The Deportation of America's Adoptees

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The goal of the Adoption and Safe Families Act (ASFA)[1] was to promote permanency for children as early as possible. When President Clinton signed the bipartisan bill into law twenty-five years ago, Senator Mary L. Landrieu (D-La.) noted that it "will promote permanency" and "result in more children leaving hopeless situations and finding the best gift we can give a child—a permanent loving home." While ASFA was primarily directed at children in the foster care system, advocates of international adoption have promoted the same goal of giving children a permanent, "forever home." And for years, the United States has led the world in the number of children adopted from other nations. However, the promise of "forever" has been broken for many.

Historically, adoption has been considered a state matter. Each state develops its own laws concerning the formation and dissolution of a family, keeping the "best interests of the child" of paramount concern. However, the United States is also the largest "receiving country" of children through international adoption,[2] which falls under a different governmental system. Children who are born abroad and then adopted by American parents are subject to U.S. immigration law, which is primarily a federal concern.[3]

The children were adopted through a legal process initially; however, as many of the internationally adopted children reached adulthood, they found out they lacked U.S. citizenship because their parents had not fully completed their immigration requirements. Because they were never naturalized, they were forced to live in a "legal limbo," living in the country, but not as a citizen, and unable to secure a green card to work, acquire a driver's license, obtain a passport to travel outside of the country, or register to vote.

Lawmakers passed legislation to grant citizenship to those adoptees who had not been naturalized. However, because of congressional compromise, it omitted a whole segment of the adoptee population: those who had already turned eighteen on or before the Act's passage. An estimated 18,000 or more adoptees are thus classified as noncitizen immigrants, despite the fact that both the sending country and the United States legally agreed to the adoption and officially cut the adoptee's ties with the former country to allow the adoptee to form new family connections in the United States.

In recent years, immigration law has expanded the definition of "aggravated felony" to include even minor, nonviolent crimes. This meant that adoptees who had committed certain crimes were subject to deportation as noncitizen immigrants.[4] They were sent back to their countries of origin—places they did not remember, where they no longer had meaningful family ties or connections, and did not know the language—to predictably negative outcomes. And, under the revised immigration law, judges were stripped of their discretion to intervene.

New legislation has been introduced several times to finally grant citizenship to all adults who were internationally adopted as children. But because the issue is tied to immigration, these bills have failed to pass each time they have been introduced, leaving this group of adoptees without lawful citizenship.

THOUSANDS OF INTERNATIONAL ADOPTEES LACK U.S. CITIZENSHIP

International adoption began as an effort to help children who had been displaced, abandoned, or orphaned by war. The United States first passed the Displaced Persons Act of 1948[5] to allow for the adoption of nearly 2,000 orphaned children under the age of sixteen. Children came from Italy, Poland, Germany, Greece, and other European areas that were impacted by World War II. Following the Korean War, many mixed-race G.I. babies were rejected by a patriarchal society that favored racial purity. They

AUTHOR'S NOTE

The basis of this article is the author's previous work, *"[Take From Us Our] Wretched Refuse": The Deportation of America's Adoptees*, 85 U. CIN. L. REV. 33 (2017). The author's use of "deportation" in this article is deliberate, even though the nomenclature has changed and the statutory text has replaced the term with "removal."

Footnotes

1. Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).
2. Over a twelve-year period, the United States brought in nearly a quarter of a million children from other nations. The high mark was in 2004, when Americans adopted more than 22,884 children from other nations.
3. *See* Passenger Cases, 48 U.S. (7 How.) 283, 392, 400, 409 (1849) (striking state laws that taxed aliens and passengers arriving from foreign ports). The Federal Bureau of Immigration was established in 1891 with responsibility for all immigration matters. It was first overseen by the Treasury Department, but moved to the Department of Labor in 1913, along with a separate Bureau of Naturalization. Twenty years later, the two bureaus merged into a joined unit, the Immigration and Naturalization Service (INS), still under the jurisdiction of the Department of Labor. In 1940 Congress relocated the INS to the United States Justice Department, where it remained until 2003, when the Department of Homeland Security assumed its duties.
4. *See* Schultz v. Gonzales, 221 F. App'x 726 (10th Cir. 2007) (upholding the deportation order of 25-year-old, who was adopted from India at age three but never naturalized, upon his conviction for felony car theft).
5. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, amended by Pub. L. No. 81-555, 64 Stat. 219 (1950).

were found on doorsteps, in train stations, in public toilets, and garbage dumps. Some blond-headed babies were found washed up from the sea. Congress passed the 1953 Refugee Relief Act[6] and granted visas to allow for the adoption of four thousand Korean children. Soon thereafter, U.S. federal immigration law was changed to allow for the unrestricted entry of legally adopted Korean children.

This was largely due to the work of Harry and Bertha Holt, who received special dispensation from Congress[7] and famously adopted eight children from Korea in the 1950s. A farmer from Oregon, Holt employed several practices to facilitate a greater number of adoptions. First, he implemented "proxy adoptions," obtaining power of attorney and standing in for prospective parents so they did not have to travel to Korea in person for the adoption. Second, he chartered "baby lift" flights to transport large groups of children at a time to the United States. These early methods made the transactions cheaper and faster and facilitated the emerging industry of international adoption, with Holt International Children's Services as its leader.[8]

In 1961, the United States amended the Immigration and Nationality Act of 1952[9] (INA) and revised its laws to allow international adoptions by Americans on a permanent basis, and not merely as a relief effort for refugees.[10] The U.S. State Department reported that 4,017 children, mainly Asian, were adopted by U.S. citizens in 1973. After the fall of Saigon in 1975, President Ford authorized Operation Babylift, and thousands of Vietnamese children were adopted by American families. By 1981, fifty agencies handled international adoptions, many of them facilitated by employing Holt's method of proxy adoption.

