, the list of issues that should be heard in administrative proceedings might change. But under current law, few avenues of relief are available, and the arguments are straightforward for most criminal offenders. In this immigration environment, it is realistic to ask the attorneys and judges in the criminal courtroom to address the issues competently, so long as a sentencing judge’s authority is limited to the easiest claims.

4. Federal and State Felony Defendants

Some of the most intriguing choices for this system involve federalism. Should the power to resolve immigration questions extend only to federal judges who are sentencing federal criminal defendants? Or should it reach state judges in state criminal court, as JRADs used to do?

There are some powerful reasons to worry about placing this question into state sentencing hearings. A huge volume of cases flows through state criminal court. This inevitably affects the quality of attention that each case receives. For many less serious crimes, the state does not provide an attorney to the defendant, eliminating some of the most important benefits of our proposal. The quality of the interpreters working in state courts—obviously an acute need in immigration matters—often does not measure up to the services available in federal court. For cases where the state does appoint counsel, the breathtaking caseloads of the defense attorneys would make it difficult for them (not to mention the prosecutors, who also handle enormous dockets) to master a new body of law. There might even be a constitutional problem in “dragooning” these state officials to administer federal immigration law.

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168 The procedures for expedited removal provide a model. An immigration officer inspecting applicants for admission has the authority to issue a removal order, but must refer to an asylum officer any applicant who expresses fear of persecution or indicates an intent to apply for asylum. The asylum officer conducts an interview to determine if the applicant has a “credible fear” of persecution, and if so the case is referred to an immigration judge. See INA § 235(a), 8 U.S.C. § 1225(a); 8 C.F.R. § 235.3(b)(4) (2001).

169 Cf. 8 C.F.R. § 235.3(b)(5) (providing for immigration judge review of an expedited removal order when individual that INS has deemed to be an applicant for admission claims to be a citizen of the United States).

170 Printz v. United States, 521 U.S. 898 (1997). While this is one plausible interpretation of Printz, it is not clear that the case would pose a bar to imposing immigration tasks on state sentencing judges. The Supremacy Clause obliges state judges to apply federal law, and the Court in Printz specifically distinguished
The state criminal courts also could undermine the uniformity of immigration law. Moreover, they might swamp the immigration system with new cases. Most state criminal defendants receive a punishment other than a prison term, and thus do not come to the attention of the INS. If the INS were forced to seek removal at the time of the state sentence or lose the claim entirely, the agency would face a massive problem of coordinating with state prosecutors in so many locations.

Other problems could crop up if immigration enforcement efforts spread beyond the state sentencing hearing to include other components of the state criminal justice system. Just as our traffic laws are built on an assumption of limited enforcement, so our immigration laws are tolerable to some only when states and localities stay out of the picture. Local law enforcement entities create major ripple effects when they actively enforce the immigration laws.\textsuperscript{171} Members of immigrant communities might avoid the courthouse altogether and hesitate to cooperate with any government agents who are known to have an interest in immigration matters. This creates particular problems for “community policing” strategies that depend on trust between the police and members of the community.\textsuperscript{172}

On the other hand, there are some compelling reasons to involve at least some state sentencing judges in this program.\textsuperscript{173} There is an enormous disparity in the relative sizes of the federal and state correctional systems: the federal prison system accounts for roughly ten percent of the prison population in this country.\textsuperscript{174} Although reliable estimates are difficult to come by, the state prison systems incarcerate more than 200,000 foreign-born offenders who

\textsuperscript{171} These ripple effects are already emerging as the Justice Department, as part of its anti-terrorism initiative, has pursued a controversial policy of empowering state law enforcement officers to enforce civil immigration law. Law enforcement officials in Florida were recently deputized for this work. \textit{See} Mary Beth Sheridan, \textit{Plan to Have Police in Florida Help INS Stir Rights Debate}, \textit{WASH. POST}, March 6, 2002, at A17.


