

# Evolution of the Definition of Aggravated Felony

By Norton Tooby & Joseph Justin Rollin\*

The Anti-Drug Abuse Act of 1988 (ADAA) first created a new category of deportable criminal offenses known as aggravated felonies. Provisions contained in the Immigration Act of 1990 (IMMACT90), the Immigration and Nationality Technical Corrections Act of 1994 (INTCA), the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), and IIRAIRA each broadened the scope of crimes included under this category. Section 101(a)(43) of the Immigration and Nationality Act (INA) defines “aggravated felony” and now encompasses over 35 crimes.

The following chronology gives citations to the legislation creating and adding to the list of offenses considered aggravated felonies, and creating disabilities for aggravated felons.

a. The Anti-Drug Abuse Act of 1988 (effective 11/18/88).<sup>1</sup> The ADAA amended the Immigration and Nationality Act by adding INA § 101(a)(43)<sup>2</sup> which defined an aggravated felony to include:

- Murder;
- Any drug trafficking crime as defined in 18 U.S.C. § 924(c) or Section 102 of the Controlled Substances Act; and
- Any illicit trafficking in any firearms or destructive devices as defined in 18 U.S.C. § 921.

This legislation also provided for mandatory detention of noncitizens convicted of aggravated felonies.<sup>3</sup> It disqualified a noncitizen convicted of an aggravated felony from eligibility for a grant of voluntary departure.<sup>4</sup>

This statute created a new ground of deportation for a noncitizen convicted of an aggravated felony at any time after entry.<sup>5</sup> It also expanded the firearms ground of deportation

---

\* This was last published as Appendix D to N. TOOBY & J. ROLLIN, AGGRAVATED FELONIES 859 (2007).

<sup>1</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (November 18, 1988).

<sup>2</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7341, 102 Stat. 4181 (November 18, 1988).

<sup>3</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4181 (November 18, 1988), amending INA § 242(a), 8 U.S.C. § 1252(a).

<sup>4</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(b), 102 Stat. 4181 (November 18, 1988), amending INA § 244(e), 8 U.S.C. § 1254(e).

<sup>5</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344, 102 Stat. 4181 (November 18, 1988), amending former INA § 241(a), 8 U.S.C. § 1251(a).

for a noncitizen convicted of possession of an automatic weapon or sawed off shotgun to include convictions for unlawful possession of any firearm or destructive device.<sup>6</sup>

It increased the maximum federal prison term to 15 years where a noncitizen was convicted of illegal re-entry after deportation after an aggravated felony conviction.<sup>7</sup>

This statute also subjected noncitizens with an aggravated felony conviction to degraded procedural rights in removal proceedings. It directed the Attorney General to expedite deportation proceedings for aggravated felons in prison, so they could be ordered deported while still in prison and actually deported upon release.<sup>8</sup> A noncitizen convicted of an aggravated felony was conclusively presumed to be deportable from the United States.<sup>9</sup> The Attorney General was not required to deport an aggravated felon until after completion of service of his or her prison term, except on written request of the chief prosecutor or judge.<sup>10</sup> The time within which an aggravated felon was required to file a petition for review in the court of appeals was reduced from six months to 60 days.<sup>11</sup>

b. The Immigration Act of 1990 (effective 11/29/90).<sup>12</sup> The IMMACT 1990 added the following crimes to the aggravated felony list:

- Money laundering as described in 18 U.S.C § 1956;
- Any crime of violence (other than purely political ones) as defined under 18 U.S.C. § 16 for which the term of imprisonment imposed (even if it is suspended) is at least five years;
- Any attempt or conspiracy to commit these acts; and
- Foreign convictions of listed offenses for which the term of imprisonment was completed within the past 15 years.

This legislation also created a bar to showing Good Moral Character for those convicted of an aggravated felony. The mandatory detention provision for aggravated felons, however, was amended to allow discretionary release on bond for Lawful Permanent Residents of the United States. The time within which an aggravated felon may file a petition for review in the court of

---

<sup>6</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7348, 102 Stat. 4181 (November 18, 1988), amending INA § 241(a)(14), 8 U.S.C. § 1251(a)(14).

