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Judulang v. Holder and the Future of 212(c) Relief

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ARTICLES

JUDULANG V. HOLDER AND THE FUTURE OF 212(c) RELIEF

PATRICK GLEN*

INTRODUCTION

On December 12, 2011, the Supreme Court issued a unanimous decision in Judulang v. Holder, the latest chapter in the strange afterlife of former section 212(c) of the Immigration and Nationality Act.1 Section 212(c), initially enacted in 1952, granted the Attorney General discretion to waive the inadmissibility of certain qualifying lawful permanent residents.2 Repealed in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act,3 it was given a second-life by the Supreme Court in its 2001 decision in INS v. St. Cyr.4 In that decision, the Court held that 212(c) relief remains available to qualifying residents notwithstanding its repeal, in circumstances where the alien pled guilty to an offense prior to the repeal and would have been eligible for 212(c) relief at the time of his or her plea.5 The decision in Judulang addressed a discrete question regarding the eligibility of aliens charged with deportability to seek a waiver under former section 212(c), a form of relief ostensibly limited to aliens charged with inadmissibility. The Board of Immigration Appeals had extended relief under section 212(c) to aliens charged with deportability, but only if the ground of deportation was comparable to a ground of inadmissibility. In Judulang, the Supreme Court held that the Board’s use of this “comparable grounds” analysis was “arbitrary and capricious” under the Administrative Procedure

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2. INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996).
5. Id. at 326.
Act. It thus remanded proceedings in order for the agency to create a new mechanism by which to determine the eligibility of deportable aliens for relief under former section 212(c).

Commentators were quick to latch onto the “arbitrary and capricious” language of the Court’s opinion and hail it as a signal that the judiciary would be especially vigilant in ensuring that the immigration system would meet the appropriate standards of due process and justice. The New York Times ran an editorial opining that Judulang highlights the “irrationality in deportation law.” “A stinging opinion by Justice Elena Kagan for a unanimous Supreme Court reinforced last month a message that lower courts have been sending for many years; the law applied in immigration cases too often fails to meet the standards of justice.”

The National Law Journal also ran an opinion piece, describing Judulang as an indication that the Supreme Court was willing to pay attention to arbitrary, irrational, or inconsistent agency decision-making affecting the ability of resident aliens to remain in the United States. On SCOTUSBlog, Dean Kevin Johnson of U.C. Davis law school also highlighted Judulang as a signal to the executive branch and its immigration authorities: “The U.S. government, and specifically the Board of Immigration Appeals, should pay heed to the growing number of cases in recent years in which the Supreme Court has rejected its positions in removal cases.”

The unanimity of commentator opinion should not obscure its simplistic assessment of the case and its failure to address the history in which Judulang must be situated. A fair assessment of Judulang would begin with the statute itself, and the Supreme Court’s consistent reference in Judulang to the fact that the text of 212(c) does not, and thus could never have, supported the extension of 212(c) relief into the deportation context. The problem that the Supreme Court was called on to resolve was thus a function of the Board’s decision to extend discretionary relief to a class of aliens that should never have been deemed to fall within the purview of 212(c). Whether the Board’s practice of determining which deportable aliens should be deemed eligible for 212(c) relief was correctly found to be arbitrary should not obscure this underlying fact—that the allegations of arbitrariness arose not out of a restrictive or narrow interpretation of the INA, but from an expansive interpretation that has, since 1952, granted relief to tens of thousands of aliens who, absent the Board’s extension of the statute, would have been deported. The narrative painted by the New York Times and Dean Johnson, among others, simply does not fit the history of 212(c), however well it might

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7. Id. at 490.
fit with false and biased conceptions of the Board as an institution antithetical to the interests of aliens.

Leaving these points aside, the purpose of the instant article is to place Judulang within the historical context of the relevant immigration laws, while also determining what ways forward are open to the Board in its newly charged mission to find a replacement for the comparable grounds analysis. Section I reviews the context of the 212(c) conundrum, the differentiation between aliens who are inadmissible to the United States and those who are deportable. This distinction is at the heart of and serves to frame the historical evolution of relief under former section 212(c). Section II turns to that evolving history, tracing 212(c) through four major epochs, beginning with its antecedent, the Seventh Proviso, the enactment of 212(c) in the Immigration and Nationality Act of 1952, the Second Circuit’s decision in Francis v. INS, and culminating in the repeal of 212(c) and the steps taken by the Board in the wake of 212(c)’s resuscitation in St. Cyr. Section III highlights the conflict in the courts of appeals regarding the proper method for determining the eligibility of deportable aliens for relief under section 212(c), which leads into Section IV’s deconstruction and analysis of the decision in Judulang. Finally, Section V attempts to ascertain how the Board should approach a deportable alien’s eligibility for 212(c) relief post-Judulang. Unfortunately, this final section cannot rely too much on the decision itself, as Judulang dodged the most important issues relating to the continuing eligibility of deportable aliens for relief under section 212(c), while falling into hopelessly intractable internal contradictions regarding the appropriate path forward. Whatever values may inher in unanimity, Justice Kagan’s opinion fails as a guidepost for agency action.

The history of 212(c) makes clear that the vast morass 212(c) relief has become since 1952 is due not to the agency’s too-quick desire to remove resident aliens from the United States using any means possible, but from its attempts to extend relief to classes of aliens not covered by the text of the statute itself. If the proverbial road to Hell is in fact paved with good intentions, the road to Judulang is similarly paved with the attempts of the Board and successive Attorneys General to safe-guard the ability of resident aliens to remain in the United States. This does not mean that the end result has not been a policy that is arbitrary or capricious, only that the agency should be given more credit for attempting to inject a humanitarian impulse into the text of the statute.