\textsuperscript{173} Cf. Schuck & Williams, \textit{supra} note 7, at 460 (“If state and local governments have both the programming resources and the fiscal and political incentives to remove criminal aliens, why should they not also be given the legal authority to do so?”); Peter J. Spiro, \textit{The States and Immigration in an Era of Demi-Sovereignties}, 35 \textit{VA. J. INT’L L.} 121 (1994) (calling for larger role for states in immigration policy).

\textsuperscript{174} See \textit{BUREAU OF JUSTICE STATISTICS, supra} note 15, at tbl.6.18 (2001) (134,000 federal prisoners compared to 1,178,000 in state prisons plus 621,000 held in state and local jails).
might be subject to removal. Limiting our proposal to federal sentencing judges would reach only a fraction of deportable noncitizen defendants. For our proposal to deliver real cost savings, it must reach at least some state court defendants.

Another reason to include state systems appeals to equal treatment among offenders. Already the decision to send a case to federal or state court can make a substantial difference in the sentence a defendant receives. For instance, the penalties for drug offenses are much heavier in federal court than in state court. We hesitate to increase this disparity by permitting a sentencing judge to impose immigration consequences only on federal defendants.

Recognizing the dangers of moving into state court, we believe it is possible to tailor the program to pick up some state criminal proceedings while leaving others untouched. Our package would allow states to “opt into” an agreement with the federal government, permitting their sentencing judges to make immigration determinations in some cases. We would expect the states with the largest concentration of foreign born offenders in their prison populations to pursue this arrangement. Seven states—California, New York, Texas, Florida, Arizona, New Jersey, and Illinois—incur more than three quarters of foreign-born offenders in the state prison population. Already these states participate in an enhanced Institutional Removal Program that has fostered regular avenues of cooperation with the INS.

It is realistic, we think, to expect that the judges and attorneys in these particular state courts will develop the skills necessary to handle the easiest immigration claims. The volume of noncitizens already present in these seven states gives the courtroom regulars plenty of reason to make it work. The federal government could sweeten the pot to encourage their participation. Perhaps the government could offer participating states reimbursements for

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175 See Rebecca L. Clark & Scott A. Anderson, Illegal Aliens in Federal, State, and Local Criminal Justice Systems 1, 56 (Urban Institute, NCJ 181049) (June 1999); Schuck & Williams, supra note 7, at 376-82 (collecting figures as basis for 200,000 estimate). The estimates are stronger for the federal system. See U.S. SENTENCING COMM’N, supra note 111, at tbl.9 (35.8% of federal prisoners noncitizens in fiscal year 2000); Susan Katzenelson et al., Non-U.S. Citizen Defendants in the Federal Court System, 8 FED. SENT. REP. 259 (1996) (24.2% of offenders convicted in federal court in fiscal 1995); John Scalia & Marika F.X. Litras, Immigration Offenders in the Federal Criminal Justice System, 2000 at 8 (Bureau of Justice Statistics, NCJ 191745) (23,477 noncitizens charged in federal court for 2000, compared to 63,000 total cases filed); John Scalia, Noncitizens in the Federal Criminal Justice System, 1984-1994, at 10 (Bureau of Justice Statistics Special Report, NCJ 160934), Aug. 1996.

176 See Schuck & Williams, supra note 7, at 379-80. See also Clark & Anderson, supra note 175, at 57.

177 See supra notes 34-37 and accompanying text.
interpreters, training for attorneys and judges, and even some of the states’ prison costs. The funding would be tied to the percentage of noncitizen offenders who have completed their immigration process by a target date (say, one month after sentencing).^{178}

Within the participating states, some effort must be made to limit the sentencing judge’s deportation authority to the most serious offenses. The state’s agreement with the federal government should cover only state felony convictions, on matters where defense counsel is routinely provided. The program should also only reach crimes where a significant prison term is considered an ordinary sentence. We would argue, in other words, that a state sentencing judge’s immigration authority should not be coextensive with the current criminal deportation grounds, which presently reach misdemeanor offenses and crimes that do not result in incarceration.^{179} A program extending the state sentencing judge’s authority to minor offenses that result in minimal or no prison time would unacceptably widen the net of the INS and would profoundly alter the current bargaining power of state prosecutors.^{180} Any crimes not covered in the state’s agreement with the federal government would remain available to the INS as a removal ground through the ordinary administrative process.