Even in the absence of war, the sending nations have tended to be places of political, social, and economic unrest. For example, thousands of babies from Central and South American countries were placed for adoption in the United States.[11] The well-publicized fall of the Ceausescu dictatorship and the plight of children in Romanian orphanages led to an influx of adoption agencies in Bucharest. The collapse of the Soviet empire and the Iron Curtain saw a surge in the number of international adoptions of children with medical issues from Russia. China's governmental one-child policy led to tremendous numbers of children, primarily girls, being adopted by American citizens.

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Even though international adoption began as a humanitarian effort, many of the adoptees have since found themselves in a precarious place as adults. The United States Constitution provides American citizenship through the Fourteenth Amendment for those "persons born or naturalized in the United States."[12] Because intercountry adoptees were not born on American soil, the United States government did not automatically grant them U.S. citizenship. Instead, under former immigration law, foreign-born children adopted by American parents entered the country as permanent residents with a green card but still had to undergo a separate naturalization process to secure American citizenship.[13] Thus, a child could be legally adopted under state law and still lack U.S. citizenship if they were not naturalized.

For whatever reason, whether intentionally or because of oversight, many parents never completed the naturalization process. The process was expensive and could take up to three years for Immigration and Naturalization Service (INS)[14] to complete. Further, some of the adoption agencies failed to follow up to make sure the steps had been taken. But once their green cards expired, the adopted children lost their legal status and were left to reside in the United States illegally as noncitizen immigrants subject to U.S. Immigration and Customs Enforcement (ICE) action. Indeed, many adoptees learned they lacked U.S. citizenship and were living in the country illegally when they applied for a job, or for a passport, or attempted to register to vote. Others only realized their status when they were flagged for deportation following their conviction for even minor, nonviolent crimes. The adoptees became de facto stateless: the adopting country no longer claimed them, sending them back to countries that gave up all claims to them decades before and no longer wanted them.[15]

6. The Refugee Relief Act of 1953, Pub. L. No. 203-336, 67 Stat. 400. In addition to the Korean visas, the 1953 Refugee Relief Act allowed entry to almost 200,000 immigrants, with no regard for quotas. *Id.* § 3. However, a family could only adopt two foreign-born children. *Id.* § 5(a).
7. An Act for the Relief of Certain Korean War Orphans (Holt Bill), Priv. L. No. 84-475, 69 Stat. A161 (1955).
8. The Holts officially incorporated Holt International Children's Services in 1956. Holt sought to rescue both physically and spiritually orphaned, abandoned, and vulnerable children. However, his methods were not without criticism, as he accepted many adoptive parents who previously had been turned down by their state systems "for wise and good reasons" before turning to international adoption.
9. Immigration and Nationality Act of 1952 (McCarran–Walter Act), Pub. L. No. 82-414, 66 Stat. 163.
10. An Act to Amend the Immigration and Nationality Act; and for other purposes, Pub. L. No. 87-301, 75 Stat. 650 (1961).
11. Chile, Peru, Bolivia, Paraguay, Ecuador, Guatemala, El Salvador, Honduras, Panama, Brazil, and Colombia were some of the countries that partnered with American agencies for adoption. In 1974 Americans adopted so many babies from Colombia that Colombian novelist Gabriel Garcia Marquez exclaimed, "Americans are importing Colombian babies like bags of coffee."
12. U.S. CONST. amend. XIV, § 1.
13. Immigration and Nationality Act, 8 U.S.C. § 1431(a)(3) (2012).
14. First overseen by the Treasury Department, the Federal Bureau of Immigration moved to the Department of Labor in 1913, along with a separate Bureau of Naturalization. Twenty years later, the two bureaus merged into a joined unit, the Immigration and Naturalization Service (INS), still under the jurisdiction of the Department of Labor. In 1940 Congress relocated the INS to the United States Justice Department, where it would remain until 2003, when the Department of Homeland Security assumed its duties, alongside the newly formed United States Citizenship and Immigration Services (USCIS) and U.S. Customs and Border Protection (USCBP).
15. Rebecca Walsh, *Meth, Adoption, Deportation*, SALT LAKE TRIB., (July 27, 2008), http://archive.sltrib.com/story.php?ref=/news/ci_10011361. For example, India has refused to admit U.S. deportees. *Id.*

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THE EXPANSION OF AGGRAVATED FELONY STATUS IN IMMIGRATION LAW

Despite the creed that America is a "nation of immigrants,"[16] the American immigration experience has been as much about exclusion as it has been inclusion. Early in the nation's history, President John Adams signed into law the infamous Alien and Sedition Acts, a series of measures that allowed the deportation of immigrants judged to be "dangerous to the peace and safety of the United States."[17] Those laws were vastly unpopular in the two years of their existence and probably cost Adams the presidency. But their unpopularity did not erase hostility toward certain classes of immigrants. The Chinese Exclusion Act of 1882[18] ended immigration for all Chinese laborers for a period of ten years and also prohibited courts from granting U.S. citizenship to anyone of Chinese descent. The U.S. Supreme Court upheld the restrictive law.[19]

The Immigration Act of 1924[20] excluded Japanese also from migration into the United States and further established a quota system that restricted immigration from Eastern and Southern Europe, Asia, and Africa, but allowed white, Protestant Anglo-Saxon immigrants. This law stood for the next thirty years, when Congress codified restrictive immigration through a quota system in the 1952 INA that provided for the immigration and naturalization of a limited number of Korean and Japanese Americans.