I. INADMISSIBILITY, DEPORTABILITY, AND REMOVABILITY

Non-citizens of the United States do not constitute a single, homogenous group that receives identical treatment or benefits under this country’s immigration laws. Rather, the immigration laws of the United States have ‘historically distinguished between aliens who have ‘entered’ the United
States and aliens still seeking to enter (whether or not they are physically on American soil). Immigration proceedings, as historically understood, thus comprised two distinct sets of proceedings depending on the position of the alien—exclusion or inadmissibility proceedings and deportation proceedings. As the Supreme Court explained in 1982, “[t]he deportation proceeding is the usual means of proceeding against an alien already physically present in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.”

These distinct proceedings differed in several important ways, from the mechanism of judicial review permitted following the conclusion of administrative proceedings, to the due process protections attendant upon the specific proceeding itself and the forms of relief an alien might be eligible to seek.

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act. This wide-ranging act eliminated the distinction between “exclusion” and “deportation” proceedings, and replaced them with a single unified proceeding termed a “removal proceeding.” Despite the elimination of these discrete forms of proceedings, the INA retained the distinction between being inadmissible and being deportable by retaining the separate statutory provisions providing for grounds of inadmissibility and deportability. There is significant overlap between these two statutory provisions. For instance, the conviction or commission of a crime involving moral turpitude can subject an alien to both inadmissibility and deportability. Aliens are both inadmissible and deportable on identical security-related grounds, for engaging in terrorist activities, for participating in Nazi-related persecution and genocide, and for committing severe violations of religious freedom. Alien-smuggling is both a ground of inadmissibility and deportability, as is making a false-claim of United States citizenship.

Yet there are also important differences between the two classes of
“removable” aliens. Some of these distinctions are related to systemic differences stemming from the fact that inadmissibility targets those who are generally not yet in the United States, whereas deportability targets those who are present in the United States. Thus, aliens who have been previously ordered removed or have accrued a period of unlawful presence in the United States are inadmissible, and aliens may be charged with inadmissibility on health-related grounds, i.e., that they have an infectious or dangerous disease. To the contrary, an alien may become deportable on account of the expiration or termination of his period of lawful residence in the United States, or be deportable because, at the time of his entry, he was inadmissible to the United States.

The most important difference in these grounds of removal for 212(c) relief is the inclusion of a ground of deportability for aliens convicted of an aggravated felony and the lack of such a specific ground in the context of inadmissibility. Although discrete classes of “aggravated felons,” as defined by the INA, might come within the purview of a specific ground of inadmissibility, there is no general aggravated felony ground of inadmissibility.

A final point of distinction between inadmissibility and deportability, which will be clarified and expanded upon in the following section relating to the history of 212(c), relates to relief from removal. When a waiver of a ground of removability is provided in the INA, it is tied specifically to the lodged charge of removal. Thus, whether an alien is inadmissible or deportable will affect what waivers of removal he might be eligible to pursue. For example, section 212(h) of the INA provides a waiver of inadmissibility to aliens charged with being inadmissible on certain criminal grounds, but not to aliens who are deportable on account of criminal convictions. Likewise, despite identical grounds of inadmissibility and deportability related to alien-smuggling, the INA provides distinct waivers depending on whether

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25. INA § 212(h), 8 U.S.C. § 1182(h) (2006); see Cabral v. Holder, 632 F.3d 886, 890-94 (5th Cir. 2011); Klementanovsky v. Gonzales, 501 F.3d 788, 791-92 (7th Cir. 2007).
the alien is inadmissible or deportable. 27 In short, pursuant to the general distinction between inadmissibility and deportability, the placement of section 212(c) in the statute pertaining to inadmissibility should give rise to a presumption that any relief available under that provision is limited to aliens charged with inadmissibility. The history of 212(c) is, of course, contrary to that assumption.

II. A Brief History of 212(c)

To fully understand Judulang, one must first understand the history of former section 212(c). This history spans nearly one hundred years, and can be broadly divided into four major epochs encompassing specific agency practices: 1) the Seventh Proviso of the Immigration Act of 1917; 2) the initial enactment of section 212(c) in the Immigration and Nationality Act of 1952; 3) the Second Circuit’s decision in Francis v. INS and its aftermath; and 4) post-repeal/post-St. Cyr. This is not a comprehensive history of all the various intricacies of agency application of 212(c), but seeks only to explain how the interpretation of 212(c) reached the form the Supreme Court found so objectionable in Judulang.

A. The Seventh Proviso of the Immigration Act of 1917

The genesis of what would become section 212(c) relief can be traced to the Seventh Proviso of the Immigration Act of 1917. 28 Section 3 of that Act listed those classes of aliens who “shall be excluded from admission into the United States.” 29 Notwithstanding the general exclusion grounds, the so-called Seventh Proviso granted the Secretary of Labor the discretion to admit certain otherwise excludable aliens in set circumstances: “[A]liens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe.” 30

The Senate justified the enactment of the Seventh Proviso in its report on the bill that would become the 1917 Act: “it seems only just and humane to invest the Secretary of Labor with authority to permit the readmission to the United States of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in peculiar or unusual hardship.” 31 Yet the immediate impetus behind the Seventh Proviso was not an abstract desire to grant the Secretary of Labor a blank check for the

exercise of discretion. Rather, “Congress intended the Seventh Proviso as a hardship measure for aliens who were temporarily out of the country when the Immigration Act of 1917 was passed and who, for reasons often technical in nature, were excludable upon their return.” Whatever limitations Congress may have had in mind in enacting the Seventh Proviso, Secretary of Labor Frances Perkins declined to apply the provision in a narrow fashion during her helm at the Department of Labor. Secretary Perkins used the “concept 'returning after a temporary absence' to apply to aliens who had not yet departed and to include in its scope illegal aliens who ‘have lived here a long time.’” Through this application, the Seventh Proviso was extended from the exclusion context to at least some sympathetic deportation cases.

