

**Adopted/voice vote**

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION  
COMMISSION ON IMMIGRATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges Congress to restore authority to  
2 state and federal sentencing courts to waive a non-citizen’s deportation or removal based  
3 upon conviction of a crime, by making a “judicial recommendation against deportation”  
4 upon a finding at sentencing that removal is unwarranted in the particular case; or,  
5 alternatively, to give such waiver authority to an administrative court or agency.  
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7 FURTHER RESOLVED, That the American Bar Association urges federal immigration  
8 authorities to avoid interpretations of the immigration laws that extend the reach of the  
9 “aggravated felony” mandatory deportation ground to:

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- 11 (1) low-level state offenses that either are misdemeanors under state law or would
- 12 be misdemeanors under federal law; and
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- 14 (2) state dispositions that are not considered convictions under state law.
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16 FURTHER RESOLVED, That the American Bar Association urges states, territories, and  
17 the federal government to expand the use of the pardon power to provide relief to non-  
18 citizens otherwise subject to deportation or removal on grounds related to conviction,  
19 where the circumstances of the particular case warrant it; and to

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- 21 (1) establish standards governing applications for pardon to avert removal;
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- 23 (2) ensure that pardons granted for the purpose of averting removal satisfy the
- 24 standard in the federal immigration laws that such pardons must be “full and
- 25 unconditional;”
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- 27 (3) specify the procedures that an individual must follow in order to apply for a
- 28 pardon to avert removal, and ensure that these procedures are reasonably
- 29 accessible to all persons; and
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- 31 (4) ensure that applications for pardon to avert removal are processed
- 32 expeditiously so that non-citizens will not be removed on grounds related to
- 33 conviction without some prior opportunity for a waiver of that sanction.

## REPORT

The Immigration and Nationality Act mandates deportation or removal in most cases where a non-citizen is convicted of a crime. *See* 8 U.S.C. § 1227(a)(2). Often, the only way removal may be avoided even in the most compelling cases, once deportation proceedings have been initiated, is if a criminal offender has been granted “a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.” *See* 8 U.S.C. § 1227(a)(2)(A)(v).<sup>1</sup> This recommendation urges that Congress act to make non-citizens once again eligible for judicial or administrative waivers of removal in appropriate cases.

Since 1996, non-citizens convicted of any but the least serious crimes have been ineligible for existing forms of statutory relief from removal. Historically, however, some judicial or administrative relief was available to some or all non-citizens subject to deportation. In the 1917 statute referred to above, Congress made aliens convicted of certain crimes in the United States subject to deportation, but at the same time authorized state and federal sentencing judges to issue a “judicial recommendation against deportation,” a determination binding on immigration authorities that deportation based upon the fact of conviction was not warranted on the facts of the case. *See* Act of Feb. 5, 1917, § 19(a), 39 Stat. 874, 889-90; Immigration and Nationality Act of 1952, § 241(b)(2), 66 Stat. 163, 208 (repealed 1990). Both state and federal sentencing judges had responsibility for making these “JRAD” determinations in most cases for the next 73 years, until the authority was repealed in 1990. *See generally* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143-51 (2002).<sup>2</sup>