Criminal history has also served as a basis for exclusion. Since 1891, the United States has barred entry to, and also subjected to deportation, immigrants who have been "convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."[21] The 1917 Immigration Act[22] later authorized the deportation of "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States." And those who committed two or more crimes of moral turpitude could be deported any time after entry.

Congress did not define "crime of moral turpitude"; however, courts have generally settled upon the definition as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."[23] In 1922, convictions for narcotics and controlled substances were also classified as crimes of moral turpitude.[24] Still, the list of deportable offenses was exhaustive and considered a "narrow class" and deportation was considered a "drastic measure."

However, in the 1980s and 1990s, criminal and immigration legislation greatly expanded the range of deportable offenses. In 1988, Congress passed the Anti-Drug Abuse Act (ADAA),[25] which added as an "aggravated felony" any conviction for murder, federal drug trafficking, and certain firearms offenses. Two years later, the Immigration Act of 1990[26] imported aggravated felony as a deportable offense and added drug trafficking, money laundering, and any "crime of violence" with an imposed sentence of at least five years to the list of offenses that counted as an aggravated felony.

Two pieces of legislation, in particular, have had a profound effect upon immigration and deportation. In 1996, in the wake of the Oklahoma City bombing, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA).[27] The AEDPA was passed with the stated purpose of deterring terrorism and providing justice for the 168 people who were killed when Timothy McVeigh bombed the Alfred P. Murrah Federal Building on April 19, 1995. But the response to domestic terrorism by a U.S. citizen arguably has most impacted "criminal aliens," as the AEDPA significantly expanded the grounds of deportability for immigrants with criminal records.

On the heels of the AEDPA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[28] in response to calls for tightened national security following the 1993 terrorist attack on the World Trade Center. Representing the most comprehensive immigration legislation since 1952, the IIRIRA amended almost every section of title two of the INA.[29] It expanded upon the ADAA's definition of aggravated felony and included as crimes of violence those punishable by one year in prison. Even though aggravated felony is a creation of federal law, it applied to crimes a person most likely committed under state

16. *See* JOHN F. KENNEDY, A NATION OF IMMIGRANTS 3 (1964) ("There is no part of our nation that has not been touched by our immigrant background.").
17. An Act Concerning Aliens, ch. 58, 1 Stat. 571 (1798).
18. Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58, 61 (repealed 1943). Chinese immigration resumed with passage of the Magnuson Act, ch. 344, § 3, 57 Stat. 600, 601 (1943), which was passed to recognize the Chinese-American alliance in World War II.
19. Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (opining that "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the [C]onstitution"). *See also* Geary Act, ch. 60, 27 Stat. 25 (1892) (extending the provisions of the Chinese Exclusion Act for another ten years).
20. Immigration Act of 1924 (Johnson–Reed Act), ch. 190, § 11(a), 43 Stat. 153, 159.
21. Immigration Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.
22. Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 19, 39 Stat. 874, 889.
23. *See, e.g.*, Gelin v. U.S. Attorney Gen., 837 F.3d 1236, 1240 (11th Cir. 2016).
24. Narcotic Drugs Import and Export Act (Jones-Miller Act), Pub. L. No. 67-227, ch. 202, 42 Stat. 596 (1922) (excluding 30 grams of marijuana); Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).
25. Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469.
26. Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048.
27. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 [hereinafter AEDPA].
28. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1227(a)(2)(A)(iii)) [hereinafter IIRIRA].
29. *Id.*; INA § 101(a)(43)(F)–(G), 8 U.S.C. § 1101(a)(43)(F)–(G) (2012); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Law and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000).

law. That means that even state misdemeanors, such as theft by check, shoplifting, or even failure to appear, have qualified as aggravated felonies under federal immigration law.

IIRIRA's expanded definition of aggravated felony also meant that many of the crimes now "fit within the broad immigration law category of 'crimes involving moral turpitude.'"[30] In the AEDPA, Congress made a single crime of "moral turpitude" a deportable offense without defining its contours.[31] Further, the definition of "conviction" and "sentence" were changed to include expunged convictions and suspended sentences, so that even suspended sentences of one year have qualified as a one-year prison term and met the definition of aggravated felony.[32]

Additionally, Congress allowed aggravated felony to be applied retroactively under IIRIRA, so that then-INS (now ICE) could pursue and remove noncitizens for convictions that occurred before the statute's enactment.[33] That meant that even relatively minor offenses that were not classified as aggravated felonies under immigration law when they were committed could, if later added by Congress to the list, be the basis for immediate deportation for noncitizens. While this would be unconstitutional in a criminal context, the Supreme Court has allowed it because deportation is a civil matter.[34] It also means that noncitizens who plead guilty to offenses that were so minor at the time that they lacked immigration consequences, can be deported if the crimes later become a deportable offense.