In 1940, in the midst of a European war that had not yet directly involved the United States in hostilities, President Roosevelt transmitted his Reorganization Plan No. V to the Congress, which transferred the Immigration and Naturalization Service from the Department of Labor to the Department of Justice. This shift was justified by the President based on the exigencies of the moment:

[T]he startling sequence of international events which has occurred since [the submission of Reorganization Plan No. IV] has necessitated a review of the measures required for the Nation’s safety. This has revealed a pressing need for the transfer of the immigration and naturalization functions from the Department of Labor to the Department of Justice . . . . I am convinced . . . that under existing conditions the immigration and naturalization activities can best contribute to the national well-being only if they are closely integrated with the activities of the Department of Justice.

With this transfer of authority to the Justice Department, the discretionary authority contained in the Seventh Proviso passed from the Secretary of Labor to the Attorney General.

Under the authority of the Attorney General, the Seventh Proviso was confined to its terms, i.e., to aliens charged with excludability, except for certain distinct circumstances where it was extended to aliens charged with deportability. Relief under the Seventh Proviso was permitted nunc pro tunc, in circumstances where the alien’s offense was committed prior to his last entry and would have rendered him excludable if he had been stopped at the

33. Id.
36. See Reorganization Plan No. V of 1940, § 1; 54 Stat. at 231.
border, but he was readmitted and only subsequently charged with being subject to grounds of deportation.\footnote{37. See Matter of L, 1 I. & N. Dec. 1 (B.I.A., A.G. 1940).} To hold otherwise, then Attorney General Robert Jackson argued, would be irrational and would place the form of the proceedings and other technical considerations above reason.\footnote{38. Id. at 5-6.} The alien in Matter of L “first became deportable at the time of his last entry, and the only ground for deportation is one that might have been removed by discretionary action at that time. In such circumstances, I am of the opinion that the Attorney General may exercise a similar discretion in subsequent deportation proceedings” as “[s]uch action, nunc pro tunc, amounts to little more than a correction of a record of entry.”\footnote{39. Id. at 6.}

Although the operative factor in Matter of L seemed to be that the alien’s conviction pre-dated his last departure, entry, and the subsequent institution of deportation proceedings, in Matter of A the Board extended operation of the Seventh Proviso to a case where the alien was convicted of the relevant crime after his last entry.\footnote{40. Matter of A, 2 I. & N. Dec. 459 (B.I.A. 1946; A.G. 1947).} The Board likened this extension of the Seventh Proviso to the discretionary authority it exercised in the context of pre-examination, whereby aliens unlawfully present in the U.S. could be “pre-examined” for admission, depart the country, and then “reenter the United States formally as a legal admission.”\footnote{41. Ngai, supra note 32, at 100-101.} Utilizing this discretionary authority in deportation proceedings enabled the alien “to depart and, with the ground of exclusion removed in advance, to reenter legally,” but did not excuse the deportation ground itself, \textit{i.e.}, the alien had to actually depart.\footnote{42. Matter of A, 2 I. & N. Dec. at 460.} Thus, the Board concluded “that advance exercise of Seventh Proviso power is available to an alien deportable for a crime committed within 5 years of entry as well as to one deportable for a crime prior to entry.”\footnote{43. Id. at 462-63.}

Accordingly, by the eve of passage of the Immigration Act of 1952, the Seventh Proviso had, in application by both the Labor and Justice Departments, far outstripped the limited purposes for which Congress had initially enacted the provision.

\textbf{B. The Codification of 212(c) in the Immigration and Nationality Act of 1952}

In the debates running up to the enactment of the 1952 Act, the Seventh Proviso was specifically targeted for an overhaul; if it did manage to live into the Immigration and Nationality Act, it would be on terms narrower and
stricter than what had prevailed since its 1917 codification. The Senate Committee Report noted that a high percentage of those seeking relief under the Seventh Proviso were granted relief, and that the percentage of those granted relief had risen in the years between 1947 and consideration of the reforms that would become the 1952 Act. More problematic to Congress was the drift in application away from the literal terms of the Proviso. According to the report, “the proviso was intended to give discretionary power to the proper Government official to grant relief to aliens who were reentering the United States after temporary absence, who came in the front door, were inspected, lawfully admitted, established homes here, and remained for 7 years before they got into trouble.” Yet the Proviso had been applied regardless of the legality of entry, in cases where time after deportation was counted towards satisfying the 7 year domicile requirement, and in deportation cases. Calls to outright abolish the Seventh Proviso were noted, as were the perverse effects that application of the Proviso could lead to by permitting otherwise inadmissible aliens to obtain residency simply by initially evading the immigrations laws and, after accruing sufficient presence in the U.S., applying via the Proviso or pre-examination for lawful residency based on the length of their illegal presence in the United States. Rather than abolish this form of relief, however, the subcommittee considering the Act made the following recommendation: “that the proviso should be limited to aliens who have the status of lawful permanent residents who are returning to a lawful domicile of seven consecutive years after a temporary absence abroad. They must have proceeded abroad voluntarily and not under an order of deportation to be eligible for the relief. Furthermore... that the provision should not be applicable in the case of aliens who are excludable under the law as subversives.”

Thus was born section 212(c). As enacted, section 212(c) provided that “[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General” notwithstanding their ostensible inadmissibility under section 212(a) of the INA. The language of 212(c), as enacted, tracked closely the Senate recommendations and moved away from the Seventh Proviso in two important regards—relief would only be available to lawful permanent residents, and the time spent abroad could not be pursuant to an order of deportation.

