

# America's Hidden Citizens: The Untold Stories of the Unconscionable Deportations of Its International Adoptees

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## PREFACE

When women outside of the United States are forced to put their children up for adoption, they hope their children will have beautiful lives in far-flung corners of the earth where they might never see them again. My mother gave me up out of love. She was young, she was alone, and she hoped I would be well taken care of by a family who could give me every opportunity life had to offer.

My American parents gave me every opportunity within their power, and not only did they always tell me how much they loved me, but they told me how much my birthmother must have loved me to have given me away. Not until I learned of adoptees like Adam Crapser and Phillip Clay did I really understand just how lucky I was.

I never had to question my citizenship status. My parents in America had the knowledge and resources to ensure I was naturalized. They still have photos of my naturalization ceremony, me as a small baby wearing a traditional Korean hanbok. What I took for granted has become a nightmare for so many others who should have been naturalized, but never were through no fault of their own. Congress has seemingly abandoned adult international adoptees who came to the U.S. legally, who are rightfully U.S. citizens, but are not protected under current law if they have a criminal record which renders them deportable. This Note seeks to add to the discourse on this topic as well as highlight the stories of two adoptees who were both deported, and whose lives then took different paths.

I dedicate this Note to my Korean mother, Sun Nyuh. I hope that wherever you are, I continue to fulfill your dreams of being the person you always hoped I would become.

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## INTRODUCTION

Imagine a life that was not yours to begin with. Imagine being brought to the United States because you were given up by your biological parents, and because a foreign family wanted a child. Imagine that your legal guardians neglected their duty to ensure that you, barely a citizen of your country of origin, were naturalized to become a citizen of the country you were forcibly brought to. You are nationless through no fault of your own, despite calling this country your home for your entire life. This is the reality for a startling number of international adoptees who were adopted

by American families in the U.S., and particularly, for South Korean adoptees who were the largest number of children “exported” to the U.S. beginning after the Korean War.<sup>1</sup>

Adoptees without citizenship status face many hardships, the first of which is identifying their citizenship status. If adoptees discover they are not citizens, not only do they bear the burden of attaining citizenship as adults, but their lack of citizenship also creates a danger of deportation if they plead guilty or are otherwise convicted of criminal charges due to their immigration status as “Deportable Aliens.”<sup>2</sup> Many adoptees are unaware of their non-citizenship status in the United States and only learn they are not citizens when deportation proceedings are initiated against them after a U.S. criminal conviction.<sup>3</sup> The Adoptee Rights Campaign estimates as many as 35,000 international adoptees in the U.S. were not naturalized as minors, and therefore, are not citizens as adults.<sup>4</sup> As the country with the largest number of international adoptees in the U.S., even South Korea has not been able to ensure the safe and secure naturalization of adoptees in the U.S. According to South Korean officials, the citizenship status of a staggering 18,000 adoptees who were adopted by American families is unknown.<sup>5</sup> Not only is it unclear just how many South Korean adoptees in the U.S. lack citizenship, but South Korea is also unaware of how many of these adoptees have been deported.<sup>6</sup>

While international adoptees come to this country legally under specialized visas or a green card, prior to 2000, adoptees were required to also be naturalized by their adoptive families, a process that could take up to three years and often proved to be quite costly.<sup>7</sup> Many adoptive families were unaware that this naturalization process was required, believing instead that their child would attain automatic citizenship once the adoption was finalized.<sup>8</sup> Other families were simply deterred by the cost and the complicated nature of the naturalization process.<sup>9</sup> When the Child

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1. DeLeith Duke Gossett, *The Deportation of America's Adoptees*, 58 CT. REV. 34, 40 (2022).

2. See 8 U.S.C. § 1227(a)(1)(B).

3. Choe Sang-Hun, *Deportation a 'Death Sentence' to Adoptees After a Lifetime in the U.S.*, N.Y. TIMES (July 2, 2017), <https://www.nytimes.com/2017/07/02/world/asia/south-korea-adoptions-phillip-clay-adam-crapser.html> [<https://perma.cc/8N5T-ZNSD>].

4. See *About ARC*, ADOPTEE RTS. COAL., <https://www.adopteerightscoalition.com/about> [<https://perma.cc/PMC2-EPTU>]; Sang-Hun, *supra* note 3.

5. Sang-Hun, *supra* note 3.

6. See *id.*

7. Gossett, *supra* note 1, at 35.

8. See, e.g., Maggie Jones, *Adam Crapser's Bizarre Deportation Odyssey*, N.Y. TIMES (Apr. 1, 2015), <https://www.nytimes.com/2015/04/01/magazine/adam-crapser-bizarre-deportation-odyssey.html> [<https://perma.cc/73K5-9P4E>].

9. See, e.g., Gossett, *supra* note 1, at 35.

Citizenship Act of 2000 (CCA)<sup>10</sup> was passed, retroactive automatic citizenship was granted to children who were under eighteen at that time but who had not been naturalized, resulting in 70,000–75,000 internationally adopted children becoming citizens overnight.<sup>11</sup> The CAA also amended the Immigration and Nationality Act (INA) to eliminate the requirement that adoptive families naturalize their children after an adoption was complete.<sup>12</sup> However, the CCA excluded adoptees who were already adults at the time of its passage, rendering many adopted adults still vulnerable to deportation.<sup>13</sup>

One of the primary ways adoptees without citizenship are unprotected and susceptible to deportation is through a criminal record. Once non-citizen adoptees have a criminal record, the Department of Homeland Security (DHS) can then initiate deportation proceedings through Immigration and Customs Enforcement (ICE).<sup>14</sup>

Adam Crapser and Phillip Clay are two adoptees who fall into this liminal state of existence: adoptees from South Korea who never attained American citizenship prior to becoming adults before the CCA was passed in 2000. Because Adam Crapser and Phillip Clay were never naturalized as minors by their adoptive parents, they were not protected by the CCA, and their subsequent criminal history prompted DHS to deport them.<sup>15</sup> Their stories, discussed in further detail in this Note, illustrate how the only country they had ever known failed them and how the U.S., blinded by its own overzealous predisposition to be tough on crime,<sup>16</sup> continually deports adoptees even where it has great discretion not to pursue deportations against non-citizen adoptees at all.<sup>17</sup> The consequences of the overarching U.S. attitude towards immigration have resulted in disproportionate and inhumane treatment of those who *should* have been made American citizens in the first place.

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10. Child Citizenship Act of 2000, Pub. L. No. 106–395, 114 Stat. 1631 (codified at 8 U.S.C. § 1431) [hereinafter Child Citizenship Act of 2000].

11. Victor C. Romero, *The Child Citizenship Act and the Family Reunification Act: Valuing the Citizen Child as Well as the Citizen Parent*, 55 FLA. L. REV. 489, 493 (2003).

12. See Child Citizenship Act of 2000, *supra* note 10, § 101(a), at 1631.

13. Gossett, *supra* note 1, at 39.

14. See generally Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 805–16 (2012) (discussing the process for initiating deportation and previous avenues available to immigration judges to prevent this based on their discretion).

15. Sang-Hun, *supra* note 3.

16. See Meneses, *supra* note 14, at 808–09. In 2010, 62.3% of non-citizens deported from the United States on the basis that they were “criminal aliens,” and their deportations were based on convictions related to narcotics activity, immigration violations, and traffic violations. *Id.*

17. See *id.* at 809–812.

The U.S. has a duty to ensure non-citizen adult adoptees are not deported because of a technicality in their legal citizenship status, which their legal guardians and adoptive country failed to grant them. Although the federal government can exercise great discretion in determining who is subject to deportation, it has still chosen to relentlessly pursue deportation orders against non-citizen adoptees like Adam Crapser and Phillip Clay.<sup>18</sup> Because Congress is not likely to amend the CCA to include adoptees who were over the age of eighteen at the time of its passage, the only solution is for Congress to amend its legislation regarding deportation of adult adoptees who are non-citizens through no fault of their own.

This Note addresses how the U.S. should rectify the harms it has perpetrated on non-citizen adoptees by amending the current deportation statutes to prevent their deportation. Part I addresses the history of adoption in the U.S. and related effects on immigration law. Part II highlights the stories of Adam Crapser and Philip Clay, who were adopted by American families who failed to naturalize them as minors, and who were subsequently deported after they sustained criminal records. Part III examines the policy goals behind deportation as a consequence of criminal convictions, as well as remedies instituted to prevent unwarranted deportation and why those remedies have failed non-citizen adoptees.