What began as a one-paragraph definition for aggravated felony in 1988 grew to over twenty paragraphs with multiple subsections, and the number of deportations rose dramatically. In the seven decades leading up to 1980, the United States had deported approximately 56,000 immigrants because of criminal convictions. However, that number was surpassed in one year alone following the passage of the 1996 laws, and countries that had previously resisted began cooperating and accepting the deportees.[35]

The United States Supreme Court has opined about the harsh effects of the laws. For example, the Court determined that aggravated felony should not encompass simple possession or DUI offenses.[36] Further, in *Carachuri-Rosendo v. Holder*,[37] Justice John Paul Stevens rejected governmental overreach and found that, under any construction, "a 10-day sentence for the unauthorized possession of a trivial amount of a prescription drug" did not comport with the ordinary meaning of aggravated felony to subject someone to deportation. But after the unprecedented terrorist attacks of September 11, 2001, security concerns once again dominated immigration policy, and the government still attempted to deport individuals for similar minor offenses that the Court rejected in *Carachuri-Rosendo*.[38]

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THE SIMULTANEOUS NARROWING OF JUDICIAL DISCRETION

For noncitizen immigrants convicted of aggravated felonies, IIRIRA established an expedited removal process without a formal hearing before an immigration judge and effectively eliminated judicial review. Before IIRIRA, a noncitizen subject to deportation could apply to a judge for suspension of deportation and adjustment of status. However, IIRIRA replaced suspension of deportation with "cancellation of removal,"[39] and made it unavailable to any noncitizens convicted of an aggravated felony as defined by immigration law.

IIRIRA's expedited removal process largely "eliminated the role of immigration judges in expulsion decisions"; deportation was all but certain for noncitizens who met the newly expanded definition of an aggravated felony,[40] even if they had been in the country for years and had developed substantial family and community ties. And Congress all but removed judicial discretion to decide otherwise, precluding judicial review of the noncitizen's factual challenges to a final order of removal.[41]

Critics argued that IIRIRA's approach to immigration conflated immigration with crime and treated all immigrants, including law-

30. Morawetz, *supra* note 29, at 1940.
31. AEDPA, *supra* note 27, § 435, at 1274 (codified at 8 U.S.C. § 1227(a)(2)(A)(i)).
32. *See* INA § 101(a)(48), 8 U.S.C. § 1101(a)(48) (2012); *see also* Morawetz, *supra* note 29, at 1942. This further includes charges that have been dropped after successful participation in a rehabilitation or diversion program.
33. IIRIRA, *supra* note 28; 8 U.S.C. § 1101(a)(43); Morawetz, *supra* note 29, at 1939.
34. *Padilla*, 559 U.S. at 362.
35. *Ice Statistics*, U.S. IMMIGRATION & CUSTOMS ENF'T, https://www.ice.gov/remove/statistics (last visited Dec. 20, 2021). Deportations leapt to 63,012 in 1999 alone and increased to 88,000 in 2004. The highest number of deportations occurred in 2012 and 2009, with 407,821 and 401,501 deportations, respectively. From October 2014 through September 2015, fifty-nine percent of the 325,413 people who were deported had criminal convictions. In 2020, ninety-two percent of the 185,884 who were deported had criminal convictions or pending criminal charges.
36. *See* Lopez v. Gonzales, 549 U.S. 47, 59-60 (2006) (noting that aggravated felony was founded in federal law even when state offenses were involved but should not apply to simple drug possession offenses); Leocal v. Ashcroft, 543 U.S. 1, 12 (2004) (finding aggravated felony should not apply to DUI offenses).
37. Carachuri-Rosendo v. Holder, 560 U.S. 563, 566, 575 (2010) (rejecting the government's argument that two misdemeanor drug convictions, one for the possession of a single Xanax tablet, amounted to an aggravated felony under federal immigration law).
38. *See, e.g.*, Moncrieffe v. Holder, 569 U.S. 184, 206 (2013) (noting this was the third time in seven years the Court had considered this issue and holding that a non-citizen's state conviction for possession of marijuana with intent to distribute was not an aggravated felony under the INA).
39. 8 U.S.C. § 1229(b).
40. *Padilla*, 559 U.S. at 360 (quoting Fong Haw Tan v. Phelan, 333 U.S. at 10).
41. 8 U.S.C. § 1252(a)(2)(C). Constitutional and legal challenges were still available in federal appeals courts, bypassing district courts. 8 U.S.C. §§ 1252(a)(1); 1252(a)(2)(D). *But see* Nasrallah v. Bar, 140 S. Ct. 1683 (2020) (holding that the appellate court may also review the noncitizen's factual challenges to an order under the Convention Against Torture even for noncitizens who have committed aggravated felonies).

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ful permanent residents, as dangerous criminals.[42] Even the bill's sponsor, Representative Lamar S. Smith (R-Tex.), along with two dozen congressional leaders, conceded in a letter to then-Attorney General Janet Reno and INS Commissioner Doris Meissner that "some deportations were unfair and resulted in unjustifiable hardship" such that they "call for the exercise of such discretion."