44. See Mark J. DiFiore, Note, The Unforeseen Costs of Going to Trial: The Vitality of 212(c) Relief for Lawful Permanent Residents Convicted by Trial, 79 FORDHAM L. REV. 649, 660-61 (2010).
46. Id. at 382.
47. Id. at 382-83.
48. Id. at 383.
49. Id. at 384.
50. INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996).
Initially, the Board seemed inclined to confine itself to the narrow language of the statute. In Matter of T, the Board distinguished the new provision from its predecessor, noting that the “discretionary relief embodied in § 212(c) is no longer a discretion which may be used generally but is confined to the grounds of inadmissibility enumerated therein.” The logic of this early decision seemed to indicate that 212(c) was not applicable in deportation proceedings, as the lodged charge in those proceedings necessarily would not fall within the ambit of those grounds the statute explicitly made waivable by operation of 212(c). This limiting interpretation, if it was in fact that, was short-lived. Regardless of 212(c)’s clear shift away from the more open-ended grant of discretion under the Seventh Proviso, as well as the Senate’s clear disapproval of the drift in administrative adjudication under the prior regime, the Board again extended its interpretation of who was eligible for discretionary relief beyond the clear text of the statute.

In 1954, the Board opined that there was no necessary bar to the application of 212(c) in deportation proceedings, so long as that application was of the same approximate form and manner as the prior application of the Seventh Proviso. In a 1956 decision, the Board sanctioned the exercise of 212(c) discretion nunc pro tunc in the case of an alien who would have been inadmissible at his last entry, but was admitted and only subsequently placed into deportation proceedings. In so holding, the Board relied heavily upon Attorney General Jackson’s decision in Matter of L, interpreting the proper scope of relief under the Seventh Proviso. In Matter of Smith, the Board permitted an alien to pursue a 212(c) waiver in deportation proceedings, notwithstanding the fact that he had not departed and was thus not returning to the United States, because he was applying for adjustment of status: “An applicant for adjustment of status...stands in the same position as an applicant who seeks to enter the United States with an immigration visa for permanent residence.... Since this respondent...is subject to all of the exclusion provisions of section 212(a) [in conjunction with his application for adjustment of status], we find no valid reason for denying him the benefits of section 212(c) on the technical ground that he is not returning to the United States after a voluntary departure.”

Despite these extensions, however, the Board did generally require that, for a deportable alien to be eligible for 212(c) relief, there must be a departure and reentry between the conviction or commission of the offense and the institution of the deportation proceedings, even if the departure was only

52. Id. at 390-91.
55. Id. at 276.
brief. In *Matter of Arias-Uribe*, the Board explicitly held that a deportable alien, other than one seeking adjustment of status, could only apply for 212(c) relief if he was returning from abroad to resume residence in the United States, *i.e.*, only if the alien was convicted of the relevant offense prior to their departure and reentry. In short, an alien who was convicted of their deportable offense *after* their last entry and had not since departed could not seek relief under section 212(c).

C. Francis v. INS and BIA Acquiescence

From 1952 through 1976, the Board had, despite extending 212(c) relief into the deportation context, required, consistent with the language of the statute, a departure from the United States in order for a deportable alien to establish eligibility for the waiver. In *Francis v. INS*, an alien challenged this distinction as violating equal protection, and the Second Circuit agreed. Tracing the history of both the Seventh Proviso and 212(c), the Second Circuit noted that at least one Seventh Proviso case, *Matter of A*, had not required a departure from the United States in order to establish eligibility for relief, and that Francis would be eligible for a 212(c) waiver under the rationale of that decision.

Regardless of how the Seventh Proviso had been interpreted, the Court did note that under the new statutory regime of the INA, the Board had required some departure between the offense or conviction and the institution of deportation proceedings. Joining the Ninth Circuit, the Second Circuit held that the Board’s interpretation of the statute as requiring this departure was consistent with the actual text of 212(c). But the Court concluded that regardless of the propriety of the Board’s *statutory* interpretation, the distinction violated equal protection because there was no rational basis for distinguishing between deportable aliens who had departed after their convictions and those who had not. To the Court, “[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time.” Accordingly, despite its faithfulness to the statutory text, the Second Circuit concluded that the Board’s limiting interpretation could not pass

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59. *Id.* at 699-700.
60. *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).
61. *Id.* at 270. This is an incorrect reading of *Matter of A*, as that case did assume that the alien would have to depart and reapply for admission. See *Matter of A*, 2 I. & N. Dec. at 461-63.
63. *Id.* (citing Arias-Uribe v. INS, 499 F.2d 1198 (1972)).
64. *Id.* at 272-73.
65. *Id.* at 273.
constitutional muster.66

The Solicitor General declined to seek certiorari in Francis, and the Board and Immigration and Naturalization Service subsequently acquiesced in the Court’s holding. In Matter of Silva, the BIA stated: “We conclude that . . . a waiver of the ground of inadmissibility may be granted to a permanent resident alien in deportation proceedings regardless of whether he departs the United States following the act or acts which render him deportable. In light of the constitutional requirements of due process and equal protection of the law, it is our position that no distinction shall be made between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens.”67

The rationale of Francis untethered the application of 212(c) from the statutory text by effectively eliminating the explicit requirement that the alien must be returning from abroad to apply for the waiver. Despite this step, however, the Board did not institute a regime whereby all deportable aliens could seek 212(c) relief. Rather, it permitted the pursuit of 212(c) relief only where “a ground of deportation is also a ground of inadmissibility.”68 The subsequent jurisprudence of the Board in 212(c) cases focused overwhelmingly on how to determine the comparability of grounds of deportation and inadmissibility. In Matter of Salmon, decided shortly after Francis, the Board held that an alien charged with deportability on the basis of a conviction for a crime involving moral turpitude could pursue a 212(c) waiver, as this ground of deportability was comparable to the inadmissibility ground for being convicted of a crime involving moral turpitude, and the lack of total identity in language between the statutory provisions did not undercut this conclusion of comparability.69 In Matter of Wadud, however, where the alien was charged with deportability under a provision pertaining to aiding and abetting the procurement of a fraudulent immigrant visa, the Board held that there was no comparable inadmissibility ground, even though the offense for which the alien was convicted constituted a crime involving moral turpitude.70