Finally, Part IV proposes that because it is unlikely there are any other remedies available to adoptees as discussed in Part III, Congress must amend the Immigration and Naturalization Act itself to expressly exempt adoptees without citizenship from being deported as a penalty incident to a criminal conviction as well as provide a pathway back for those who have already been deported. This Note concludes with the acknowledgement that adoptees who have already been deported are still suffering the unbearable effects of an unjust decision and have no current legal pathway back to the U.S. In spite of the discriminatory line Congress has drawn in granting automatic citizenship to only *some* adoptees, Congress must compensate for this failure by protecting those adoptees who are still vulnerable to deportation and bring adoptees who have already been deported back to the U.S.

#### I. A BRIEF HISTORY OF ADOPTION IN THE UNITED STATES

The gravity of the consequences of deportation to those adoptees who should be citizens, but were never granted citizenship status, is best understood in the context of the history of the U.S. and international

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18. See, e.g., Gossett, *supra* note 1, at 39 (noting Congress's expansion of categories of crimes that make non-citizens deportable); Meneses, *supra* note 14, at 815–16 (noting that DHS has broad discretion to, for example, ignore an immigration judge's bond determination and can also exercise discretion to ignore an immigration judge's determination that an individual *is* a citizen).

adoption. Children born abroad but adopted by American families are subject to U.S. immigration laws under the Immigration and Nationality Act (INA), which previously required that an adoptive family go through a costly naturalization process that could take as many as three years to complete.<sup>19</sup> Under these conditions, many adoptees, though they were brought here legally, failed to become U.S. citizens.<sup>20</sup>

*A. Holt International, the Rise of Proxy Adoptions, and Its Impact on Immigration Law*

International adoptions in the U.S. began as efforts to assist children who were refugees in war torn countries, first from countries in Europe after World War II, then expanding to other countries experiencing similar political or social unrest.<sup>21</sup> Following the Korean War, Congress passed the 1953 Refugee Relief Act, allowing for the adoption of four thousand children from Korea.<sup>22</sup> After Harry and Bertha Holt successfully lobbied Congress to grant them special dispensation to adopt eight children from South Korea,<sup>23</sup> Congress soon allowed for the unrestricted entry of Korean children adopted by American families.<sup>24</sup> Seizing on this achievement, the Holts began one of the most well-known international adoption agencies in the world: Holt International.<sup>25</sup> The Holts pioneered a method of adoption by “proxy”: American families would designate a proxy agent to act in their place, that agent would then travel to the country where the child was and represent the interests of the adoptive parents, and then bring the child back to America.<sup>26</sup> By 1961, the U.S. had altered the INA to allow for permanent international adoptions by Americans and not just as an effort to assist refugees.<sup>27</sup> Through Congressional recognition of the popularity of international adoptions, Holt International’s success gave rise to a staggering number of agencies specializing in international

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19. Gossett, *supra* note 1, at 35.

20. *Id.*

21. *Id.*

22. Refugee Relief Act of 1953, Pub. L. No. 203–335, 67 Stat. 400. Families were limited to adopting only two foreign-born children.

23. Act for the Relief of Certain Korean War Orphans, Priv. L. No. 84-475, 69 Stat. A161 (1955). Harry and Bertha Holt were inspired by seeing a video by World Vision that solicited monthly donations on behalf of Korean children orphaned during the Korean War. Harry Holt then went to Seoul to care for children who had been orphaned or abandoned as a result of the war. *The History of Holt International*, HOLT INT’L, <https://www.holtinternational.org/history> [perma.cc/LKP7-TVB7].

24. Gossett, *supra* note 1, at 35.

25. *Id.*

26. *Id.*

27. Act to Amend the Immigration and Nationality Act, Pub. L. No. 87–301, 75 Stat. 650, 650 (1961).

adoptions.<sup>28</sup> By 1981, there were fifty agencies all employing the proxy method.<sup>29</sup>

### *B. The Child Citizenship Act of 2000*

However, through negligence, oversight, or fraudulent practices, many international adoptees who believed they were U.S. citizens never attained citizenship.<sup>30</sup> Adopted children born abroad were not automatically granted U.S. citizenship: under former immigration law, adoptive families had to go through an *additional* process to naturalize their child through the Immigration and Naturalization Service (INS), which would lead to citizenship.<sup>31</sup> If a child's family failed to naturalize them, they could be simultaneously legally adopted under state law yet still not a citizen.<sup>32</sup> As a result, many adoptees never attained citizenship and were left vulnerable to deportation if they were later convicted of criminal charges.<sup>33</sup> Many adoptees were unaware of their citizenship status until they were actually subject to deportation proceedings, and were then deported even though the circumstances clearly demonstrated they were brought here legally, and it was not their own negligence that resulted in their lack of citizenship.<sup>34</sup>

In an effort to address this problem, Congress amended the INA and passed the CCA with broad bipartisan support.<sup>35</sup> The CCA affected two tiers of adoptees born abroad.<sup>36</sup> First, it addressed current and future adoptions by automatically granting U.S. citizenship to children born abroad once their adoptions were finalized and eliminating the need to go through the costly and time-consuming process of naturalization.<sup>37</sup> Second, it addressed adoptees who had already been adopted but had never been naturalized, but only for those adoptees who were *younger* than eighteen at the time the law was enacted.<sup>38</sup> The CCA's elimination of the lengthy naturalization process implicitly recognized that it was a

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28. Gossett, *supra* note 1, at 35.

29. *Id.*

30. *Id.*

31. Act to Amend the Immigration and Nationality Act, Pub. L. No. 87-301, 75 Stat. 650, 656 (1961).

32. *See generally* Romero, *supra* note 11, at 494 (describing the standard adoption process most adoptive parents had to undertake when adopting internationally).

33. *Id.* at 498.

34. Gossett, *supra* note 1, at 35.

35. Romero, *supra* note 11, at 492.

36. Child Citizenship Act of 2000, *supra* note 10, § 101, at 1631.

37. *See id.* (amending Immigration and Nationality Act § 320(a)); Gossett, *supra* note 1, at 38-39.

38. Child Citizenship Act of 2000, *supra* note 10, § 101(a), at 1631 (providing that the adoption had to be final, the child was living in the legal and physical custody of one American parent who was a U.S. citizen, and was admitted into the United States lawfully).

“laborious process” that was insulting to foreign born adopted children by treating them as lesser than children born in the U.S.<sup>39</sup>

One of the most significant benefits of the CCA in conferring automatic citizenship was that it eliminated the danger that eligible adoptees would be deported if they had ever been convicted of a criminal charge.<sup>40</sup> The flaw, however, was that it failed to grant the same right of automatic citizenship to adoptees who were *older* than eighteen at the time of enactment but had not been naturalized.<sup>41</sup> Considering the first wave of international adoptions began almost fifty years prior to the passage of the CCA, the decision to limit the CCA’s protections implicated perhaps as many as 18,000 adoptees.<sup>42</sup> Congress’s sweeping intolerance of crime resulted in a compromise that excluded adoptees older than eighteen.<sup>43</sup> To ensure the bill passed at all, proponents agreed to exclude those who were already over the age of eighteen to block adult adoptees who had already committed crimes from obtaining retroactive citizenship.<sup>44</sup>

### C. *The Adoption Citizenship Act of 2021*

To rectify this oversight, Congress introduced the Adoption Citizenship Act of 2021 (ACA) to grant automatic citizenship to all adoptees meeting a certain criteria, but the bill stalled and was never enacted.<sup>45</sup> The ACA contained more inclusive language than the CCA, allowing foreign born adoptees to obtain automatic citizenship if they: (1) had been adopted by a citizen before the age of eighteen; (2) were physically present in the custody of the citizen parent before eighteen; (3) had not obtained citizenship prior to the bill’s enactment; and (4) were lawfully residing in the U.S. on the date of the bill’s enactment.<sup>46</sup> The bill also stated that grounds for inadmissibility outlined in section 212(a) in the INA “shall not apply to any individual in subparagraph (A) who is seeking admission to the United States,” clearly exempting adoptees from removal even if they sustained any of the criminal convictions referenced in that section.<sup>47</sup>

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39. See *Child Citizenship Act of 2000: Hearing on H.R. 2883 Before the House Comm. on the Judiciary, Immigration and Claims Subcommittee*, 106th Cong., 146 CONG. REC. H7774, H7776 (2000) [hereinafter *CCA Hearing*].

40. Kathleen Ja Sook Bergquist, *Right to Define Family: Equality Under Immigration Law for U.S. Inter-Country Adoptees*, 22 GEO. IMMIGR. L.J. 1, 5–6 (2007).