But IIRIRA's language was clear that removal was mandatory for those noncitizens convicted of aggravated felonies, and Congress provided no further recourse. Often referred to as the "criminal-alien bar," Congress expressly decided that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" an aggravated felony. Congress doubled down on this proposition in 2005, when it passed the REAL-ID Act,[43] which eliminated the power of federal district courts to review deportation orders through habeas corpus petitions. And in 2011, the Court circumscribed the ability of the president and state governors to pardon deportation based on narcotics and firearms crimes.[44]

SOME ADOPTEES ARE GRANTED CITIZENSHIP

Adoptees who were born abroad and adopted by American parents, but who had not been naturalized, were classified as noncitizen immigrants and subject to deportation as any other noncitizen alien. And because some state misdemeanors classified a noncitizen immigrant as an "aggravated felon," that made adoptees who had committed even nonviolent, minor crimes targets for deportation. For example, twenty-two-year-old Joao Herbert was convicted for selling 7.5 ounces of marijuana. It was his first offense, and he was sentenced to probation and community treatment. Nevertheless, he was deported because his adoptive American parents never completed the naturalization process. Twenty-five-year-old John Gaul was deported to Bangkok after his conviction for car theft and writing bad checks. Adopted at the age of four by American parents, but never naturalized, he was sent back to Thailand, a place he had never been since his adoption, where he spoke no Thai and had no Thai relatives.

Both of these cases were highly publicized and reached former Representative William Delahunt (D-Mass.), who had adopted a daughter from Vietnam as part of the Operation Babylift program and secured her American citizenship within a few years of her adoption. Representative Delahunt tried to accomplish for adoptees what their parents and agencies had neglected.[45] Speaking from the House floor, he educated his congressional colleagues, who mistakenly thought children adopted from overseas automatically became American citizens. He called on Congress to grant citizenship to non-naturalized adoptees, urging, "No one condones criminal acts, Mr. Speaker; but the terrible price these young people and their families have paid is out of proportion to their misdeeds. Whatever they did, they should be treated like any other American kid. They are our children, and we are responsible for them."[46]

As Delahunt worked the bill in the House, then-Senate Assistant Majority Leader Don Nickles (R-Okla.) began a similar push in the Senate. His legislative counsel, J. McLane Layton, had adopted three children from Eastern Europe in 1995, only to learn they did not automatically receive U.S. citizenship upon adoption because they had been born overseas. Senator Nickles tasked Layton with drafting legislation that would confer automatic citizenship on those not born on American soil but who were subsequently adopted by an American citizen parent. He proposed the legislation to his colleagues with this admonition, "Lawmakers and the public need to understand that these adoptees were adopted by American citizens, were brought to this country legally, [and] were raised in American society." He garnered the unanimous consent of the Senate.

Just five months after its introduction, and after only one hearing, the bill passed both the House and the Senate. In October 2000, former President Bill Clinton signed into law the Child Citizenship Act of 2000[47] (Child Citizenship Act), which amended the INA and automatically granted U.S. citizenship to foreign-born children upon the finalization of their adoptions by

42. This laid the groundwork for what some have termed the field of "crimmigration." *See* Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2170-71 (2014); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 380 (2006).
43. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. 109-13, 119 Stat. 302 (2005) (abrogating the Court's decision in I.N.S. v. St. Cyr, 533 U.S. 289 (2001)).
44. Judulang v. Holder, 565 U.S. 42 (2011).
45. Child Citizenship Act of 2000, H.R. 3667, 106th Cong. (2000). Representative Lamar Smith (R-Tex.) had earlier introduced the Adopted Orphans Citizenship Act, H.R. 2883, 106th Cong. (2000). However, members of Congress, along with representatives from the State Department, INS, and the adoption community, testified that the bill's provision that granted citizenship retroactively to birth might produce inequities between adopted and biological children and other naturalized citizens. *Adopted Orphan Citizenship Act and Anti-Atrocity Alien Deportation Act: Hearing on H.R. 2883 and H.R. 3058 Before the Subcomm. on Immigration and Claims of the Comm. on the Judiciary*, 106th Cong. (2000). Rejecting the "legal fiction" that the child would be "deemed always to have been a United States citizen," which Smith's bill would create, they suggested instead Delahunt's language that conferred automatic citizenship on the date when the statutory criteria were met. *Id.* at 12-14 (testimony of Gerri Ratliff, Director of Business Process and Reengineering, Immigrations Services Division) ("While after the adoption it is entirely fitting and proper that the adopted child be considered equal to the adoptive parents' natural children for citizenship and other purposes, we do not believe it is appropriate to attempt to extend the claim retroactively back to birth."). On July 26, 2000, an amendment substituted the first four sections of Delahunt's bill, H.R. 3667, for the text of Smith's bill, and H.R. 2833 was renamed the Child Citizenship Act of 2000. H.R. REP. NO. 106-852, at 6 (2000).
46. 146 CONG. REC. 18,492 (2000).
47. Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (codified as amended at 8 U.S.C. § 1431 (2012 & Supp. 2014)). Introduced first on Sept. 21, 1999, as the Adopted Orphans Citizenship Act, the bill was revised to also include certain foreign-born biological children.