After fifteen years of attempting to match deportability provisions with inadmissibility grounds, the Board issued a decision holding that 212(c) should be available to all deportable aliens, except for those aliens deportable on grounds related to the specific grounds of inadmissibility for which 212(c) is not available, i.e., those exclusion grounds that 212(c) cannot be invoked to waive.71 The Board justified this approach largely on the basis that the application and practice in 212(c) cases had already far outstripped the text of the statute, and that permitting 212(c) for all deportable aliens was at least as

66. Id.
logical as its past practice of limiting 212(c) relief to comparable grounds of deportation. On review by the Attorney General, however, this approach was disapproved. In light of the government’s failure to seek further review in Francis, the Attorney General did not revisit the Board’s decision in Matter of Silva and its acquiescence in the equal protection holding of the Second Circuit. He did disapprove of a blanket extension of 212(c) into the deportation context, as the equal protection holding of Francis required only that 212(c) be made available in deportation proceedings on the same terms as it would be available in exclusion proceedings. The comparable grounds analysis met this obligation, and, in light of the great distance interpretation had already come, there was no compelling reason to extend the scope of 212(c) even further past its plain language.

On the eve of its demise, the Board could thus succinctly state the rule regarding the availability of 212(c) in deportation proceedings: “The essential analysis is to determine whether the deportation ground under which the alien has been adjudged deportable has a statutory counterpart among the exclusion grounds waivable by section 212(c).”

D. Repeal, St. Cyr, and the Enduring Spectre of 212(c) Relief

In 1996, section 212(c) was repealed as part of the far-reaching reforms instituted by the Illegal Immigration Reform and Immigrant Responsibility Act. In its place, Congress provided for a new form of relief entitled “cancellation of removal for certain lawful permanent residents.” In order to establish eligibility for this form of relief, lawful permanent residents had to demonstrate admission as a resident for not less than five years, continuous residence in the United States after having been admitted in any status of not less than seven years, and the absence of any disqualifying aggravated felony convictions.

212(c) did not, however, go quietly into that good night, living on thanks to the closely divided decision of the Supreme Court in INS v. St. Cyr. In St. Cyr, the Supreme Court determined that IIRIRA was ambiguous regarding whether Congress intended the repeal of 212(c) to apply to all removal proceedings instituted after the 1997 effective date of the act. To interpret the statute as categorically foreclosing 212(c) relief to all aliens placed into removal proceedings after IIRIRA’s effective date would, in the Court’s
opinion, create an impermissibly retroactive effect on those aliens who pled guilty prior to 1996 in possible reliance on the continued availability of a waiver.\(^8^1\) In order to avoid this effect, the Court held that “212(c) relief remains available for aliens... whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their pleas under the law then in effect.”\(^8^2\)

In response to \textit{St. Cyr}, the Department of Justice promulgated regulations in 2004 to address the continuing availability of 212(c) relief to that class of alien covered by the Supreme Court’s decision.\(^8^3\) These regulations addressed several eligibility issues, including disqualifying certain aliens with aggravated felony convictions from eligibility for 212(c) relief.\(^8^4\) It also institutionalized, by regulation, the general Board practice of requiring a comparable inadmissibility ground for the exercise of 212(c) discretion in deportation proceedings. Subsection (f)(5) of the regulation provided that 212(c) relief should be denied where “[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.”\(^8^5\)

Post-\textit{St. Cyr} and following the promulgation of the new regulations, litigation focused largely on when a non-disqualifying aggravated felony conviction would have a statutory counterpart in the inadmissibility statute which, by its explicit terms, contained no specific category mandating the exclusion of aggravated felons. In two cases decided in quick succession in 2005, the Board gave a broad outline to the relevant inquiry: “whether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses.”\(^8^6\) In \textit{Matter of Blake}, the Board rejected the alien’s assertion that there was sufficient overlap between the charge of deportability, aggravated felony sexual abuse of a minor, and a ground of inadmissibility, as the charged ground of deportation was not substantially equivalent to the inadmissibility ground of “crime involving moral turpitude.”\(^8^7\) Likewise, in \textit{Matter of Brieva}, the Board found only incidental and insufficient overlap between the charged ground of deportability, aggravated felony crime of violence, and the “crime involving moral turpitude” ground of inadmissibility.\(^8^8\) These cases indicated that aliens charged with deportability as aggra-

\(^8^1\). \textit{Id.}
\(^8^2\). \textit{Id.} at 326.
\(^8^3\). \textit{See Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57, 826 (Sept. 28, 2004).}
\(^8^4\). \textit{See}, e.g., \textit{8 C.F.R. § 1212.3(f)(4).}
\(^8^5\). \textit{8 C.F.R. § 1212.3(f)(5).}
\(^8^7\). \textit{Id. at 728-29.}
vated felons would have a difficult road to travel in order to establish eligibility for 212(c) relief.

III. CONFLICT IN THE COURTS OF APPEALS

Following the Supreme Court’s holding in St. Cyr, 212(c) litigation in the courts of appeals tended to focus on whether the agency had correctly determined that a ground of deportability lacked a comparable ground of inadmissibility, although enterprising aliens still occasionally challenged the Board’s very use of the comparable grounds analysis in determining a deportable alien’s eligibility for relief.89 The courts may have occasionally disagreed with the Board’s finding that a ground of deportation lacked a comparable ground of inadmissibility, but they uniformly upheld the agency’s use of the comparable grounds analysis.90

This unanimity changed in 2007, when the alien ordered removed in Matter of Blake petitioned for review of the removal order in the Second Circuit. That court, relying on its prior precedent decision in Francis, focused the inquiry not on whether there were comparable grounds between the charge of deportation and the inadmissibility statute, but on how the specific criminal offense would be classified under the inadmissibility statute regardless of the lodged charge of deportation.91 Rejecting the comparable grounds analysis, the rule in the Second Circuit became: “If the offense that renders a lawful permanent resident deportable would render a similarly situated lawful permanent resident excludable, the deportable lawful permanent resident is eligible for a waiver of deportation” under section 212(c).92