41. Gossett, *supra* note 1, at 39.

42. *Id.*

43. See generally *id.*

44. See *id.*

45. See Adoptee Citizenship Act of 2021, H.R. 1593, 117th Cong.; Adoptee Citizenship Act of 2021, S. 967, 117th Cong.

46. Adoptee Citizenship Act of 2021, S. 967, 117th Cong. § 2.

47. *Id.* (amending Immigration and Nationality Act § 320(b)(3)(B)).



Equally as important if not more so, the ACA also contained a provision that allowed deported adoptees to be granted automatic citizenship provided they could be lawfully admitted back into the U.S.<sup>48</sup> This required non-citizen adoptees who had been deported due to a criminal conviction to undergo a background check followed by a process to ensure that “action” was taken to resolve the issue of any criminal activity.<sup>49</sup> This provision provided a legislative foothold for non-citizen adoptees to acquire automatic citizenship even if they had previously been deported, acknowledging that deported adoptees deserved some recourse provided they could demonstrate efforts to rehabilitate themselves from past criminal activity. However, the ACA never made it out of the House or the Senate.<sup>50</sup> The language from the ACA was then incorporated into another bill, which was passed by the Senate only after removing all language granting automatic citizenship to adoptees who were *older* than eighteen at the time the CCA was passed.<sup>51</sup>

To date, no legislative efforts have been undertaken to address non-citizen adoptees who have already been deported due to their lack of citizenship and criminal record.<sup>52</sup> Some states, as recently as March of 2022, have urged both the President and Congress to pass legislation granting automatic citizenship to *all* adoptees.<sup>53</sup> However, no individual states have urged the federal government to initiate the return of deported adoptees to the U.S., nor have state representatives proposed any legislative solutions that would at least prevent the deportation of adoptees who are without citizenship. Without any meaningful congressional advocacy for adult adoptees who remain without citizenship, the future is uncertain for both adoptees residing in the U.S. as well as those who have already been deported back to the countries in which they were born.

## II. ADAM CRAPSER, PHILLIP CLAY, AND THE UNTOLD HUMAN COST OF DEPORTATION OF ADOPTEES

Deported adoptees exist in a state of limbo. Not only do they face uncertainty as to whether they will ever be able to return home or obtain U.S. citizenship, but they must also navigate a new life in a foreign country without the ability to speak the language and with no cultural competency or support from the country to which they have been deported. While *some* adoptees may be able to persevere against these considerable obstacles,

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48. *Id.* (amending Immigration and Nationality Act § 320(b)(2)).

49. *Id.* (amending Immigration and Nationality Act § 320(b)(3)(C)).

50. *Latest on Citizenship for Intercountry Adoptees*, ADOPTEE RTS. L. CTR. (Nov. 27, 2022), <https://adopteerightslaw.com/adoptee-citizenship-act-status/> [<https://perma.cc/P8TF-VTBH>].

51. *Id.*

52. *See id.*

53. *See, e.g.*, H.F. 4332, 92d Leg., Reg. Sess. (Minn. 2022).

many are paralyzed by simply trying to survive in a strange country while simultaneously processing shock, anger, sadness, and fear. Without the support of the country that effectively exported them in the first place, the cruel and unusual punishment of deporting adoptees to the countries in which they were born can have devastating results.

#### A. Adam Crapser

Adam Crapser's story is one that should never have happened. Shin Song Hyuk, his mother, abandoned him and his sister in South Korea where an American family adopted them from a Seoul orphanage.<sup>54</sup> He endured six years of unspeakable abuse at the hands of this family: they subjected him to recurrent whippings and forced him sit in a dark basement for hours.<sup>55</sup> After this family decided they no longer wanted Adam or his sister, they were cast into the foster system and subsequently separated.<sup>56</sup> Adam lived in multiple foster homes as well as a boys' home before an Oregon couple, Dolly and Thomas Crapser, eventually adopted him.<sup>57</sup>

The Crapsers had as many as ten other children in the house at a time and administered frequent and brutal corporal punishments.<sup>58</sup> Adam endured punishments from the Crapsers that included having his hands burned, being hit on the back of his head with a large wooden plank after he woke Dolly up from a nap, and being beaten so badly that his nose broke.<sup>59</sup> In addition to administering disciplinary abuse, Thomas often duct-taped the other children's mouths shut.<sup>60</sup>

When Adam was sixteen, the Crapsers kicked him out of their home. This led to the commission of Adam's first crime: breaking back into the Crapsers' home to retrieve the items brought with him from South Korea, including some little rubber shoes and a Korean bible.<sup>61</sup> After Adam was arrested, he pled guilty to a charge of burglary and served twenty-five months in prison.<sup>62</sup>

A string of other arrests ensued.<sup>63</sup> He was found guilty of unlawful firearm possession, multiple misdemeanors, assault, and also violated a protection order taken out by an ex-girlfriend with whom he shared a

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54. Jones, *supra* note 8.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

child.<sup>64</sup> Later on, he acknowledged that these were mistakes in his life he was not proud of and that he “learned a lot of lessons the hard way” but worked to ensure those lessons meant something.<sup>65</sup> Adam married, became a full-time parent, and worked diligently to secure employment.<sup>66</sup> He first ran into the issue of his lack of citizenship when it left him unable to hold a job for more than ninety days because he could not prove his legal status, leaving him to “pretty much . . . work under the table for most of [his] life.”<sup>67</sup> Neither set of his adoptive parents, nor the adoption agency who arranged his original placement, ever filed for his citizenship.<sup>68</sup> When he finally obtained his adoption paperwork from the Crapser family in 2012, he applied for a green card.<sup>69</sup> This application process then triggered a DHS background investigation, which led to the discovery of Adam’s previous convictions that served as the grounds for his deportation.<sup>70</sup> In Adam’s own words, he had already “done [his] time and probation and followed the rules”<sup>71</sup> yet the DHS still pursued proceedings against him. A spokesperson for Immigration and Customs Enforcement (ICE) said the department was “not aware of Mr. Crapser’s childhood history” when it decided to pursue his case, but that it would be taken into consideration.<sup>72</sup>

Adam’s story gained national recognition and the support of two U.S. senators, including Jeff Merkley of Oregon who stated what was already glaringly apparent when he told the Associated Press that it was “not [Adam’s] responsibility to fill out that immigration paperwork.”<sup>73</sup> Two years after the DHS began the initial investigation into Adam’s criminal convictions, his case finally came before an immigration court in Oregon.<sup>74</sup> Adam gave a moving statement in court, taking full responsibility for his criminal past, pleaded with the judge to take all of his circumstances into account, saying all he wanted was to “be the best American [he could] be.”<sup>75</sup> If the government was able to demonstrate his convictions made him for eligible for deportation, his attorney planned to

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64. *Id.*

65. *Id.*

66. *Id.*

67. Liam Stack & Christine Hauser, *A South Korean Man Adopted by Americans Prepares for Deportation*, N.Y. TIMES (Nov. 1, 2016), <https://www.nytimes.com/2016/11/02/us/adam-crapser-deportation-south-korea.html> [<https://perma.cc/QJ37-QERD>].

68. *Id.*

69. *Id.*

70. *Id.*

71. Jones, *supra* note 8.

72. *Id.*

73. Bryan Denson, *Deportation Hearing Begins for Adopted Man Whose Parents Didn't Seek His Citizenship*, OREGONIAN (Apr. 2, 2015), [https://www.oregonlive.com/clark-county/2015/04/deportation\\_hearing\\_begins\\_ver.html](https://www.oregonlive.com/clark-county/2015/04/deportation_hearing_begins_ver.html) [<https://perma.cc/L44C-39BU>].

74. *Id.*

75. *Id.*

argue that Adam should be granted relief through one of three mechanisms: (1) asylum, (2) obtaining a green card through his wife who was a naturalized citizen, or (3) obtaining a visa by showing he was a criminal victim of the adoptive parents who abused him.<sup>76</sup>

Still, Adam was deported back to South Korea when he was forty-one, after having lived in the United States for thirty-eight years, a decision that Adam likened to being sentenced “to death for crimes [he had] already done hard time for.”<sup>77</sup> Although ICE had discretion regarding whether to pursue his case in the first place and said it would consider the circumstances of his upbringing, nothing indicated that ICE considered that he should have been granted citizenship in the first place, that he “didn’t ask to be sent to the United States,” or that he did not “ask to be a culturalized American.”<sup>78</sup>

The U.S. immigration mechanism failed Adam in two respects, producing unconscionable results. First, ICE should have immediately eliminated deportation as a consequence for his criminal past because, as Senator Merkley articulated, his failure to attain citizenship was not his responsibility.<sup>79</sup> The very existence of the CCA itself is a clear governmental admission that granting automatic citizenship is the only remedy when the parents of international adoptees have failed to secure citizenship for their children.