<sup>7</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345, 102 Stat. 4181 (November 18, 1988), amending INA § 276, 8 U.S.C. § 1326.

<sup>8</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347, 102 Stat. 4181 (November 18, 1988), adding INA § 242A(a) and (d), 8 U.S.C. § 1252a(a) and (d).

<sup>9</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347, 102 Stat. 4181 (November 18, 1988), adding INA § 242A(c), 8 U.S.C. § 1252a(c).

<sup>10</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347, 102 Stat. 4181 (November 18, 1988), adding INA § 242A(c), 8 U.S.C. § 1252a(c).

<sup>11</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347, 102 Stat. 4181 (November 18, 1988), amending INA § 106(a)(1), 8 U.S.C. § 1105(a)(1).

<sup>12</sup> Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (November 29, 1990).

appeals was reduced from 60 to 30 days. The Immigration Act of 1990 repealed the authority of sentencing judges to grant Judicial Recommendations Against Deportation, and this legislation was specifically made retroactive.<sup>13</sup> Aggravated felons, who had served a term of imprisonment of at least five years, were disqualified from eligibility for a waiver of deportation for Lawful Permanent Residents with seven years continuous lawful domicile. A ground of inadmissibility, lasting 20 years, was created for a noncitizen convicted of an aggravated felony who was deported and who was not authorized by the Attorney General to reapply for admission. An aggravated felon was disqualified from eligibility for political asylum or withholding of deportation as a refugee. An aggravated felon would no longer obtain an automatic stay of deportation upon filing a petition for review of a final deportation order.

c. The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA).<sup>14</sup> MTINA made the following changes to immigration statutes affecting aggravated felons:

It provided that the INS was not required to stay deportation of an aggravated felon until a petition for review had been adjudicated in a court of appeals, unless the court specified otherwise, regardless of when the conviction occurred.<sup>15</sup>

d. The Violent Crime Control and Law Enforcement Act of 1994<sup>16</sup> had several provisions affecting aggravated felons:

It created new authority under which the Attorney General can bypass normal deportation procedures for certain noncitizens convicted of aggravated felonies, who are not Lawful Permanent Residents, and who are not eligible for relief from deportation, and order them deported administratively without proceedings before an immigration judge.<sup>17</sup> The legislation allows the noncitizen only limited judicial review by petition for review or habeas corpus challenging only whether the noncitizen (a) is the person described in the deportation order, (b) is described in the statute allowing administrative deportation, (c) has a final conviction of an aggravated felony; and (d) was given the limited procedures allowed under this legislation.<sup>18</sup> These amendments apply to noncitizens for whom deportation proceedings are initiated after the date this legislation was enacted.<sup>19</sup>

---

<sup>13</sup> INA § 241(b), 8 U.S.C. § 1251(b), as amended by Immigration Act of 1990, § 511, Pub. L. 101-649, 104 Stat. 4978 (November 29, 1990).

<sup>14</sup> Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102-232, 105 Stat. 1733.

<sup>15</sup> Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), § 306(a)(11), Pub. L. No. 102-232, 105 Stat. 1733, overruling *Ayala-Chavez v. INS*, 945 F.2d 288 (9<sup>th</sup> Cir. 1991).

<sup>16</sup> The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 1208 Stat. 1796.

<sup>17</sup> The Violent Crime Control and Law Enforcement Act of 1994, § 130004(a), Pub. L. No. 103-322, 1208 Stat. 1796, creating new INA § 242A(b), 8 U.S.C. § 1252a(b).

<sup>18</sup> The Violent Crime Control and Law Enforcement Act of 1994, § 130004(b), Pub. L. No. 103-322, 1208 Stat. 1796, amending INA § 106, 8 U.S.C. § 1105a.

<sup>19</sup> Gordon § 2.04[13][b][iii].

