

PRACTICE ADVISORY
FY 2022 Appropriations Provision
Supporting the Return of Individuals Unjustly Removed
March 2022

The Consolidated Appropriations Act for Fiscal Year 2022, Public Law 117-03, was signed into law on March 15, 2022, funding federal agencies for the fiscal year that ends on September 30, 2022.¹ The Joint Explanatory Statement accompanying the Act's funding provisions for the Department of Homeland Security (DHS) includes a provision that instructs DHS and its component agencies to facilitate the return to the United States of individuals unjustly removed. Specifically, the provision states:

Addressing Prior Removals Committed in Error.—ICE, USCIS, and other DHS agencies shall leverage all mechanisms provided by current law to facilitate the return to the United States of those whose removal was contrary to law, whose removal order has since been overturned or reopened by judicial order, where the return of an individual would correct an error or assist in an ongoing criminal or any other federal, state, tribal, or territorial investigation. Such mechanisms should include the use of parole, the support of a respondent's motion to reopen, and stipulation to relief from removal. Efforts shall be taken to ensure that the individual is restored to prior lawful status, to the greatest extent possible, or the ability to adjust to lawful status. Not later than 60 days after the date of enactment of this Act, ICE shall brief the Committee on its efforts to comply with these directives.²

This Practice Advisory intends to alert practitioners to the existence and utility of this language [hereinafter "Addressing Prior Removals Provision"], which demonstrates congressional intent for DHS and its components sub-agencies to utilize discretion to support the return to the United States of those who were wrongly deported.

What is a Joint Explanatory Statement and what is its legal import?

The Constitution grants Congress the authority to direct how the federal government spends money, and Congress does so through passage of appropriations bills that fund federal agencies for the upcoming government fiscal year (which runs from October 1st through September

¹ FY2022 Consolidated Appropriations Act, H.R. 2471, P.L. 117-103, Mar. 15, 2022, <https://www.congress.gov/117/crec/2022/03/09/168/42/CREC-2022-03-09-bk3.pdf>.

² Joint Explanatory Statement accompanying Division F, FY 2022 Consolidated Appropriations Act, 168 Cong. Rec. 2402, <https://www.congress.gov/117/crec/2022/03/09/168/42/CREC-2022-03-09-bk3.pdf>.

30th).³ When the House and Senate complete their work reconciling the competing versions of appropriations bills that have made their way through the legislative process, the final conference report of the bill is accompanied by a Joint Explanatory Statement.⁴

A Joint Explanatory Statement (also sometimes referred to as a “statement of managers”) explains the elements of the finalized spending bills, only describing elements agreed to by both chambers.⁵ Unlike the final bill text, the Joint Explanatory Statement is not voted upon and therefore does not carry the weight of law. It does, however, carry significant weight as an expression of bicameral congressional intent.⁶ The federal courts generally rely on Joint Explanatory Statements as an expression of congressional intent, but not as binding law.⁷

What are the components of the provision entitled “Addressing Prior Removals Committed in Error” in the FY2022 DHS Joint Explanatory Statement?

1) What does the Addressing Prior Removals Provision instruct the agency to do?

Because this Joint Explanatory Report specifically accompanies the Division of the FY 2022 spending bill that funds DHS, the Addressing Prior Removals Provision only applies to DHS and its component agencies including Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). It does not directly govern any action of immigration judges or other adjudicators within the Department of Justice.

The Provision instructs DHS and its component agencies to “...leverage all mechanisms provided by current law” to facilitate the return to the United States of individuals described above. The Joint Explanatory Statement specifically names as potential mechanisms: parole, support of a motion to reopen, and stipulation to relief from removal. In all cases, the Joint Explanatory Statement states that, “[e]fforts shall be taken to ensure that the individual is restored to prior lawful status, to the greatest extent possible, or the ability to adjust to lawful status.”

³ For a thorough backgrounder on the appropriations process, see American Immigration Council, An Overview of the Government Funding Process: Appropriations (Dec. 15, 2021), <https://www.americanimmigrationcouncil.org/research/overview-government-funding-process-appropriations>; also see James V. Saturno, et al., Congressional Research Service, The Congressional Appropriations Process: An Overview (Nov. 30, 2016), <https://sgp.fas.org/crs/misc/R42388.pdf>.

⁴ Christopher M. Davis, Congressional Research Service, Conference Reports and Joint Explanatory Statements (June 11, 2015), <https://sgp.fas.org/crs/misc/98-382.pdf>.