Second, the circumstances surrounding Adam’s childhood warranted leniency in the exercise of ICE’s discretion. Adam survived unimaginable abuse from *two* adoptive families and the first crime he was charged with was in relation to retrieving the only items he had of his Korean heritage. Adam had also shown that he was endeavoring to not let his past criminal record define him and to live a meaningful life, having learned from his past mistakes. Indeed, Adam’s story is no different from many other public figures who suffered hardship, engaged in criminal behavior shaped by that hardship, but then worked hard to redeem themselves and be productive members of society. This is the kind of growth we celebrate and often reward, yet Adam had not been afforded the same recognition and was instead irrevocably punished for his criminal past.

ICE purposefully targeted Adam because of the “severity of his criminal history,” even though in the intervening years he had undeniably rehabilitated himself.<sup>80</sup> ICE could have exercised prosecutorial discretion

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76. *Id.*

77. Catherine E. Shoichet, *Americans Adopted Him; Now He’s Facing Deportation*, CNN (Nov. 7, 2016) <https://www.cnn.com/2016/11/04/us/adam-crapser-deportation/index.html> [<https://perma.cc/4UPN-K435>].

78. Sang-Hun, *supra* note 3.

79. Denson, *supra* note 73.

80. Shoichet, *supra* note 77.

in recognizing that it was merely a technical flaw in the adoption process that left Adam without citizenship, but the DHS and ICE instead chose to follow a blanket policy of removing non-citizens it deemed as threats to national security and public safety, which Adam was clearly not.<sup>81</sup>

Adam came to accept his fate in being sent back to South Korea and even heartbreakingly tried to recognize that some “good things” came out of the ordeal.<sup>82</sup> Because of the exposure his case received in both the U.S. and South Korea, his birthmother came forward, and he was able to connect with her and the rest of his known Korean family, giving him what many deported adoptees lack: some semblance of stability and resources to be able to start a life in a new country.<sup>83</sup> Despite what has been described as the “Kafkaesque”<sup>84</sup> nature of his life in the U.S., Adam kept an optimistic perspective: “I am a citizen of Korea so when I go back[,] I will already be a citizen of some country . . . I guess that’s where I belong.”<sup>85</sup>

*B. Only Allowed to Return Home in Death: Phillip Clay's Story*

While Adam was able to reconcile the inevitability of beginning a new life in South Korea, his story is far from the reality most adoptees, including Phillip Clay, face upon deportation: they are without resources, without any known family members, and lack any knowledge of the culture and language. Like Adam, Phillip was deported to South Korea after a string of criminal charges since he had not been naturalized upon adoption.<sup>86</sup> Born Kim Sang-pil, Phillip Clay had been found abandoned in Seoul, and grew up in an orphanage.<sup>87</sup> He was later adopted through Holt International when he was eight.<sup>88</sup> After his first placement with an American family failed, a family in Pennsylvania had adopted him.<sup>89</sup> For

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81. Memorandum from Jeh Charles Johnson, Secretary, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, R. Gil Kerlikowski, Leon Rodriguez & Alan D. Bersin 3 (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<https://perma.cc/CNX3-THB2>] [hereinafter DHS Memo].

82. Stack & Hauser, *supra* note 67.

83. *Id.*

84. “Kafkaesque” refers to the culmination of nightmarish events that led to Adam’s deportation. *Id.*

85. *Id.*; See also Kim Tong-Hyung, *South Korean court order agency over his mishandled adoption to US*, AP News (May 16, 2023), <https://apnews.com/article/south-korea-adoption-adam-crapser-lawsuit-3065e00fc9e7889e3cb4862700d88aef> [<https://perma.cc/G23Y-VW6H>] (describing Adam Crapser’s recent win in the first successful civil case in South Korea against the Holt Adoption Agency alleging fraudulent paperwork as well as screening failures).

86. Chris Fuchs, *Deported Adoptee's Death Heightens Calls for Citizenship Bill*, NBC NEWS (June 2, 2017), <https://www.nbcnews.com/news/asian-america/deported-adoptee-s-death-heightens-calls-citizenship-bill-n767341> [<https://perma.cc/JPY3-VK9S>].

87. *Id.*

88. *Id.*

89. *Id.*

unknown reasons, his new parents never initiated the naturalization process and unbeknownst to him, he never became a U.S. citizen.<sup>90</sup> In 2001, Phillip began to accumulate a lengthy criminal record of arrests for minor shoplifting charges and was also well-known to local law enforcement as a bicycle thief.<sup>91</sup> The only time he had been convicted of a “violent” crime was for kicking a police officer in the knee.<sup>92</sup> Phillip also struggled with mental health issues and battled alcohol and substance abuse; in 2010, he had been hospitalized for a week due to the severity of his depression.<sup>93</sup>

In 2012, the DHS became aware of Phillip’s criminal charges and initiated deportation proceedings against him.<sup>94</sup> Although ICE acknowledged that Phillip had “entered the U.S. lawfully,”<sup>95</sup> it still justified its decision to pursue deportation based on his criminal history, which “included criminal convictions for robbery and multiple theft and drug-related offenses.”<sup>96</sup> After living in America for almost thirty years, his deportation was like a death sentence.

Unlike Adam, Phillip arrived in South Korea without resources or support.<sup>97</sup> He was initially homeless the first few months he was in South Korea, living in shelters and in mental health institutions, and struggled with alcoholism and drug abuse.<sup>98</sup> Eventually, Korean Adoption Services (KAS), a government-run organization that works with South Korea’s Ministry of Health and Welfare to support adoptees, provided him housing.<sup>99</sup> He stayed in KAS housing with other deported adoptees for a little over a year, but housing alone was insufficient to alleviate the trauma of adjusting to his new life in a country where he was a complete stranger and had no real support system.<sup>100</sup> As a result, Phillip’s battle with his mental health worsened; after being shuttled in and out of various mental health clinics, a South Korean hospital diagnosed Phillip with bipolar disorder in 2014.<sup>101</sup>

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90. *Id.*

91. *Id.*; Jeff Gamage, *Adopted from Korea as a Child, Deported as an Adult—Philly Man Takes His Life*, PHILA. INQUIRER (June 2, 2017), <https://www.inquirer.com/philly/news/pennsylvania/philadelphia/adopted-from-korea-as-a-child-deported-as-an-adult-philly-man-takes-his-life-20170602.html>.

92. Gamage, *supra* note 91.

93. *Id.*

94. Fuchs, *supra* note 86.

95. *Id.*

96. *Id.*

97. Sang-Hun, *supra* note 3.

98. Fuchs, *supra* note 86.

99. *Id.*

100. *See id.*

101. Sang-Hun, *supra* note 3.

Phillip's difficulties in adjusting to his new life persisted. While in KAS housing in 2014, he was arrested for assault and served two years in prison.<sup>102</sup> After his release, he stayed in a rehabilitation facility run by Holt International, the agency that had facilitated his adoption.<sup>103</sup> Both Holt and KAS attempted to assist Phillip by giving him a living allowance, connecting him with a psychiatrist, and providing basic necessities like food and clothing.<sup>104</sup> But without any sincere investment in helping Phillip adjust to his new reality, these efforts were largely fruitless.<sup>105</sup> His inability to understand the Korean cultural practices and language only served to exacerbate his already fragile state, especially due to the cultural stigma in South Korea associated with mental illness.<sup>106</sup> Without the resources and assistance to navigate these two crucial aspects of living and thriving in a new country, all other efforts to help him were destined to fail.

In 2017, Phillip attempted to end his life by drinking paint thinner and was subsequently hospitalized.<sup>107</sup> His KAS caseworker reported that Phillip said he wanted to die because "there was nothing he could do in South Korea."<sup>108</sup> Even though his advocates sought additional medical assistance for Phillip, mental health clinics did not want him as a patient because they had no English speaking staff,<sup>109</sup> demonstrating again how the failure to ensure that he was proficient in the Korean language kept him from receiving life-saving care. The limited assistance he continued to receive from KAS and Holt was not enough.

In May of 2017, Phillip committed suicide by jumping from a fourteen-story apartment building.<sup>110</sup> He was only forty-two years old.<sup>111</sup> In death, he was finally able to gain legal entry to the United States.<sup>112</sup> Phillip's suicide spurred adoption advocates to lobby for Congress to create a pathway back to the United States for deported adoptees.<sup>113</sup> However, it did not result in any changes to current U.S. immigration law and these efforts stalled while Adam Crapser was embattled in his own fight to stay in America.<sup>114</sup>

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102. Fuchs, *supra* note 86.