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<sup>1</sup> Both the Antiterrorism and Effective Death Penalty Act of 1996, (AEDPA), 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546, significantly narrowed the grounds on which an immigration judge may waive deportation or removal under the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.* While immigration authorities retain discretion not to institute deportation proceedings in particular cases, since passage of the AEDPA and IIRIRA the discretion of immigration judges to waive removal based on compelling equitable circumstances has been severely curtailed. In addition, in recent years the number of crimes resulting in automatic removal, in the sense that judges must order removal once the convictions are established in immigration court, has grown exponentially. *See, e.g., In re: Alan Quispe Llerena*, 2005 WL 952461 (BIA) (immigration judge had “no authority to accord the [alien] leniency,” and was required to enter a removal order as provided for under 8 U.S.C. §§ 1227(a)(2)(A)(i) (crimes of moral turpitude) and (iii) (aggravated felony)); *U.S. v. Guiterrez-Alba*, 929 F. Supp. 1318, 1322 n.4 (D. Hi. 1996) (“Because the felony conviction was accepted as a basis for deportation, the immigration judge had no discretion but to order that he be deported without any consideration of the option for voluntary departure.”) Prior to 1996, immigration judges granted waivers in more than half the cases that came before them. *See INS v. St. Cyr*, 533 U.S. 289, 296 n. 5 (2001) (citing Rannik, “The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver,” 28 U. Miami Inter-Am. L.Rev. 123, 150, n. 80 (1996) (providing statistics indicating that 51.5% of the applications for which a final decision was reached between 1989 and 1995 were granted), and *Mattis v. Reno*, 212 F.3d 31, 33 (1<sup>st</sup> Cir. 2000) (“[I]n the years immediately preceding the statute's passage, over half the applications were granted”).

<sup>2</sup> Professors Wright and Taylor argue for restoration of the JRAD authority as part of “A thoughtful merger of the sentencing and immigration processes for criminal noncitizens,” which they argue “can leave both

This resolution urges Congress to restore authority in the courts in the context of sentencing, or in an administrative court or agency, to allow case-by-case relief to those facing removal based upon conviction of a crime. Placing this power in the hands of a sentencing judge takes advantage of the traditional effort by courts to understand the full context of a crime and to craft an individualized sentence for the offender, and also affords the prosecutor an opportunity to apprise the court of all relevant facts of the case, and to present the government's position in the matter. The immigration consequences of a criminal sanction should be harmonized with the other parts of the overall sanction. While many non-citizens are appropriately excluded from the United States upon commission of a crime, others have longstanding family and other ties to this country — such as U.S. citizen children or spouses—and were convicted of offenses that were relatively minor.

The automatic removal of non-citizens upon conviction, without regard to the equities of their particular situation, has resulted in many injustices, both for individuals and for their families. Moreover, the draconian nature of this collateral consequence of conviction may have unanticipated adverse consequences for the integrity of the justice system, and for its fair and regular operation. *See, e.g.*, Robert M.A. Johnson, “Collateral Consequences,” Message from the President, The Prosecutor (National Association of District Attorneys), May/June 2001.<sup>3</sup>

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the government and the noncitizen in better positions than each occupies under current law.” 51 Emory L. J. at 1169. In addition to giving the sentencing judge the power to decide a defendant's immigration status at the time of sentencing, the merged system would also place “more responsibility for immigration matters in the hands of ordinary criminal prosecutors,” with the result that “the criteria used to prioritize cases in the criminal arena could enhance the fairness of the immigration enforcement system.” *Id.* at 1174.

<sup>3</sup> District Attorney Robert Johnson explained, from a prosecutor's perspective, the adverse operational consequences when a collateral consequence such as deportation is imposed automatically upon conviction of crime, without any possibility of administrative exception or judicial waiver:

When the consequences are significant and out of anyone's control, victims of criminal conduct are less likely to cooperate. Defendants will go to trial more often if the result of a conviction is out of the control of the prosecutor and judge and is disproportionate to the offense and offender. Judges often consider the collateral consequences of a conviction. When the consequences are too severe, many judges change their rulings, sentencing felonies as misdemeanors and expunging records to avoid what they believe to be an unjust result. A judge in my jurisdiction once allowed a felon to withdraw his plea of guilty after he served his prison sentence to avoid a deportation. . . .

These collateral consequences cannot easily be charged or bargained away when justice requires them. But we must consider them if we are to see that justice is done. This struggle for justice was evident in the mind of a highly respected district attorney in a major jurisdiction when he shared his agony in deciding the fate of a father who abused his child. This father, after all, would be deported upon conviction, destroying a family that the district attorney and the victim's family thought could be saved. . . .