Two years later, the Ninth Circuit indicated its own disagreement with the 212(c) status quo, albeit taking a much different road than the Second Circuit. In Abebe v. Mukasey, that Court held that the deportable alien was not eligible for a waiver under former section 212(c), but reached that conclusion only after overruling its prior case law which had followed the equal protection rationale of Francis.93 The Ninth Circuit determined that Congress could have rationally differentiated between excludable and deportable aliens in constructing the relief scheme under former section 212(c), and thus deportable aliens had no cognizable constitutional claim that would mandate their eligibility for such relief.94 In essence, the Abebe decision was based on the Court’s conclusion that the statute does not, and should not be read to,

89. See, e.g., De la Rosa v. U.S. Att’y Gen., 579 F.3d 1327, 1335-40 (11th Cir. 2009).
90. See, e.g., Gjonaj v. INS, 47 F.3d 824, 827 n.4 (6th Cir. 1995) (citing, inter alia, Rodriguez-Padron v. INS, 13 F.3d 1455, 1459-61 (11th Cir. 1994); Rodriguez v. INS, 9 F.3d 408, 412-13 (5th Cir. 1993); Leal-Rodriguez v. INS, 990 F.2d 939, 948-51 (7th Cir. 1993); Campos v. INS, 961 F.2d 309, 311-14 (1st Cir. 1992); Cabasug v. INS, 847 F.2d 1321, 1326-27 (9th Cir. 1988)).
91. Blake v. Carbone, 489 F.3d 88 (2d Cir. 2007).
92. Id. at 103-04.
93. Abebe v. Mukasey, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc), overruling Tapia-Acuna v. INS, 640 F.2d 223 (9th Cir. 1981).
94. Id. at 1205-07.
extend to deportable aliens.

Despite the development of this circuit split, in the years following *St. Cyr* the government was able to successfully keep 212(c) cases out of the Supreme Court. This success was premised on two arguments consistently made in opposing aliens’ petitions for certiorari: 1) because 212(c) had already been repealed, there was only a dwindling class of eligible aliens and thus no compelling or exceptional circumstances that would justify the Supreme Court’s discretionary exercise of certiorari jurisdiction, and 2) the Second Circuit was, in effect, the single outlier in an otherwise uniform interpretation of the statute.95 This string of good luck ended when the Supreme Court granted certiorari in *Judulang v. Holder*.96

IV. *Judulang v. Holder*: The Supreme Court Revisits 212(c)

Joel Judulang, a native and citizen of the Philippines, had entered the United States in 1974 and lived there continuously, as a lawful permanent resident, since that time. In 1988, he was a participant in a brawl that resulted in the death of an individual. As a result of this event, Judulang pled guilty to voluntary manslaughter, received a 6-year suspended sentence, and was released on parole. Subsequently, he also pled guilty to a theft offense. Following his second plea, the Department of Homeland Security instituted removal proceedings against him based on a charge of removability related to the 1988 voluntary manslaughter conviction; deportability as an alien convicted of an aggravated felony crime of violence.97

An immigration judge ordered Judulang removed based on the lodged charge, and the Board affirmed, holding that Judulang was ineligible for relief under former section 212(c) because the aggravated felony crime of violence ground of deportability was not comparable to any of the grounds of inadmissibility. The Ninth Circuit denied a subsequent petition for review, and Judulang filed a petition for certiorari with the Supreme Court. In his petition for certiorari, Judulang phrased the question presented for review as: “[w]hether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did not depart and reenter the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the INA.”98 The Supreme Court granted certiorari over the government’s opposition and, after briefing and

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argument, unanimously reversed the decision of the Ninth Circuit.

The issue framed for decision by the Court was whether the Board’s comparable grounds analysis for determining a deportable alien’s eligibility for 212(c) relief is arbitrary and capricious under the Administrative Procedure Act.99 In reviewing agency action and decisions under the APA, the Court “must assess, among other matters, ‘whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’”100 Review under the APA “involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons.”101 The Court was emphatic in its judgment of whether the Board’s decision could meet these reviewing standards: “The BIA has flunked [the APA] test here. By hinging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.”102

The Court declined to resolve a fundamental dispute in the arguments presented by Judulang and the government regarding “whether the BIA must make discretionary relief available to deportable and excludable aliens on identical terms.”103 According to the Court, this dispute was beside the point—“The BIA may well have legitimate reasons for limiting § 212(c)’s scope in deportation cases. But still, it must do so in some rational way.”104 This passage signaled the narrowness of the Court’s approach to the issue. It would delve no further into the 212(c) swamp than necessary in order to resolve the specific question it conceived as before it, whether the comparable grounds approach was consistent with the dictates of the APA.

Whether that approach was or was not consistent was made to turn, in the Court’s opinion, on whether the comparable grounds analysis was tied “to the purposes of the immigration laws or the appropriate operation of the immigration system.”105 This is where the agency’s approach ran upon the rough shoals of the APA. A comparison of the statutory grounds of deportability and inadmissibility did not, in the Court’s opinion, address the underlying issue of whether an alien, based on his conduct, should be offered the opportunity to apply for discretionary relief.106 In highlighting this point, the