By choosing the state proceedings with care, the statute can avoid many of the potential problems of moving from federal to state court. The program could remain a manageable size but still generate real cost savings if a handful of key states participate.

^{178} Cf. Schuck & Williams, supra note 7, at 443-47 (noting the rising frustration of states who bear the brunt of failures in immigration policy). Such funding tracks a program for federal reimbursement of state prison costs that has dried up lately. SeeINA § 242(i), 8 U.S.C. § 1252(i) (2000); Sergio Bustos, Bush Changes View on Illegal Immigrant Jail Costs, GANNETT NEWS SERVICE, Feb. 19, 2002 (reporting lack of funding for the State Criminal Alien Assistance Program). Alternatively, the INS could remove nonviolent criminals before the end of their sentences, if states elect this route to reduce their prison costs, pursuant toINA § 242(i).

^{179} The pre-1996 definition of an aggravated felony, which generally encompassed crimes for which a prison sentence of at least five years was imposed, might provide a blueprint for limiting the state sentencing judge’s immigration authority.

^{180} By excluding misdemeanors and some lesser felonies from our package, our package might allow state prosecutors to file lesser criminal charges in an effort to take the immigration question away from the sentencing judge and to send the offender into more streamlined removal proceedings. However, given that the federal rather than the state government has the principal interest in immigration processing, we believe state prosecutors are more likely to select criminal charges without giving much thought to the available immigration options.
5. Judicial Review

No single person should have unreviewable authority over immigration determinations. Although Congress has been chipping away at appeal rights, the current administrative system has multiple layers of review. For ordinary administrative proceedings before an immigration judge, appeals from the initial determination can be taken to the Board of Immigration Appeals (BIA). Some (but not all) immigration claims can go from there to the United States Courts of Appeal. And even though Congress provided in 1996 that “no court shall have jurisdiction to review” removal orders entered on criminal grounds, habeas corpus petitions remain available to challenge the legal interpretations that underlie these decisions.

Our proposal, which vests sentencing judges with authority that once resided with immigration judges and the INS, necessarily eliminates BIA review of the administrative determination. But we retain the critical feature of judicial review. The new statute would route all appeals of immigration matters from federal district court to the U.S. Court of Appeals, as the current statute does for judicial orders of removal. As for appeals from the state courts that opt into the system, they could go to U.S. District Courts. The federal trial courts, who already hear habeas corpus claims on immigration matters, could review the deportation decisions of state sentencing judges.

CONCLUSION

Our proposal places the judge at the center of the action for many immigration matters. The immigration legislation of the last decade has pushed Article III judges (and even immigration judges) to the sidelines in the name of streamlined procedures. The package we discuss returns some important immigration authority to the courts, but limits their role to cases where they will not create an administrative logjam.

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183 This could have a significant impact on immigration court dockets and the BIA’s caseload. Presently, the BIA has enormous backlogs and is being “streamlined” to reduce the membership of the Board and eliminate three-member panels for most cases. See 67 Fed. Reg. 7309-01 (Feb. 19, 2002).
One potential advantage of our proposal would be to "normalize" immigration law by making it less foreign to federal judges. If they confronted the issues more regularly, federal judges might be less likely to treat all of immigration law as hostile territory.

At this intersection of two exceptionally complex systems—immigration and criminal justice—shifting one piece creates movement in lots of other pieces. No doubt there are some moving parts we have not anticipated. But we hope that we have demonstrated the potential value of this thought experiment. Where the government is losing so much time and money to process these claims administratively with so little payoff in terms of fairness and dignity for noncitizen criminals, surely we can do better.