The efforts of prosecutors and judges do not fully deal with the problem. At times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences. There must be some reasonable relief mechanism. It is not so much the existence of the consequence, but the lack of the ability of prosecutors and judges to control the whole range of restrictions and punishment imposed on an offender that is the problem. As a

This resolution is consistent with existing ABA policy. The ABA Criminal Justice Standards provide that collateral sanctions imposed on persons convicted of crime should be subject to waiver, modification, or “timely and effective relief” from a court or a specified administrative agency if the sanctions have become inappropriate or unfair based on the facts of the particular case. ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standard 19-2.5(a). This resolution implements the Standard by providing that sentencing courts or an administrative agency (presumably the U.S. Department of Justice, Executive Office for Immigration Review) can relieve the immigration consequences of a criminal conviction. Similarly, a 1975 ABA House resolution states that “Relief from deportation upon grant of a pardon or judicial recommendation against deportation, now restricted to convictions for crimes involving moral turpitude, should be made applicable to deportability predicated on any criminal conviction.” 100 ANNUAL REPORTS OF THE AMERICAN BAR ASSOCIATION 663 (1975).

This resolution leaves to Congress the appropriate implementation of the waiver policy. Accordingly, Congress might conclude: (1) that trial judges are in the best position to evaluate the appropriateness of removal or relief therefrom, and therefore that a new form of relief issueable at the time of sentence or release from custody should be created; (2) that the question of an individual’s removability should be allocated to a specialized administrative agency; or (3) that some cases should be handled judicially and others administratively.

This resolution also urges federal immigration authorities to avoid broad interpretations of the law that limit the availability of administrative waivers by extending the concept of “aggravated felony” to low-level state offenses or state dispositions that are not considered convictions under state law. As discussed above, immigrants who have been convicted of an offense deemed an “aggravated felony” under immigration law are generally subject to the most extreme immigration consequences, including automatic deportation without any opportunity to present their equities before any criminal or immigration court. Despite this extreme impact, the Department of Homeland Security (DHS, formerly Immigration and Naturalization Service) has aggressively pursued, and continues to pursue, broad interpretations of the “aggravated felony” term to include even offenses classified as misdemeanors or lesser offenses by the convicting jurisdiction, other state offenses that cover conduct considered minor under federal criminal laws, or state dispositions that are not even considered convictions under state law. Included in the last-mentioned category are charges dismissed pursuant to deferred adjudication schemes, and convictions set-aside or expunged.

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prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect.

The overbroad interpretations of the various aggravated felony categories by DHS are often contrary to the plain language of the statutes and to Congressional intent.<sup>4</sup> For example, despite strong evidence that Congress intended the “aggravated felony” term to cover only felonies, as reflected not only by the terminology used (“aggravated felony” as opposed to “aggravated offense”), but also by Congressional reports and debates discussing the term, the government successfully argued in the early post-IIRIRA years that the term includes misdemeanor offenses.<sup>5</sup> In fact, the DHS has been so aggressive in their efforts to extend the reach of these harsh provisions as far as the courts will allow that they now are arguing that even a state violation deemed a non-criminal disposition by a state may, in certain cases, constitute an aggravated felony.

Another notable illustration of the DHS’s broad interpretations of the aggravated felony term arises in the context of the illicit “drug trafficking” class of aggravated felony offenses. Under the DHS interpretation, state offenses for simple possession of a controlled substance may be deemed a “drug trafficking” aggravated felony. Especially since a 2002 reversal of direction by the government in interpreting the “drug trafficking crime” definition, see *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), the government has argued that a simple possession drug offense is a “drug trafficking” aggravated felony simply because the state classifies the offense as a felony even though the offense would be classified as a misdemeanor possession offense under the federal Controlled Substances Act. Such a broad interpretation has been successfully defeated in precedent decisions binding on immigration judges in cases in the Second, Third, Sixth, and Ninth Circuits. See *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996); *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002); *Liao v. Rabbett*, 398 F.3d 389 (6<sup>th</sup> Cir. 2005); and *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9<sup>th</sup> Cir. 2004). However, in other circuits, the government continues to charge and deport individuals convicted of simple possession offenses as “drug trafficking” aggravated felons.