103. *Id.*

104. *Id.*

105. *Id.*

106. Sang-Hun, *supra* note 3.

107. *Id.*

108. *Id.*

109. *Id.*

110. Jason Nark, *In Death, Phillip Clay Finally Returns to U.S. Legally*, PHILA. INQUIRER (July 19, 2017), <https://www.inquirer.com/philly/news/in-death-philip-clay-finally-enters-the-u-s-legally-20170719.html#loaded> [<https://perma.cc/H74K-V287>].

111. *Id.*

112. *Id.*

113. Sang-Hun, *supra* note 3.

114. *Id.*

Phillip's story is illustrative of a larger problem that applies to most deported adoptees. First, the U.S. does not have a policy to communicate that the deportee is an adoptee.<sup>115</sup> In South Korea, at least six cases exist where deported adoptees from the United States went unreported to South Korea.<sup>116</sup> As a result, adoptees are *still* undocumented once they are deported to their country of birth.<sup>117</sup> Second, deported adoptees are generally without any resources or government-initiated support once they return to their countries of origin.<sup>118</sup> Like Adam and Phillip, they almost always have no language skills and have very little, if any, practical knowledge of the culture or social norms that are necessary to navigate life in a new country. One adoptee, Monte Haines, who was also deported from the United States to South Korea recalled that “[a]ll [he] had was \$20 on [him]” when he landed and had no idea where he was.<sup>119</sup> He has been struggling to survive ever since because he lacks the support to integrate as a Korean citizen in any meaningful way.<sup>120</sup>

Adoptees deported to their countries of origin are likely to experience depression, anxiety, and to commit crimes due to lack of resources and official governmental assistance from the country where they now live.<sup>121</sup> Like Phillip and Monte, many deportees have nowhere to go and are often homeless for a significant period of time, eventually turning to criminal activity out of desperation.<sup>122</sup> One deportee served a prison term for attempting to rob a bank with a toy gun, while another, like Phillip, had mental health problems and had been indicted twice in South Korea on assault charges.<sup>123</sup>

These stories demonstrate how the United States continues to fail adult adoptees to tragic and devastating consequences. By implicitly laying responsibility for the lack of citizenship at the feet of adoptees who, through no fault of their own, had not been naturalized even though they entered the United States legally, the U.S. government ignores that adoptees are themselves victims of an entire structure that refuses to protect them. As if deporting non-citizen adoptees who have criminal conviction was not in itself a complete miscarriage of justice, the U.S. further fails adoptees like Adam, Phillip, and Monte by not putting systems

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115. *Id.*

116. *Id.*

117. *Id.*

118. *See, e.g.,* Fuchs, *supra* note 86.

119. Sang-Hun, *supra* note 3.

120. *See id.*

121. *See generally id.*

122. *Id.*

123. *Id.*



in place that can help adoptees gain the language and cultural competency needed to have a chance at a successful life.

### III. WHY POLICY CONTINUES TO FAIL ADOPTEES WHO ARE RIGHTFULLY U.S. CITIZENS

The stories of Adam Crapser and Phillip Clay not only illustrate where discretion and leniency could have resulted in preventing their deportations, but also that deportation should never have been a consequence to their criminal convictions in the first place. If Adam and Phillip had been properly naturalized by their adoptive families yet still accrued the same criminal records, they never would have been subjected to deportation. Through the development of U.S. immigration law, different mechanisms have been employed to ameliorate the harsh effects of deportation as a consequence to criminal convictions, implying that lawmakers intended for judges to be able to exercise discretion. However, these approaches have been eliminated over time because of a persistent congressional disposition to be tough on crime in the interests of national security.<sup>124</sup> Because the purpose of several legislative amendments to the INA has been to prevent non-citizens who have committed criminal acts from remaining in the United States, it is consistently interpreted in ways that broadens the scope of what crimes are grounds for deportation for non-citizens, including non-citizen adoptees.<sup>125</sup>

#### A. Who's Who in Immigration Law

In 2002, the DHS was created and assumed the functions of the INS.<sup>126</sup> However, due to the restructuring under the newly formed DHS, the INS was absorbed along with many other federal agencies.<sup>127</sup> In its place, the DHS created the Bureau of Immigration and Customs

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124. See, e.g., Meneses, *supra* note 14, at 808–09. In 2010, 62.3% of non-citizens were deported from the United States on the basis that they were “criminal aliens,” and their deportations were based on convictions related to narcotics activity, immigration violations, and traffic violations. *Id.*

125. See generally Immigration Act of 1891, Pub. L. No. 51–556, 26 Stat. 1084 (revising the 1882 Immigration Act); Narcotic Drug Act of 1922, Pub. L. No. 67–227, 42 Stat. 596 (making certain narcotics violations a trigger for deportation); United States *ex rel.* Grimaldi v. Ebey, 12 F.2d 922, 923 (7th Cir. 1926) (noting that the Narcotic Drug Act was an enactment to address “aliens” engaging in this act rather than general offenders committing a particular act); Luu-Le v. INS, 224 F.3d 911, 916 (9th Cir. 2000) (broadly construing violations “relat[ed] to” controlled substances); Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546; Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (2006) (defining “aggravated felony” in various sub-sections but not actually classifying what crimes fall under this category).

126. Homeland Security Act of 2002, 6 U.S.C. § 251.

127. *Id.* § 291; *Honoring the History of ICE*, DEP’T HOMELAND SEC. (Mar. 22, 2023), <https://www.ice.gov/features/history> [<https://perma.cc/3NYJ-R87U>].

Enforcement (ICE).<sup>128</sup> The DHS employs trial attorneys through ICE who then prosecute non-citizens before the immigration court as well as the Board of Immigration Appeals (BIA).<sup>129</sup>

*B. Immigration's Exclusionary Origins: The Immigration and Nationality Act*

A conviction on its own does not necessarily render a non-citizen deportable. Even if a non-citizen has been convicted of a criminal charge, an immigration court must still determine whether that conviction falls into one of the categories that serve as grounds for deportation. Congress enacted immigration laws with the purpose of excluding groups of people, but eventually turned to the issue of deporting non-citizens who had been convicted of criminal activity while in the United States.<sup>130</sup> Because naturalization required a showing of "good moral character," Congress reasoned that a non-citizen who had committed a criminal act could not possibly meet this standard and would never be able to attain citizenship.<sup>131</sup> The 1917 Immigration Act expressly permitted for the deportation of any non-citizen "who [was] 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."<sup>132</sup> Courts acknowledged early on that "moral turpitude" was vague and that "[i]ts meaning [depended] to some extent [sic] upon the state of public morals."<sup>133</sup>

Even if criminal activity results in a conviction, an immigration court must still determine whether that conviction falls into one of the categories serving as grounds for deportation.<sup>134</sup> In analyzing whether a crime involving moral turpitude (CIMT) has been committed that would render a non-citizen eligible for deportation, courts have looked to the inherent nature of the offense by examining the text of the relevant criminal statute

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128. See *Honoring the History of ICE*, *supra* note 127.

129. Meneses, *supra* note 14, at 816.

130. See, e.g., Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58, 59 (banning Chinese laborers from immigrating to the United States for ten years and denying citizenship to foreign-born Chinese individuals); Johnson-Reed Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (preventing immigration from Asian countries and setting quotas on immigrants from the Eastern Hemisphere).

131. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5251, 102 Stat. 4181, 4309 (containing several provisions dealing with immigration).

132. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (increasing entry restrictions for foreigners immigrating to the United States, prohibiting immigration for specific countries in Asia, implementation of a required literacy test, streamlining deportation procedures).

133. *United States v. Uhl*, 203 F. 152, 154 (S.D.N.Y. 1913).

134. See generally 8 U.S.C. § 1227(a)(2)(A) (articulating various categories crimes that render a non-citizen deportable, but falls short of explicitly stating what crimes fall into these categories).

rather than the circumstances surrounding the defendant's conduct.<sup>135</sup> Amendments to the INA have still not provided a specific definition of CIMTs, but courts have interpreted them generally as “[acts] of baseness, vileness, or depravity,”<sup>136</sup> broadly construing crimes ranging from production of fraudulent identification to prostitution as CIMTs.<sup>137</sup>

Amendments to the INA have also resulted in creating additional categories of crimes that render non-citizens deportable, including narcotics convictions and aggravated felonies.<sup>138</sup> As these amendments were intended to increase homeland security by removing non-citizens engaged in criminal activity, they necessarily had the effect of broadening the scope of what crimes are considered CIMTs and aggravated felonies, resulting in overlap between the two categories.<sup>139</sup> Adam and Phillip were eligible for deportation as non-citizens under the INA because they committed crimes that qualified as CIMTs and aggravated felonies.<sup>140</sup>

Non-citizen adoptees are not protected under the CCA and are open to deportation if they are convicted of deportable offenses that can be construed as CIMTs, aggravated felonies, and narcotics offenses.<sup>141</sup> If the DHS chooses to pursue deportation proceedings based on these convictions, non-citizen adoptees are almost certain to be deported because immigration judges lack the authority to exercise discretion to prevent it.<sup>142</sup> In 2010, the DHS Office of Immigration Statistics (OIS) estimated that 169,000 convicted non-citizens were deported that year.<sup>143</sup>

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135. Fajardo v. U.S. Att’y Gen., 659 F.3d 1303, 1305 (11th Cir. 2011).