American citizens. Parents no longer had to go through a separate naturalization process to secure citizenship. Upon the bill's passage, Senator Patrick Leahy remarked, "Given the severe curtailment of noncitizens' rights under the immigration laws we passed in 1996, it is all the more important to extend the right to American parents and their adopted children."[48]

As enacted, the law prospectively and automatically conferred U.S. citizenship on children who were born abroad and coming to the United States on IR-3 visas, acquired when the child's adoption by American citizens was formalized in the country of origin. The Child Citizenship Act required that the child be under the age of eighteen and living in the legal and physical custody of at least one American citizen parent. The child had to be admitted into the United States as an immigrant for lawful permanent residence, and the adoption had to be final.[49] For children arriving on IR-4 visas, given in cases where the adoptions were not formalized in the country of origin, citizenship attached when the parents finalized the adoption by readopting the children in their state of residence.[50]

In either case, under the Child Citizenship Act, the parents no longer had to go through a separate and lengthy naturalization process to secure citizenship for their newly adopted children. In addition to prospectively granting automatic citizenship to future adoptions, the Child Citizenship Act also provided for retroactive citizenship to those foreign-born children who were adopted by U.S. parents but did not acquire citizenship through naturalization before they reached the age of eighteen. An estimated 75,000 adoptees under the age of eighteen became U.S. citizens overnight on February 27, 2001, the date of the Act's enforcement.

Though lauded as a "rare example of bipartisanship on immigration legislation," the Child Citizenship Act's passage only came about because of political compromise. Foreign-born adopted children who turned eighteen on or after February 27, 2001, and who were not previously naturalized, were excluded from U.S. citizenship under the Act. While the bill did provide relief from deportation for those over eighteen who innocently voted as noncitizens (a felony offense), it did not grant citizenship to them.

Ironically, the stories told on the House floor about the experiences of John Gaul (from Thailand) and Joao Herbert (from Brazil) may have worked against them. Simply put, Congress had taken a hardline stance on crime, and the bill failed to gain traction as long as it included citizenship for adult adoptees who had already committed crimes. Thus, advocates were willing to accept the compromise that resulted in the exclusion of those aged eighteen and over from retroactive citizenship. The hope was that if they could get the bill passed for the majority of adoptees, they could then address the Act's shortfalls. Then, just six short months later, 9/11 happened.

"Congress treated legal adoptees no differently than illegal immigrants and terrorists."

THE DEPORTATION OF AMERICA'S ADOPTEES

Border security concerns reached new heights after September 11, 2001, when radical Islamist jihadists hijacked commercial airplanes and attacked the Pentagon and the Twin Towers of the World Trade Center, forcing their collapse. With a nation reeling from the aftermath of September 11, the U.S. government vigorously enforced the stringent AEDPA and IIRIRA 1996 immigration laws. The Child Citizenship Act's passage ensured that adoptees under eighteen would be shielded from deportation as American citizens. But Congress's refusal to grant citizenship to adoptees aged eighteen and over subjected those who had already been punished for their crimes to a second punishment in the form of deportation. By equating the terms *child* and *adult* with age, rather than kinship, Congress treated legal adoptees no differently than illegal immigrants and terrorists.

Meanwhile, U.S. immigration law continued to expand the list of offenses that could subject a noncitizen adoptee to deportation. Because adoptees aged eighteen and over were left out of the Child Citizenship Act's protection, adoptees were left with little recourse. Generally, by the time adoptees discovered their parents had not completed the naturalization process, the entry visas that allowed them to legally live in the United States had lapsed. But green card applications following September 11 typically generated background investigations by the Department of Homeland Security and unwanted attention from then-INS.

Many adoptees were deported back to their countries of origin. The precise number is unknown because the federal government does not track how many adoptees receive citizenship. Critical adoption studies scholar Bert Ballard has estimated that if even 1% of the hundreds of thousands of children who came to the United States through adoption were not naturalized before the Child Citizenship Act came into effect, thousands could potentially be affected. His forecast is in line with the National Council for Adoption and other groups that estimate that 18,000 adoptees are without U.S. citizenship. Some suggest the number is even higher.

But that often led to tragic results when the adopted children were deported to countries where they had no meaningful con-

48. 146 CONG. REC. 22,780 (2000).

49. The Child Citizenship Act of 2000 was enacted before the ratification of the Hague Convention on Intercountry Adoption in 2008. IH-3 visas are issued for children with full and final adoptions from a Hague Convention country. "With an IH-3 visa, a child automatically acquires U.S. citizenship if the child enters the United States before his or her eighteenth birthday and resides with his or her adoptive parents in the United States (or overseas if parents are U.S. government or military personnel assigned abroad)." Elaine Schwieger, *Getting to Stay: Clarifying Legal Treatment of Improper Adoptions*, 55 N.Y.L. SCH. L. REV. 825, 845 & n.97 (2010/2011); *see also Before Your Child Immigrates to the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/adoption/your-child-immigrates-united-states (last updated July 8, 2021).

50. IH-4 visas are issued for children who are adopted from a Hague member country but whose adoptions are not finalized in that country. "With an IH-4 visa, a child does not automatically acquire U.S. citizenship upon entry to the United States, but becomes a permanent resident (green card holder) and automatically acquires citizenship on the date of his or her adoption in the United States, as long as the adoption occurs before the child's eighteenth birthday." Schwieger, *supra* note 49, at 845 & n.97; *see also Before Your Child Immigrates to the United States*, *supra* note 49.