This legislation also increased the maximum prison term for aggravated felons who illegally re-enter the United States after deportation from 15 to 20 years.<sup>20</sup>

e. The Immigration and Nationality Technical Corrections Act of 1994 (effective 10/25/94).<sup>21</sup> INTCA § 222(a) amended INA § 101(a)(43) to add the following offenses to the aggravated felony list:

- Trafficking in certain firearms, destructive devices or explosive materials;
- Theft and burglary offenses for which the term of imprisonment is at least five years (regardless of whether any of the sentence was suspended);
- Certain ransom offenses;
- Certain offenses related to child pornography or running a prostitution business;
- Certain offenses relating to the Racketeer Influenced and Corrupt Organizations Act (RICO);
- Income tax evasion in which revenue loss to the government is in excess of \$200,000; and
- Certain offenses related to peonage, slavery, involuntary servitude, espionage, sabotage or national security.

f. The Anti-Terrorism and Effective Death Penalty Act of 1996 (effective 4/24/96).<sup>22</sup> AEDPA § 441(e)<sup>23</sup> added the following crimes to the aggravated felony list:

- Offenses described in Title 18 U.S.C. § 1084 (if it is a second or subsequent offense) or Title 18 U.S.C. § 1955, relating to gambling offenses;
- Transportation for the purposes of prostitution as defined in Title 18 U.S.C. §§ 2421, 2422, 2423;
- Alien smuggling under INA § 274(a)(1) for which the term of imprisonment imposed (regardless of time suspended) is at least five years;
- Falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of 18 U.S.C. §§ 1543, 1546(a), relating to document fraud for which the term of imprisonment imposed (regardless of any time suspended) is at least 18 months;
- An offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of five years or more;

---

<sup>20</sup> The Violent Crime Control and Law Enforcement Act of 1994, § 130001(b), Pub. L. No. 103-322, 1208 Stat. 1796, amending INA § 276(b), 8 U.S.C. § 1326(b).

<sup>21</sup> Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (October 25, 1994).

<sup>22</sup> The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 279 (April 24, 1996).

<sup>23</sup> The Anti-Terrorism and Effective Death Penalty Act of 1996, § 441(e), Pub. L. No. 104-132, 110 Stat. 1214 279 (April 24, 1996).

- An offense described in INA §§ 275(a) (entry at improper time or place) or 276 (misrepresentation or concealment of facts) committed by an alien who was previously deported on the basis of a conviction for an offense described in AEDPA § 440(e);
- An offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which a sentence of 5 years of imprisonment or more may be imposed;
- An offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which a sentence of five or more years imprisonment may be imposed;
- An offense relating to failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of two or more years imprisonment may be imposed; and
- Any attempt or conspiracy to commit any of the above.

The effective date of these additions is the date of enactment, April 24, 1996. However, the provision relating to alien smuggling applies to convictions entered on or after October 24, 1994.

This legislation also drastically limited INA § 212(c) relief, barring it for any noncitizen who is deportable for having committed an aggravated felony, controlled substance violation, firearms offense, or miscellaneous offense listed in INA § 237(a)(2)(D).<sup>24</sup>

g. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) (effective 9/30/96).<sup>25</sup> IIRAIRA § 322 added the following offenses and amendments to the aggravated felony list:

- Rape and sexual abuse of a minor (A);
- The amount of funds laundered required to make the offense an aggravated felony was reduced from \$200,000 to \$10,000 under (D), and the amount of the loss to the government from tax evasion required was reduced from \$200,000 to \$10,000 under (M)(ii);
- The term of imprisonment required to make a crime of violence (F), theft offense (G), RICO offense (J), document fraud offense (P), forgery offense (R), or obstruction of justice offense (S), into an aggravated felony was lowered from five years to one year;
- Violation of anonymity of undercover intelligence agents under 50 U.S.C. § 421; and
- A defense in the case of alien smuggling (N) and document fraud (P) was created for those who assist only their spouse, child, or parent (and no other individual).

---

<sup>24</sup> The Anti-Terrorism and Effective Death Penalty Act of 1996, § 441(d), Pub. L. No. 104-132, 110 Stat. 1214 279 (April 24, 1996).

<sup>25</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996).