99. Judulang, 132 S. Ct. at 483 (“The reviewing court shall—(2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accord with law” (citing 5 U.S.C. § 706(2)(A))).
102. Judulang, 132 S. Ct. at 484.
103. Id.
104. Id. at 485.
105. Id.
106. Id.
Court specifically referenced the background of Judulang’s case. Although the aggravated felony crime of violence ground of deportation may encompass conduct that does not constitute a crime involving moral turpitude for purposes of determining admissibility, this fact should not be determinative of an alien’s eligibility to seek discretionary relief when his specific conduct might constitute a crime involving moral turpitude.107 In this context, the Court’s concern was that the Board was painting with too broad a brush in declining to extend eligibility to deportable aliens. Yet conversely, the Court also expressed concern in the opposite direction, noting that a deportation ground that is more specific than a ground of inadmissibility is likewise irrelevant to the question of whether a specific alien should be permitted to pursue discretionary relief from removal.108 The Board’s narrow focus on comparability led it to err in both directions, while effectively ignoring the underlying facts and circumstances of the conduct that subjected the alien to deportability in the first place. Yet again, the Court’s concern was solely with the comparability analysis—“we do not say today that the BIA must give all deportable aliens meeting § 212(c)’s requirements the chance to apply for a waiver. The point is instead that the BIA cannot make that opportunity turn on the meaningless matching of statutory grounds.”109

Beyond the arbitrariness that might inhere in the comparability analysis, the Court also expressed concern over DHS’s role in lodging charges of deportability and how this factor compounds the appearance of arbitrariness in the 212(c) calculus. An alien’s conduct might expose him to deportability on several grounds, but DHS has the prosecutorial discretion to charge him with a single or multiple grounds, and the grounds actually charged might not have a comparable ground in the inadmissibility statute even if DHS could have lodged a charge of deportability that did have a comparable ground.110 Thus, an alien’s eligibility for 212(c) turned not only on whether a comparable ground of deportability existed, but on how he was initially charged by DHS.

These twin considerations led to the Court’s conclusion that the comparable grounds approach “make[s] the alien’s right to remain here dependent on circumstances so fortuitous and capricious” as to constitute arbitrary and capricious action under the APA.111 The agency’s approach “does not rest on any factors relevant to whether an alien [] should be deported. It instead distinguishes among aliens—decides who should be eligible for discretionary relief and who should not—solely by comparing the metes and bounds of diverse statutory categories into which an alien falls. The resulting Venn diagrams have no connection to the goals of the deportation process or the

107. Id. at 485-86.
108. Id. at 486 (citing Matter of Blake, 23 I. & N. Dec. 722, 727-28 (2005)).
110. Id.
111. Id. at 487 (quoting Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)).
rational operation of the immigration laws,” and are exactly the type of action meant to be overseen and corrected by the APA.\footnote{Judson, 132 S. Ct. at 487.}

In reaching this ultimate conclusion, the Court also systematically rejected the arguments put forward by the government in support of the comparable grounds approach. First, although the government argued that the Board’s existing approach was more faithful to the text of 212(c), the Court disagreed. Section 212(c) was not phrased in terms of waiving specific grounds of exclusion, but in permitting a waiver of excludability so long as the alien did not fall within the grounds of exclusion that categorically barred consideration for 212(c) relief.\footnote{Id.} As 212(c) does not address itself to the grounds of inadmissibility, it does not make sense to undertake an approach in the deportation context that focuses on whether a specific ground of deportability fits within a specific ground of inadmissibility. The Court could have ceased its analysis on this point, but proceeded to address whether 212(c) provides any authority for its extension into deportation cases:

More fundamentally, the comparable-grounds approach would not follow from § 212(c) even were the Government right about the section’s phrasing. That is because § 212(c) simply has nothing to do with deportation: The provision was not meant to interact with the statutory grounds for deportation, any more than those grounds were designed to interact with the provision. Rather, § 212(c) refers solely to exclusion decisions; its extension to deportation cases arose from the agency’s extra-textual view that some similar relief should be available in that context to avoid unreasonable distinctions. Accordingly, the text of § 212(c), whether or not phrased in terms of “waiving grounds of exclusion,” cannot support the BIA’s use of the comparable-grounds rule—or, for that matter, any other method for extending discretionary relief to deportation cases. We well understand the difficulties of operating in such a text-free zone; indeed, we appreciate the Government’s yearning for a textual anchor. But § 212(c), no matter how many times read or parsed, does not provide one.\footnote{Id. at 488 (internal citations omitted).}

And this was so even where Congress had amended 212(c) shortly before its repeal to expressly bar the extension of 212(c) relief to certain aliens deportable on aggravated felony grounds.\footnote{Id. at 488 n.11.}

The government also argued that the comparable grounds approach was firmly rooted in the history of agency adjudication of 212(c) cases, but this factor was deemed irrelevant as a threshold matter—long-standing practice is not any less arbitrary and capricious simply by dint of its heritage.\footnote{Id. at 488.} In any

\footnote{Id. at 487.}

\footnote{Id.}

\footnote{Id. at 488 (internal citations omitted).}

\footnote{Id. at 488 n.11.}

\footnote{Id. at 488.}
event, the Court found Board practice to be inconsistent over the course of 212(c)’s long history, and it had certainly not applied the comparable grounds approach uniformly over that period. For this reason, although somewhat unnecessarily considering its basic holding in the case, the Court also rejected Judulang’s argument that Board practice post-2005 was impermissibly retroactive, as the inconsistency of agency adjudications in the 212(c) context could not have given rise to any reasonable reliance interest regarding a specific approach to determining 212(c) eligibility.

Finally, the Court rejected any assertion that a cost-benefit analysis could save the comparable grounds approach. The possibility that alternatives would entail higher costs to the agency and government could not, standing alone, save an otherwise arbitrary and capricious policy. The Court also found the more general assertion wanting, as it was not clear that an approach that examined the underlying conduct or offense of the alien, such as the Second Circuit’s approach in *Blake v. Carbone*, would entail significantly higher costs. Beside that specific point, the Court further noted that the Board could try other alternatives as well, which might prove even less costly than either the *Blake* or comparable grounds approach. The only strictures on remand were that the policy adopted must be consistent with the decisions in *Judulang* and *St. Cyr*.