"[T]hat often led to tragic results when the adopted children were deported to countries where they had no meaningful connections."

nections. For example, four years after his deportation, Joao Herbert, who could not speak Portuguese, was found murdered in the slums of Campinas, near Sao Paulo. Senator Landrieu, herself an adoptive parent, recognized that adoptees who committed misdemeanors or felonies should be punished "with the full penalties against them," as would any other U.S. citizen—but not with deportation.[51] She reminded her colleagues that "[s]ome adopted children, through no fault of their own, endure a precarious legal status, which can result in the horror of being deported to a country they don't remember at all, where they don't have any ties or even speak the language."[52]

Senator Landrieu introduced the 2013 Citizenship for Lawful Adoptees Amendment,[53] which sought to amend the Child Citizenship Act and the INA to provide automatic citizenship to all foreign-born adoptees of American citizen parents. The amendment was attached to a Senate immigration reform bill and specifically targeted those adoptees who were eighteen or over and thus precluded from U.S. citizenship when the Child Citizenship Act was enacted. The Senate approved the measure, but it stalled in the House of Representatives, once again leaving this group of adoptees aged eighteen and over without U.S. citizenship.[54]

THE ADOPTEE CITIZENSHIP ACT

Until 1995, Americans adopted more children from South Korea than from any other country. The work that Harry Holt began resulted in Korean adoptees comprising one of the largest adoptee communities in the country. As a result, they have also been disproportionately affected by the loophole created by the Child Citizenship Act and, thus, have actively mobilized to lobby for legislation that would finally provide redress for the thousands of adoptees without U.S. citizenship.

To finally close the gap left by the 2000 Child Citizenship Act, and to make all foreign-born adoptees U.S. citizens, regardless of their age, Senator Amy Klobuchar (D-Minn.) proposed the Adoptee Citizenship Act of 2015[55] (Adoptee Citizenship Act). The bipartisan legislation sought to amend section 320(b) of the INA "to grant automatic citizenship to all qualifying children adopted by a U.S. citizen parent, regardless of the date on which the adoption was finalized." Specifically, the bill provided for automatic citizenship of all persons born outside of the United States but adopted before age eighteen by a U.S. citizen parent.[56]

For those who had already been deported for "minor crimes" and served their sentences, the Adoptee Citizenship Act proposed to create a "clear pathway" for their return. To obtain a visa, they had to submit to a criminal background check, and any outstanding criminal issues flagged by law enforcement agencies had to be resolved in conjunction with the U.S. Department of Homeland Security and U.S. Department of State.

The bill was referred to the Committee on the Judiciary, and Senator Klobuchar, who had co-sponsored the failed 2013 bill with Senator Landrieu, advocated for its advancement. She stated, "We're dealing here with adoptees, who grew up in American families, who went to American schools, who led American lives, and are still leading them. . . . And the constant threat to the life that they know is really unjust." She noted the struggle that many adoptees encounter, as they are continually subjected to a life where they cannot advance without the ability to obtain an education or a job.

Representative Adam Smith (D-Wash.) and Representative Trent Franks (R-Ariz.) introduced a House companion bill in 2016 that tracked the Senate bill language identically.[57] Representative Franks, who served as co-chair of the Congressional Coalition on Adoption, held a press conference and called the omission of adoptees aged eighteen and over from the Child Citizenship Act an "arbitrary oversight." He acknowledged that the adoptees had "lived their entire lives knowing only the United States as home," and emphasized that "[a]dopted individuals should not be treated as second class citizens just because they happened to be the wrong age when the Child Citizenship Act of 2000 was passed." However, the Act died in committee in both houses and was not enacted.

Representative Smith and Representative John Curtis (R-Utah) recently reintroduced the Adoptee Citizenship Act.[58] This is the fourth iteration of the Act that Representative Smith has introduced, and the third that Senator Blunt has sponsored.[59] But each version has been stymied amid ongoing anti-immigration

51. 159 CONG. REC. S4435-44 (daily ed. June 13, 2013). "[Deportation] may be an option for illegal immigrants but not children who have been adopted by American citizens." *Id.*
52. *Senator Landrieu Passes Amendment to Help Adopted Children Secure Citizenship*, EQUALITY FOR ADOPTED CHILDREN (June 18, 2013), http://www.equalityforadoptedchildren.org/about_each/news_&_updates.html (quoting Sen. Landrieu). Senators Dan Coats (R-Ind.), Amy Klobuchar (D-Minn.), and Roy Blunt (R-Mo.) co-sponsored the bill. *Id.*
53. Amendment to the Border Security, Economic Opportunity, and Immigration Modernization Act, S. Amdt. 1222 to S. 744, 113th Cong. (2013–2014).
54. The House companion bill was introduced on Oct. 2, 2013, but was not enacted. H.R. 15, 113th Cong. (2013).
55. Adoptee Citizenship Act of 2015, S. 2275, 114th Cong. (2015). Senator Klobuchar served as co-chair of the Congressional Coalition on Adoption. The bill was co-sponsored by Senators Dan Coats (R-Ind.), Jeff Merkley (D-Or.), Kirsten Gillibrand (D-N.Y.), Brian Schatz (D-Haw.), Mazie Hirono (D-Haw.), and Patty Murray (D-Wash.). *Id.*
56. For the Act to apply, the adoptee had to be in the legal custody of the citizen parent before age eighteen, a resident of the United States pursuant to a lawful admission on the date of the enactment of the Act, and not already a U.S. citizen. For persons residing outside of the United States on the Act's date of enactment, citizenship became automatic once the person lawfully entered and was physically present in the United States.
57. Adoptee Citizenship Act of 2016, H.R. 5454, 114th Cong. (2016).
58. Adoptee Citizenship Act of 2021, H.R. 1593, 117th Cong. (2021); Adoptee Citizenship Act of 2021, S. 967, 117th Cong. (2021).
59. Adoptee Citizenship Act of 2018, H.R. 5233, 115th Cong. (2018); Adoptee Citizenship Act of 2018, S. 2522, 115th Cong. (2018); Adoptee Citizenship Act of 2019, H.R. 2731, 116th Cong. (2019); Adoptee Citizenship Act of 2019, S. 1554, 116th Cong. (2019). None of the bills received a committee vote.