⁵ *Id.*; see also Government Accountability Office, Principles of Federal Appropriations Law, Fourth Edition, Chap. 1, (2016), <https://www.gao.gov/assets/2019-11/675699.pdf>, p. 1-50

⁶ *Id.*

⁷ See e.g. *Roeder v. Islamic Republic of Iran*, 357 U.S.App.D.C. 107, 114 (2003); *Sierra Club v. E.P.A.*, 353 F.3d 976, 988n.1 (2004); see also *id.* at pp. 1-50-1-53.

Legal service providers should therefore consider referencing this provision in any communication or formal or informal request to ICE, CBP, or USCIS, seeking an individual's return to the United States after deportation. This includes, but is not limited to:

- Applications filed on behalf of individuals seeking to return to the United States on humanitarian parole;⁸
- Requests to ICE to return individuals who have prevailed on appeal via a petition for review to the Courts of Appeals, pursuant to ICE's Return Directive or through other vehicles;⁹ and/or
- Requests to ICE to exercise its discretion to join in motions to reopen proceedings for individuals who have been removed. ICE's joinder on motions to reopen can be particularly crucial for an individual's ability to return to the United States because the filing of a joint motion before an immigration judge or the Board of Immigration Appeals (BIA) waives the regulatory time and numerical limitations that otherwise require the motion to be filed within 90 days of the date of the final administrative order of removal and limit the applicant to one motion.¹⁰
- Requests to ICE to reopen and/or rescind removal orders entered by ICE directly, such as removal orders under Immigration and Nationality Act (INA) § 238(b) (administrative removal orders), INA § 241(a)(5) (reinstatement orders), and INA § 235(b) (expedited removal orders).

The above list is certainly not exhaustive, and because the Addressing Prior Removals Provision encourages DHS to "leverage all mechanisms provided by current law," legal service providers should reference it in support of any request to ICE, CBP or USCIS to return a previously removed individual.

2) Who can benefit from the Addressing Prior Removals Provision?

The provision applies to individuals in the following circumstances: where removal was contrary to law; where the removal order has since been overturned or reopened; where return would "correct an error"; or where return would assist in an ongoing criminal or any other federal, state, tribal or territorial investigation. Legal service providers should argue that these categories apply

⁸ 8 U.S.C. § 1182(d)(5)(A) provides DHS broad discretionary authority to return individuals to the United States on a case-by-case basis for humanitarian reasons or public benefit, regardless of the individual's admissibility.

⁹ Immigration and Customs Enforcement, Directive No. 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens (2012), https://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf; Immigration and Customs Enforcement, FAQs: Facilitating Returns for Lawfully Removed Aliens, ice.gov (Nov. 3, 2020), <https://www.ice.gov/remove/facilitating-return>.

¹⁰ 8 C.F.R. § 1003.23(b)(4)(iv). For a detailed practice advisory on filing Motions to Reopen and Reconsider for individuals already removed, see Immigrant Legal Resource Center, Practice Advisory: Post-Departure Motions to Reopen and Reconsider (Nov. 14, 2019), <https://cliniclegal.org/resources/removal-proceedings/practice-advisory-post-departure-motions-reopen-and-reconsider>.

to a wide range of individuals for whom removal was contrary to law or contrary to the interests of justice. The following is a non-exhaustive list of arguments to assert under each of the categories explicitly included in the Addressing Prior Removals Provision.

The Provision as written applies in circumstances...:

→ *Where removal was contrary to law*

This category should encompass individuals whose removal was contrary to existing law at the time of removal, or where subsequent facts or changes in law have rendered the removal unlawful or unjust. Examples might include: individuals who were removed in violation of existing law at the time of removal; individuals for whom a change in law subsequent to their removal has rendered them no longer removable or eligible for a form of relief from removal; and/or individuals removed on the basis of a conviction that has been vacated or overturned.

→ *Where removal order has since been overturned or reopened by judicial order*

This category should be read in concert with ICE’s 2012 Directive entitled, “Facilitating the Return to the United States of Certain Lawfully Removed Aliens” [hereinafter “the Return Directive”].¹¹ The Return Directive provides that ICE will facilitate an individual’s return to the United States if they were removed while their petition for review to the U.S. Supreme Court or court of appeals was pending and the court’s decision either a) restores the person to lawful permanent resident status; or b) the person’s presence is “necessary for continued administrative removal proceedings.”¹² The Directive provides that return may be accomplished by issuance of a Boarding Letter and, “if warranted,” the use of parole upon arrival at a U.S. port of entry.¹³

In practice, the Return Directive often fails to facilitate the return of many individuals because it prioritizes return of only lawful permanent residents. Furthermore, ICE often disregards its obligation to determine whether an individual’s presence is necessary for continued removal proceedings and when it does, often takes an unnecessarily restrictive approach. Legal service providers should therefore invoke the Addressing Prior Removals Provision any time they are asking ICE to facilitate a return under the Directive, noting that the Provision demonstrates congressional intent for a broad interpretation of the Directive’s provisions.