136. Gelin v. U.S. Att’y Gen., 837 F.3d 1236, 1240 (11th Cir. 2016) (quoting Cano v. U.S. Att’y Gen., 709 F.3d 1052, 1053 (11th Cir. 2013)).

137. United States v. Hernandez-Montealegre, 445 F. Supp. 2d 646, 657 (E.D. Va. 2006).

138. 8 U.S.C. §§ 1227(a)(2)(B), 1227(a)(2)(A)(iii).

139. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214; 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)).

140. See Section 1227(a)(2)(A) of the INA encompasses multiple categories of crimes, all which applied to both Adam and Phillip: CIMTs, multiple criminal convictions, and aggravated felonies. 8 U.S.C. § 1227(a)(2)(A).

141. See Meneses, *supra* note 14, at 805 (noting that immigration reforms passed by Congress in the 1990s expanded the kind of “criminal” conduct for which any non-citizen, including non-citizen adoptees, could be deported).

142. See *generally id.* Meneses discusses how immigration judges have been stripped of their discretion to be able to prevent deportations in part because of increasing congressional action that expanded the kind of criminal activity non-citizens could be deported for while simultaneously eliminating judicial discretion. *Id.* at 822–24. Meneses further elaborates that the DHS also has the ability to overrule an immigration judge’s recommendations, specifically with respect to bond recommendations, as well as even if that judge finds that the individual facing deportation is a citizen. *Id.*

143. OFFICE OF IMMIGR. STAT., DEP’T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2010 4 (2011), [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2010.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2010.pdf) [<https://perma.cc/5H4W-S7LV>].

And between 1997 and 2007, 72% of the people deported for criminal offenses were deported for committing non-violent crimes.<sup>144</sup>

*C. Forms of Relief and Their Insufficiency for Non-Citizen Adoptees*

In theory, several forms of relief are available to non-citizen adoptees facing deportation: (1) judicial recommendations against deportation, (2) expansion of the CCA, and (3) trusting in the judicial system. Each of these theories has proved ineffective because the federal government's approach to immigration inevitably results in the indiscriminate removal of adoptees who are non-citizens.

1. Judicial Recommendation Against Deportation: Why Discretion Fails

Although ICE may exercise discretion in determining which non-citizens it wants to initiate removal proceedings against,<sup>145</sup> once these removal proceedings have been initiated, immigration judges are without recourse to bring them to a halt because successive legislative efforts have eliminated any discretion immigration courts once held.<sup>146</sup>

Judicial Recommendation Against Deportation (JRAD) was expressly included in the Immigration and Nationality Act of 1917 as a pathway for immigration courts to exercise discretion when circumstances dictated that a non-citizen should not be deported.<sup>147</sup> While the INA codified broad grounds for deportation, the inclusion of the ability for judges to apply discretion indicated that Congress implicitly recognized a need for discretion to prevent deportation if the circumstances demanded leniency.<sup>148</sup> Almost thirty years later, the Immigration and Nationality Act of 1952 effectively eliminated JRAD relief for convictions based on narcotics offenses.<sup>149</sup> Building on the amendment, the Immigration Act of 1990 completely did away with any discretion immigration judges were previously able to exercise, leaving them unable to prevent any non-citizens from being subjected to deportation proceedings.<sup>150</sup> Consequently,

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144. HUM. RTS. WATCH, ESTIMATED NUMBER OF FAMILY MEMBERS SEPARATED BY DEPORTATION 3 (2009), [https://www.hrw.org/sites/default/files/related\\_material/forced\\_apart\\_charts\\_final.pdf](https://www.hrw.org/sites/default/files/related_material/forced_apart_charts_final.pdf) [<https://perma.cc/4QQJ-LND8>].

145. DHS Memo, *supra* note 81, at 2.

146. See Adam Collicelli, Note, *Affording Discretion to Immigration Judges: A Comparison of Removal Proceedings in the United States and Canada*, 32 B.C. INT'L & COMPAR. L. REV. 115, 117 (2009).

147. Immigration and Nationality Act of 1917, Pub. L. No. 64-301, 39 Stat. 874.

148. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 242(a)-(b), 66 Stat. 163, 208-10 (granting broad discretion to special inquiry officers who were tasked with determining whether a non-citizen would be deported, and that no decision of deportability would be valid unless it was based on "reasonable, substantial, and probative evidence").

149. See generally *id.*

150. See generally Immigration Act of 1990, Pub. L. No. 101-649, §§ 506, 545, 104 Stat. 4978.

once ICE decides to initiate deportation proceedings against a non-citizen for having been convicted of a criminal charge, deportation is certain. Non-citizens who are deported for having convictions that fall into one of the broad categories of deportable offenses under the INA are then barred from re-entry to the United States for the remainder of their lives.<sup>151</sup> Non-citizen adoptees who have known no other home than the U.S. are exiled from the only place they have known their whole lives and have no legal pathway back to the U.S. or to attain their rightful citizenship as legal adoptee immigrants.

While many would benefit from an amendment to the INA like JRAD, in cases where non-citizen adoptees are the subject of removal proceedings, such a solution assumes that judges would use their discretion in favor of staying the deportation. Even in Adam's case, where ICE officials said it would consider the circumstances of Adam's childhood and the trauma he endured as a mitigating factor that could prevent deportation, whether it actually did so is unclear, and Adam's circumstances certainly did not prevent its ultimate decision to deport him.<sup>152</sup> JRAD should be implemented again in immigration courts for a variety of reasons, but this alone still presents too much uncertainty for non-citizen adoptees who should have already been granted citizenship and never subjected to deportation.

Even where state courts have exercised some degree of discretion in sentencing juvenile non-citizen adoptees for criminal offenses, other state actors may still refuse to exercise any discretion they have to show leniency, and the INS still relentlessly pursues the merciless punishment of deportation. Joao Herbert was adopted from Brazil by a couple in Ohio when he was eight years old but never became a citizen.<sup>153</sup> When he was in high school, he was arrested and given probation for selling a single bag of marijuana.<sup>154</sup> Although the state judge likely exercised discretion in administering Herbert's sentence by only giving him probation, the INS still chose to pursue deportation proceedings under the 1996 amendments to the INA because his status rendered him a "resident alien."<sup>155</sup>

Joao spent two years challenging his deportation, detained for the duration of his appeal as mandated by the INA.<sup>156</sup> The Ohio Parole Board recommended clemency for Joao, but the Governor ultimately refused to exercise *his* discretion to do so, stating that Joao's case did not meet his

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151. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(ii).

152. See Stack & Hauser, *supra* note 67.

153. Ellis M. Johnston, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEO. L.J. 2593, 2593 (2001).

154. *Id.*

155. *Id.*

156. *Id.* at 2593–94; 8 U.S.C. § 1226(e) (2000).

“high standard for clemency” and that perhaps the “gravity of his actions” would inspire him to “work hard to rehabilitate himself.”<sup>157</sup> Joao’s story demonstrates that even where one actor might use discretion, another actor may refuse to do so even when the circumstances dictate that it is the only just course of action. Joao was only allowed a short visitation with his parents before being deported to Brazil where he had no knowledge of the language or culture and was tragically shot to death after his deportation.<sup>158</sup>

## 2. Why Congress Will Not Budge on the Expansion of the CCA

The CCA was an important step forward in international adoptions and immigration law, removing the cumbersome requirement of naturalization for internationally adopted children.<sup>159</sup> Its blanket coverage of extending retroactive automatic citizenship to adoptees who were under eighteen at the time of its passage also signaled that Congress understood the importance of granting citizenship to adoptees whose families had failed to secure it for them through the naturalization process.<sup>160</sup> While Congress should have extended this coverage to all adoptees, it refused to do so, leaving many adoptees, including those like Adam and Phillip, without the protection that citizenship provides against deportation. Given this seemingly curious oversight, the only reasonable solution is to expand the CCA’s coverage.