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<sup>4</sup> The term “aggravated felony” is an immigration law term-of-art that was introduced into the immigration laws by the Anti-Drug Abuse Act of 1988, and does not exist independently in state or federal criminal laws. Originally, it covered only “murder, any drug trafficking crime . . . or any illicit trafficking in any firearms or destructive devices . . .” Between 1988 and 1996, however, the definition was amended several times to include many additional categories of offenses.

<sup>5</sup> Examples of some of the misdemeanor offenses that the government early on successfully argued are aggravated felonies are *United States v. Christopher*, 239 F.3d 1191 (11<sup>th</sup> Cir. 2001), cert. denied, 534 U.S. 877 (2001)(misdemeanor GA theft by shoplifting, with 12 months suspended sentence); *Erewele v. Reno*, 2000 U.S. Dist. LEXIS 11765 (N.D. Ill. 2000)(misdemeanor shoplifting with one year suspended sentence); *United States v. Holguin-Enriquez*, 120 F.Supp.2d 969 (D. Kan. 2000)(misdemeanor WA assault with 365 day suspended sentence); *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000), cert. denied, 533 U.S. 904 (2001)(misdemeanor RI theft of a small video game valued at approximately \$10, for which the individual received a one year suspended sentence); *United States v. Graham*, 169 F.3d 787 (3<sup>rd</sup> Cir. 1999), cert. denied, 528 U.S. 845 (1999)(misdemeanor NY petty larceny); *Jaafar v. INS*, 77 F.Supp.2d 360 (W.D.N.Y. 1999)(misdemeanor NY petty larceny); and *United States v. Graham*, 927 F.Supp. 619 (W.D.N.Y. 1996)(misdemeanor NY criminal sale of marijuana).

Yet another example of a broad interpretation of the statute is the federal government's reading of the IIRIRA definition of what constitutes a conviction for immigration purposes to include state deferred adjudications dispositions that do not result in any final or formal finding of guilt. The Board of Immigration Appeals has broadly interpreted this new definition to find that no effect is to be given in immigration proceedings to any state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999)(giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute). Thus, as a result of the new definition and *Roldan-Santoyo*, the DHS argues that *any* criminal case disposition where there has been some finding or admission of guilt, such as a drug treatment diversion disposition where the defendant is required to plead guilty before placement in the drug treatment program, is to be deemed a conviction for immigration purposes regardless of later vacatur of the plea due to successful completion of the drug treatment program.

This recommendation is consistent not only with ABA policy on waiver and relief from collateral sanctions cited earlier in this report, but also with ABA policy limiting collateral sanctions to situations where “the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified.” ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standard 19-2.2. It is hard to imagine a situation in which deportation for a minor offense that the state has determined should be subject neither to criminal penalties nor collateral sanctions, without regard to the personal circumstances of the offender, would be consistent with this policy.

Finally, this resolution urges reinvigorated use of the pardon power to avert removal in particular cases where no other waiver authority exists and where the particular circumstances warrant it. As noted, the immigration laws now make pardon the only way removal may be avoided in many cases, no matter how compelling, once deportation proceedings have been initiated. See 8 U.S.C. § 1227(a)(2)(A)(v). While the range of criminal offenses eligible for relief through a pardon has been progressively narrowed since a mitigating role for pardon first appeared in the immigration laws in 1917, there remain a significant number of cases in which non-citizens convicted of aggravated felonies and crimes of moral turpitude may avoid removal if they can persuade the president, the governor, or other relevant pardoning authority that their situation merits this extraordinary equitable relief. See *Immigration Law & Crimes* § 4:23 (National Lawyers Guild, 2005); Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 Fed. Sent. Rptr. 184 (2001) (describing 139 immigration pardons issued by the Georgia Board of Pardons and Paroles between March 2000 and June 2001).<sup>6</sup> For federal offenders, a presidential pardon is sufficient to