→ *Where return would “correct an error”*

Legal service providers should argue that this category suggests a broad range of circumstances where Congress intended DHS to support return. Return to correct “an error” could refer to an

¹¹ See n. 9 *infra*.

¹² *Id.*

¹³ *Id.*

error in law, an error in fact, an error in the exercise of discretion, and/or an error in procedure. Some examples of the types of cases that might benefit from invoking this clause include: individuals who might have succeeded in their defense to removal were it not for ineffective assistance of counsel (regardless of whether they can demonstrate prejudice); individuals who did not seek a type of relief that should have been available to them because they were unrepresented; and/or individuals denied relief on the basis of an exercise of discretion by the immigration judge that was clearly not in the interests of justice.

Legal service providers can also utilize the Addressing Prior Removals Provision when seeking humanitarian parole or other vehicles for return for individuals whose cases are pending appeal before the federal courts, but where a decision has not yet been rendered or where the Return Directive is otherwise inapplicable. In such cases, the same legal and factual arguments advanced on appeal could be used to support the argument that an individual's return would "correct an error" in an underlying removal order. For individuals seeking fear-based protection, any harm or threatened harm that they endure upon removal to their country of origin strongly supports an argument that an underlying removal order that dismissed future likelihood of harm or persecution was made in error. Similarly, for individuals who were ordered removed in the exercise of discretion in waiver or cancellation cases, particular hardship arising for the individual and/or their relatives in the aftermath of removal can similarly be used to show error.

Hypothetical examples: Laura and Tomas

Laura had lived in the United States for twenty years when she was arrested for the second time on marijuana possession charges. Laura lived in a small community with her husband, her three children, and her niece who she had been raising since her sister's death. Neither Laura nor her husband had immigration status; her children and niece were United States citizens. After she was released from criminal custody, Laura was picked up by ICE, detained, and placed in removal proceedings. Laura used her savings to hire an attorney who filed an application for non-LPR cancellation of removal. However, her lawyer didn't realize that she was ineligible for that relief, and did not advise her to seek post-conviction relief to overturn her conviction, despite being told by Laura that she had not been advised of the immigration consequences of her conviction. The immigration judge denied Laura relief, and she was deported to Ecuador.

Years later, Laura retained an attorney to explore the possibility of returning to the United States when her husband fell ill and no one was available to care for her three children and her niece. Her lawyer sought and received post-conviction relief to vacate her marijuana possession conviction. She then prepared an application for her return on humanitarian parole on the basis of her children and niece's urgent need for a caregiver, and a request to ICE's Office of the Principal Legal Advisor to join in a Motion to Reopen on the basis of ineffective assistance of

counsel and the later vacatur of her conviction. Both the ineffective assistance of counsel and the vacatur would provide a basis for Laura to argue that DHS is obliged to ensure Laura is able to return home on the basis of the Addressing Prior Removals Provision because her return would correct multiple errors.

***Tomas** is a political dissident who fled a central African country and was detained upon his arrival at the United States when he stated his intent to seek asylum. Tomas appeared pro se at the immigration court level, and the immigration judge denied him asylum, finding that he had not established a likelihood of future persecution. The Board affirmed the judge's decision. Tomas was able to find pro bono representation on his petition for review to the court of appeals, but was deported during the petition's pendency.*

Subsequent to his removal, Tomas was forced into hiding in his country of origin. While his petition remained pending, Tomas was arrested by the state police in his country of origin, beaten, and threatened with death if he didn't leave the country immediately.

Tomas's attorney filed a humanitarian parole application for Tomas, noting that Tomas's return was warranted even though the ICE Return Directive did not yet explicitly apply given that Tomas had not yet prevailed on appeal. In the application, Tomas's attorney argued that it was incumbent on DHS to grant the parole application pursuant to the Addressing Prior Removals Provision; the very real harms Tomas faced subsequent to his removal provide a basis to argue that the immigration judge's original denial of his asylum claim was issued in error.

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