But repeated attempts to correct this have failed and Congress is unlikely to prioritize this kind of legislative correction to the INA in the future.<sup>161</sup> Congress stubbornly refuses to understand the nuances of the plight of international adoptees who are without citizenship and how their right to citizenship should be analyzed as a separate issue apart from any criminal record an adoptee might possess. International adoptees without citizenship represent a unique subset of the immigrant population because they were adopted by U.S. citizens who legally committed to being responsible for them. These children did not have the capacity or knowledge to advocate for their own citizenship at the time their parents or adoption agency failed to secure it for them. The U.S., as the “receiver” of these adoptions, then bears the responsibility of rectifying this mistake, regardless of whether a non-citizen adoptee has a criminal record. Although an expansion of the CCA to grant retroactive citizenship to all adoptees is warranted, it is unlikely to happen given that Congress is not

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157. Susan Levine, *Brazilian Loses Ohio Clemency Bid*, WASH. POST (Aug. 26, 2000), <https://www.washingtonpost.com/archive/politics/2000/08/26/brazilian-loses-ohio-clemency-bid/3b31fbd5-1bfa-4a1e-855d-b5fd2490e4d4/> [<https://perma.cc/3AQ6-NB2T>].

158. See Meneses, *supra* note 14, at 774–75, 821.

159. See Child Citizenship Act of 2000, *supra* note 10, § 101, at 1631.

160. See generally *CCA Hearing*, *supra* note 39.

161. See *Latest on Citizenship for Intercountry Adoptees*, *supra* note 50.

willing to depart from the purpose of their previous amendments to the INA granting the DHS broad authority to remove all non-citizens engaged in any kind of criminal activity.<sup>162</sup>

### 3. The Truth About Trusting in the Immigration Court System

While the return of JRAD and the expansion of the scope of retroactive citizenship are remedies that remain largely theoretical and the products of wishful thinking, the only practical resort open to non-citizen adoptees subject to deportation is to appeal their cases within the existing judicial system.

Deportation matters in EOIR immigration courts, including cases like Adam's or Phillip's, are time consuming. In Adam's case where the facts were complex, his attorney said that it could be eighteen months before the court came to a decision.<sup>163</sup> In deportation cases involving non-citizens, DHS attorneys bear the burden of proving an individual's state criminal convictions are U.S. immigration violations that render them deportable.<sup>164</sup> If the government attorneys succeed, the non-citizen then has the burden to show that they are eligible for certain kinds of relief.<sup>165</sup> Decisions made by immigration court judges can be appealed to the BIA, the highest administrative body for interpreting and applying immigration laws.<sup>166</sup> Only on rare occasions does the BIA hear oral arguments in cases on appeal; the majority of its decisions are made by conducting a "paper review" of cases.<sup>167</sup>

However, the BIA's own fact sheet provides that it "[h]as [b]een [u]nable to [e]ffectively and [e]fficiently [a]djudicate [i]ts [c]aseload in [y]ears [p]ast," and that even with an increase in the number of its Board members, it still has a staggering backlog of cases.<sup>168</sup> The BIA has

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162. See *Adoptees for Justice on the Failure of Congress to Grant Citizenship for All Adoptees*, ADOPTees FOR JUST. (Dec. 21, 2022), <https://www.adopteesforjustice.org/pressreleases/adoptees-for-justice-on-the-failure-of-congress-to-grant-citizenship-for-all-adoptees> [<https://perma.cc/K9KH-8Q3L>] (noting that the United States Senate failed to pass the Adoptee Citizenship Act at the end of 2022, which would have expanded automatic citizenship to all adoptees).

163. Denson, *supra* note 73.

164. *Id.* (quoting Adam Crapser's attorney, Lori Walls explaining that the DHS first bears the burden of proving the convictions at issue fall within one of the categories that would make them eligible for deportation).

165. *Id.* (explaining that if DHS satisfies the burden of showing the non-citizen is eligible for deportation, the burden then shifts to the non-citizen to show relief is applicable).

166. 8 C.F.R. § 1003.1(b)(2) (granting the Board of Immigration Appeals appellate jurisdiction over decisions of immigration judges in deportation cases).

167. *About the Office: Board of Immigration Appeals*, U.S. DEP'T JUST. (Sept. 14, 2021), <https://justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/5TKS-2YX5>].

168. UNITED STATES DEP'T OF JUSTICE, FACT SHEET—BOARD OF IMMIGRATION APPEALS: FINAL RULE 2, <https://www.justice.gov/sites/default/files/eoir/legacy/2002/08/29/BIARulefactsheet.pdf> [<https://perma.cc/U5L7-HJSZ>] [hereinafter FACT SHEET FINAL RULE].

articulated a series of reforms it believes will ensure efficiency while still allowing for thoughtful application of immigration laws. However, it clarifies that it will still afford an “[a]ppropriate [a]mount of [d]eference to [i]mmigration [j]udges’ [f]act-[f]indings” by applying the “clearly erroneous” standard, which does not allow the Board to overturn an immigration judge’s fact findings unless it was “so clearly wrong that [it] must be overturned.”<sup>169</sup> Even emergency requests to the BIA for a stay of deportation will only be considered if certain appeals before the BIA are already pending or if the BIA exercises its own discretion to grant a stay upon receiving a request in writing.<sup>170</sup>

Given the deferential standard of review towards immigration judges by the BIA, and that immigration judges themselves lack any meaningful ability to exercise discretion to prevent deportations, the BIA functions to rubber stamp deportation orders that have already been decided.<sup>171</sup> Even if the BIA is intended to be an entity that serves as a check on the decisions made by immigration judges, its own procedures do not allow for reversal unless immigration judges engage in clear misconduct.<sup>172</sup>

Outside the sphere of immigration courts and the BIA, the Supreme Court has seemingly called on Congress to reconsider immigration law in areas where criminal law intersects with immigration regulation, as with convictions that subject non-citizens to deportation.<sup>173</sup> Within the past decade, the Supreme Court decided both *Padilla v. Kentucky*<sup>174</sup> and *Judulang v. Holder*.<sup>175</sup> In *Padilla*, the Supreme Court held that the Sixth Amendment’s guarantee of effective assistance of counsel required advising a defendant of the deportation consequences of taking a guilty plea.<sup>176</sup> In *Judulang*, the appellant was a lawful permanent resident who had pled guilty to a deportable offense under the INA but had applied for discretionary relief.<sup>177</sup> After an immigration judge found him deportable having committed an aggravated felony, the BIA affirmed the deportation

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169. *Id.* at 3. There is no guidance on what constitutes a finding that was “so clearly wrong,” implying a certain amount of judiciary discretion. *Id.*

170. U.S. DEP’T OF JUST., FACT SHEET—BIA EMERGENCY STAY REQUESTS (2018), <https://www.justice.gov/eoir/page/file/1043831/download> [<https://perma.cc/4QMC-EE9R>].

171. See FACT SHEET FINAL RULE, *supra* note 168, at 3.

172. See *id.*

173. See generally Gray Proctor & Nancy King, *Post Padilla: Padilla’s Puzzles for Review in State and Federal Courts*, 23 FED. SENT’G REP. 239 (2011); Meneses, *supra* note 14, at 835–37 (exploring the possibility that cases like *Padilla v. Kentucky* are consequences that raise questions of improper deprivation of liberty). See also *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (articulating that deportation is “the most important part—of the penalty that may be imposed on non-citizen defendants who plead guilty to specified crimes”).

174. 559 U.S. 356.

175. 565 U.S. 42 (2011).

176. *Padilla*, 559 U.S. at 374.

177. *Judulang*, 565 U.S. at 51–52.



order on different but “comparable” grounds.<sup>178</sup> In holding that the BIA’s comparable grounds rule was “arbitrary and capricious,” the Court indicated that the application for discretionary relief was procedurally suspect.<sup>179</sup> Taken together, the holdings from both cases indicate that the Court desired to move away from unfettered expansion of deportability as a means of penalties for criminal convictions. But even the Supreme Court cannot mandate that Congress amend current immigration law, and the current Court is unlikely to signal to Congress that immigration law should be amended or influence legislation to that effect.<sup>180</sup>

#### IV. A PATHWAY HOME

JRAD, the unrealistic expansion of the CCA, and the decision-making authority left in the hands of the courts are all unsatisfactory approaches to alleviating non-citizen adoptees of the substantial burden of not having been granted citizenship. Lacking citizenship all but guarantees deportation when non-citizen adoptees are convicted of criminal charges and brings about tragic and completely avoidable consequences. International adoptees often know no other home but the United States and fall victim to our government’s bureaucracy, adoption agencies’ negligence, and their families’ inability to ensure their naturalization.