concerns and polarized politics while, once again, the adoptees are left without citizenship.

CONCLUSION

The significant broadening of the grounds for deportation and the simultaneous curtailing of judicial review has resulted in a "radical transformation of immigration law" that bows to party politics rather than family unification. Thus, given the tense political partisanship that now surrounds nearly every aspect of border policy, it seems unlikely that Congress will be amenable to any legislation that expands any part of immigration law—even to grant citizenship to adult adoptees who originally came to this country legally.

These adoptees were at risk during the Obama administration, which ousted more than two million immigrants, more than any other preceding president at that time.[60] In his November 2014 address to the nation, President Obama pointedly addressed criminal activity, stating that deportation efforts would be directed "not at families, but at felons," whom he defined as dangerous criminals who pose a threat to the nation's security. But President Obama's description of a felon was narrower than that defined by federal immigration law, and adoptees were at risk as long as aggravated felony served as the priority measure.

Foreign-born noncitizen adoptees were especially at risk during the Trump administration, where his "get tough" approach to "restore the rule of law" targeted *all* noncitizen immigrants and those who had committed *any* crime.[61] Predictably, following the issuance of his executive order, the deportation numbers increased 42% percent from the year before.[62] That number included both those who had been convicted and those who had been merely charged with nonviolent crimes, including traffic tickets and drug possession. Roughly 10% of the individuals arrested had neither criminal convictions nor pending charges.

But even though President Biden has vowed to take a different approach to immigration than Trump, the adoptees are also at risk during a Biden administration. In laying out his priorities, President Biden indicated a shift from the "everyone goes" approach of the previous administration to a focus on those who pose a national security or "public safety" risk.[63] And even though he highlighted discretion, his metric for who qualified under the public safety prong included those who had committed serious crimes under federal immigration law. In other words, an aggravated felony under immigration law still puts a noncitizen adoptee at risk.

However, foreign-born adoptees occupy a unique space. They are not refugees seeking asylum, nor are they the same as Dreamers, who were brought here illegally. Rather, they came to this country through a legal process, with the governments of both the sending country and the United States signing off on the adoptions. The children became part of American families, just the same as if they had been born biologically into those families. Through no fault of their own, they did not obtain citizenship only because parents and adoption agencies did not follow through on naturalization requirements.

Still, foreign-born adoptees are being treated as all other noncitizen immigrants and getting lost amid the noise surrounding immigration concerns. And under current immigration law, judges are all but powerless to intervene to deter what the Supreme Court has called "the severe penalty" of deportation.[64]

Nearly 100 years ago, Judge Learned Hand opined that it would be "deplorable" to deport a young man born abroad but brought to this country as an infant. He stated, "[H]e is as much our product as though his mother had borne him on American soil . . . . However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. . . . [S]uch a cruel and barbarous result would be a national reproach."[65] Indeed, other countries have challenged the United States, as the world leader in the number of children adopted from abroad, to "also lead the world in the humanitarian treatment of them."

Accordingly, Congress should finally grant retroactive citizenship to all U.S. foreign-born children adopted by U.S. citizen parents, regardless of their age. Only then will the goal of "forever," promoted by advocates of both ASFA and international adoption, finally be realized.[66]

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60. President Obama called himself the "champion in chief" of immigration law reform; however, he was dubbed the "Deporter in Chief" instead. According to ICE data, the Department of Homeland Security carried out 438,421 deportations in 2013 and followed that with 414,481 in 2014.
61. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).
62. According to ICE data, between Jan. 25, 2017, and the end of fiscal year 2017 (Sept. 30, 2017), ICE made 110,568 arrests compared to 77,806 during the same period in 2016.
63. Memorandum from Alejandro Mayorkas, Sec'y, Dep't of Homeland Sec., to Tae D. Johnson, Acting Comm'r, U.S. Customs & Border Prot., et al. 1 (Sept. 30, 2021), https://drive.google.com/file/d/18j2S2BvZVnK8sjoRSTVUgkg8Bh9dWQQr/view.
64. *Padilla*, 559 U.S. at 362.
65. United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630–31 (2d Cir. 1926).
66. On Feb. 4, 2022, the House passed the Adoptee Citizenship Act of 2021, H.R. 1593, as part of the America COMPETES Act of 2022, H.R. 4521. However, the citizenship provision was not part of the Senate's companion bill, the United States Innovation and Competition Act, S. 1260, and it is unclear if a reconciled version will finally include relief for these adoptees.