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<sup>6</sup> Deportable offenses that are eligible for relief through a state pardon are enumerated in 8 U.S.C. § 1227(a)(2)(A)(i) through (iv). Those that are not eligible for this relief are enumerated in § 1227(a)(2)(B) through (E), and include drug offenses, certain crimes involving firearms, and certain crimes of violence.

deprive immigration authorities of jurisdiction to remove that individual on the basis of any federal crime, not just those that would qualify for statutory relief under § 1227(a)(2)(A)(v). *See* U.S. Department of Justice, Opinion of the Office of Legal Counsel, June 19, 1995, 1995 W.L. 861618, *reprinted in* 13 Fed. Sent. Rptr. 21 (2001) (“Effects of a Pardon on Authority to Deport, Firearms Disability, and Remission of Restitution”).

In recent years, the pardon power has been exercised regularly to avert removal in only a handful of U.S. jurisdictions. For example, in 2004, the Georgia Board of Pardons and Paroles issued 39 “immigration pardons.” Constitutional pardon boards in other states have also issued immigration pardons, as have a few governors. For example, four of the five pardons issued by Oregon’s current governor have been to avert removal, and the governors of both Maryland and Virginia have also issued several immigration pardons.<sup>7</sup> However, in most states the pardon power has fallen into disuse, and has been essentially unavailable to fulfill the important purpose of making exceptions to a harsh rule in deserving cases, a key role recognized by Congress over many years in the immigration law itself.

This resolution is fully consistent with existing ABA policy, including in particular the policy adopted upon the recommendation of the Justice Kennedy Commission just two years ago, which urged more expansive use of the pardon power. In its report, the Kennedy Commission pointed out that “The atrophy of the clemency function is troublesome not for its own sake, but because the legal system in many jurisdictions offers no dependable alternative relief.” The immigration context is certainly one in which there presently is generally no form of relief from removal save pardon where a non-citizen has been convicted of an “aggravated felony” as defined in the immigrations laws.<sup>8</sup>

We are aware that in many cases individuals may be subject to removal for relatively minor crimes, even though they have lived in this country legally for many years, and have strong family and other ties to their communities. We believe that governors and other pardoning authorities should be open to considering applications for pardon from such individuals, as well as others in similarly sympathetic circumstances, and that they will be generous in granting relief where the circumstances of the particular case warrant it.

Expanding upon the recommendations of the Justice Kennedy Commission, the resolution urges that jurisdictions establish standards governing applications for pardon to

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<sup>7</sup> *See, e.g.*, Alan Gustafson, “The Power to Pardon: Gov. Ted Kulongoski’s rare and quiet use of his power has helped a handful of Oregonians turn their lives around,” Salem Statesman-Journal, January 22, 2005 (describing facts of four immigration pardons), <http://159.54.226.83/apps/pbcs.dll/article?AID=/20060122/STATE/601220324/1042>.

<sup>8</sup> *See, e.g.*, 8 U.S.C. § 1229b(a)(3)(barring the relief called cancellation of removal for long-term lawful permanent resident immigrants convicted of an aggravated felony)

avert removal, that they specify the procedures that an individual must follow in order to apply for a pardon to avert removal, and that they ensure that these procedures are reasonably accessible to all persons. It also urges jurisdictions to ensure that pardons granted for the purpose of averting removal satisfy the standard in the federal immigration laws that such pardons must be “full and unconditional.” Finally, the resolution urges that applications for pardon to avert removal are processed expeditiously, so that individuals will not be removed on grounds related to conviction without some prior opportunity for a waiver of that sanction.

Respectfully submitted,

Michael Pasano, Chair  
Criminal Justice Section

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