##### *A. Amending the INA... Again.*

Given these circumstances, Congress must once again amend the INA to expressly prohibit international adoptees without citizenship status from being deported, even if they have been convicted of charges that fall within categories of deportable offenses. Because adoptees arrived in this country legally under the coverage of a visa or green card, they would have been granted citizenship if they had been naturalized.<sup>181</sup> Congress has already implicitly recognized this by granting automatic citizenship to all international adoptees whose adoptions are finalized.<sup>182</sup> By removing families of the burden to follow further procedures to have their children naturalized, Congress has signaled that it understands that naturalization

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178. *Id.* at 52.

179. *Id.* at 55.

180. *See generally* United States v. Texas, 599 U.S. 670 (2023). The Supreme Court held that petitioner states Texas and Louisiana lacked standing to challenge the Executive branch’s enforcement decisions on whether or not to arrest non-citizens present in violation of immigration laws, but did not actually address immigration law itself. *Id.*

181. Gossett, *supra* note 1, at 35.

182. *See generally* CCA Hearing, *supra* note 39, at H7777 (debating the reasons why automatic citizenship could be granted to non-citizen adoptees, including that it was “insulting” to require international adoptees to apply for naturalization and further that U.S. citizenship was indeed their “birthright”).

is an antiquated and unnecessary hurdle for families to clear and one that has often led to children not attaining citizenship because it is an overly burdensome and expensive process.

Congress's unwillingness to extend the protections of the CCA to include all international adoptees is unconscionable. As Congress is likely unwilling to revisit its stance on granting retroactive citizenship to adult adoptees, Congress must, at a minimum, bar their deportation if they have accrued any criminal convictions that would make them eligible for deportation. The hearings concerning the cut-off age for the CCA show that legislators had qualms about non-citizen adults who have engaged in criminal activity and that attitude is likely to have endured.<sup>183</sup> The proposal of the Adoptee Citizenship Act of 2021 is proof of this; that more than two decades later, legislators were still concerned that adoptees like Adam Crapser and Phillip Clay would face the unjust fate of deportation without the protections of the CCA.<sup>184</sup> Congressman Adam Smith from Washington State and Congressman John Curtis from Utah introduced this bi-partisan legislation closing the loophole in the CCA. Congressman Adam Smith explicitly stated that this would "end this injustice and bring much needed certainty" to those adoptees who the CCA did not protect.<sup>185</sup> Congressman John Curtis also acknowledged that this bill was dedicated to "reunify[ing] many Utah families."<sup>186</sup> This legislation was widely endorsed by many other organizations, including the Adoptee Rights Campaign, the National Council for Adoption, the National Immigration Forum, as well as the National Asian Pacific Bar Association.<sup>187</sup> Aside from granting citizenship to all adoptees, regardless of age, this bill provided a way for deported adoptees to return to the U.S., albeit a vague one. As discussed above, however, this bill was not successful. Given the gap between the CCA and the introduction of the ACA, it is possible Congress may address this issue again, but it seems more likely than not that it is stalled for the foreseeable future. More education is needed to help legislators understand the unique hurdles adoptees face, especially in cases like that of Adam who suffered horrific abuse from his family, which also influenced his first crime in burglarizing his family's home to retrieve his only possessions that he brought to the United States.

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183. *See id.*; *see also* Gossett, *supra* note 1, at 39.

184. *See* Adoptee Citizenship Act of 2021, S. 967, 117th Cong.; *Reps. Smith and Curtis Introduce Adoptee Citizenship Act of 2021*, ADAM SMITH (Mar. 4, 2021), <https://adamsmith.house.gov/2021/3/reps-smith-and-curtis-introduce-adoptee-citizenship-act-of-2021> [<https://perma.cc/4WQN-4ZDQ>].

185. *Reps. Smith and Curtis Introduce Adoptee Citizenship Act of 2021*, *supra* note 184.

186. *Id.*

187. *Id.*

Although Congress must be persuaded further to grant retroactive automatic citizenship to those who should already have it, this will take time that many non-citizen adoptees cannot risk. To avoid drastic miscarriages of justice that could lead to fates like those of Adam, Phillip, and Joao, Congress must at *least* amend the INA to expressly provide that non-citizen international adoptees cannot be deported even if they are convicted of a deportable offense. Congress has already amended the INA many times as the U.S.'s policies on immigration and who is worthy of citizenship have changed.<sup>188</sup> For all intents and purposes, international adoptees *are* American citizens and deserve the same protections as if they had already been granted citizenship. Furthermore, the lack of retroactive citizenship for adult adoptees harms not only those non-citizen adoptees who already have a criminal record, but also hurts adoptees who could potentially be convicted in the future and have not been able to secure naturalization in the intervening years or who may still be unaware of their citizenship status.

*B. A Pathway Home, a Way Forward, a New Life.*

In addition to the aforementioned changes to the INA, Congress must also provide for a clear pathway for deported adoptees to return to the United States and obtain their rightful citizenship. The language of the failed ACA permitted deported adoptees to go through a process that would submit their behavior for review and seemingly allow for their return if they could “resolve the issue” that had subjected them to deportation.<sup>189</sup> In order to fulfill the implicit promise it made to adoptees by allowing their adoptions when they were first brought here legally, Congress must provide for a process by which deported adoptees may return home and begin new lives. Adam Crapser, who had already attempted to regain control of his life and was trying to be a good American before his deportation, deserves an opportunity to make the most of his life in the U.S., considering the horrific way the U.S. sanctioned ‘adoption machine’ contributed to the abuse and anguish of the first half of his life.

CONCLUSION

Through practices like proxy adoptions, as well as congressional action that has slowly allowed for more easily attainable citizenship, international adoptions have become quite common. But Congress

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188. See generally *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act> [<https://perma.cc/E83M-MGGL>]; 8 U.S.C. ch.12.

189. See Adoptee Citizenship Act of 2021, S. 967, 117th Cong.

continues to treat international adoptees as though they are inferior to American born children and refuses to recognize its own complicity in allowing for non-citizen adoptees to be treated as though they are not rightful citizens in a country where they have lived their whole lives.<sup>190</sup> They *are* Americans.

Considering that non-citizen international adoptees entered the United States lawfully, but it was their guardians who failed to naturalize them and make them citizens, resigning them to deportation if they are convicted of criminal charges would be unjust, inhumane, and barbaric as leaving adoptees to this fate could equate to death. Congress has shown it is not willing to grant *all* adoptees retroactive automatic citizenship,<sup>191</sup> but in the interim, it must do something to prevent adoptees who should be citizens from being deported from the only home they have ever known by amending its current immigration legislation to expressly provide that no adoptees can be deported. Congress can surely adhere to the purpose of protecting national security while also recognizing that the adoptee population is so significant that it deserves statutory protection from deportation regardless of whether naturalization has occurred. Additionally, Congress must also act to bring home adoptees who have already been deported. The federal government cannot specify how many non-citizen adoptees it has deported,<sup>192</sup> but even one is too many when countless adoptees were never properly made citizens under a process that legislators themselves have said is unnecessary, overly cumbersome, and insulting to the children who arrive here to become part of American families. Congress must end the second-class status of these legal immigrants, whose adoptions have been supported and encouraged by U.S. government policy for almost seventy years.

The impact of deportation on adoptees, who were first surrendered, abandoned, or otherwise given up in their countries of origin, then brought to the United States lawfully only to be denied citizenship because of the

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190. See *CCA Hearing, supra* note 39, at H7774, H7777. Congressman Smith commented that when an adoption takes place and the child is brought to the U.S. consistent with U.S. immigration law, that child should “automatically be considered a citizen.” Congressman Delahunt also stated that though no one condones criminal acts, but whatever adoptees have done, “they should be treated like any other American kid,” and that “[t]hey are our children, and we are responsible for them.” *Id.*

191. See *Adoptees for Justice on the Failure of Congress to Grant Citizenship for All Adoptees, supra* note 162.

192. See Gossett, *supra* note 1, at 39 (noting that the federal government does not track how many adoptees receive citizenship). See generally U.S. IMMIGR. & CUSTOMS ENFORCEMENT, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 23, <https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf> [<https://perma.cc/LG7D-BPNJ>] (discussing categorizations for alien removals which are reduced to, inter alia, “criminality,” whether the alien is a known gang member of terrorist, and “alien children”).

negligence of those who are responsible for them, demands a better approach than the one Congress has chosen. The cruelty in not only leaving a whole generation of adoptees open to deportation, but sending many adoptees back to countries they have no way to survive in, is irreparable and leaves a lasting stain on the United States as a nation that prides itself on being a “nation of immigrants.”<sup>193</sup>

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193. *See generally* JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* (1958) (discussing the history of immigration in the U.S., how each wave of immigration impacted the next, and calling for comprehensive immigration reform).