Regardless of how the Board elected to proceed going forward, the comparable grounds approach was declared dead: “We must reverse an agency policy when we cannot discern a reason for it. That is the trouble in this case. The BIA’s comparable-grounds rule is unmoored from the purposes and concerns of the immigration laws. It allows an irrelevant comparison between statutory provisions to govern a matter of the utmost importance—whether lawful resident aliens with longstanding ties to this country may stay here. And contrary to the Government’s protestations, it is not supported by text or practice or cost considerations. The BIA’s approach therefore cannot pass muster under ordinary principles of administrative law.”

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What does *Judulang* hold, and what does it mandate for how the agency proceeds in determining the circumstances under which a deportable alien may apply for 212(c) relief? The holding of *Judulang* is as simple as presented by the Court—the comparable grounds approach is arbitrary and capricious and cannot serve as the basis for determining a deportable alien’s eligibility for 212(c) relief. Any approach going forward must be consistent with *Judulang*, and so no assessment can rely on the matching of statutory

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117. *Id.* at 488-89.
118. *Id.* at 489 n.12.
119. *Id.* at 490.
120. *Id.*
121. *Id.*
grounds. This point is clear in the Court’s decision, and can easily be fit within a new approach.

Judulang also requires consistency with St. Cyr, which ostensibly means only that the Board cannot upset the settled expectations of individuals who would have been eligible for 212(c) relief prior to the repeal of that provision in 1996. But the import of this point runs into tension with the Court’s opinion and cannot so easily be applied going forward. First, which deportable aliens were eligible for 212(c) at the time of its repeal, and thus had settled expectations of receiving relief? Since the Board’s approach to determining the threshold eligibility question was overturned in Judulang, it must be left to the agency to address this threshold point of eligibility and determine which classes of deportable aliens did have a protectable reliance interest. Second, it is not clear which deportable aliens’ expectations must be protected. The Court consistently stated that it was not holding all deportable aliens must be eligible for 212(c) relief, and that the Board might have perfectly reasonable grounds for limiting the extension of 212(c) in the deportation context. The reference to St. Cyr thus gives the agency only the broad outlines of a future policy while leaving most of the important questions unanswered.

Although the Court did not dictate what policy the agency must adopt, giving it only the guideposts of Judulang and St. Cyr for reference, the opinion of the Court seemed to incline towards the approach taken in Blake v. Carbone. Justice Kagan’s opinion frequently notes that it is the underlying conduct that should be the focus of the inquiry, and whether that conduct might have subjected an alien to inadmissibility in the appropriate circumstances. The opinion even noted that the costs of a Blake-like approach would likely be no more than the existing costs of undertaking the comparable grounds analysis, and that agency expertise would be well-tuned to the necessities of shifting to an offense-focused inquiry. The conclusion that the Court does favor this approach is, of course, simply based on dicta and an extrapolation of importance from the opinion’s frequent favorable references to this approach. Nonetheless, the agency would do well to focus on those sections as a sign of what form an approach must take in order to meet the standards set by the Supreme Court.

Yet beyond its specific holding, the Court’s decision leaves much to be desired. The Supreme Court was under an obligation to “say what the law is,” not simply what it is not, and this point has even greater force when there are a dwindling number of 212(c) applications outstanding and where there is only a finite and shrinking class of aliens who could take advantage

122. See Judulang, 132 S. Ct. at 485, 486.
123. See id. at 485-86, 490.
124. Id. at 490.
of this form of relief. *Judulang* presented an opportunity to give concrete form to 212(c), and the question, at least as presented by the petitioner himself, was broader than what the Court actually decided. The narrowness of the holding ensures continuing uncertainty in the context of 212(c) eligibility, and may well perpetuate litigation on the issue well into the third decade of 212(c)’s statutory demise.

First, the threshold consideration of the Court does not comport with the necessary analysis. Justice Kagan focused the question of whether the comparable grounds approach is arbitrary and capricious on whether that policy adequately accounted for the purposes of the immigration laws, including an alien’s fitness to pursue discretionary relief and the desirability of his continuing residence in the United States. Yet the question of eligibility for discretionary relief is a statutory one that is unmoored, from an initial interpretive perspective, from amorphous questions regarding the desirability of a specific alien to obtain discretionary relief. Put another way, whether the Board’s interpretation of 212(c) is arbitrary or not depends on the text of the statute, not irrelevant concerns regarding an alien’s conduct or equities that otherwise do not fit within the question of whether he can establish statutory eligibility for relief. An alien who cannot demonstrate statutory eligibility is not eligible for relief simply because he might be in some abstract sense a good person.

The justification for the Court’s approach most likely lies with its consistent statement that 212(c) does not provide any basis for its extension to deportation cases, and thus, since the comparable grounds approach by necessity is not moored to the statute, the question of statutory eligibility is irrelevant. If the government’s approach to extending 212(c) has already far exceeded the bounds of the statute, then the appropriate question would be not the statutory eligibility issue, but whether the granting or denial of relief to certain classes of aliens otherwise comports with the purposes of the immigration law, specifically, in whether it ensures that desirable aliens are provided an opportunity to seek relief from removal. Framed in this manner, the Court’s analysis proceeds necessarily from its first premise that the government’s policy in 212(c) cases is not tied and cannot be tied to the text of the statute.

Even assuming that the Court could justify its approach in this case along the lines noted in the preceding paragraph, there was no reason to limit the scope of its holding to the narrow question of the comparable grounds approach. The relevant inquiry should have been whether the statute sanctions the extension of 212(c) relief to deportable aliens and, if so, the Court could then have addressed the more specific concern over the method the Board uses to determine which sub-classes of deportable aliens might be

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127. *See infra* n.128.
eligible for relief. Yet, despite ostensibly resting its holding on the incompatibility of the comparable grounds approach with the purposes of the immigration law, the Court did provide a quite emphatic answer to the textual question—212(c) provides no anchor, “no matter how many times read or parsed,” to the assertion that deportable aliens should be eligible for relief.\(^{128}\) The Court’s statement on this point is tied back to its narrow holding, but it provides no rationale for limiting that point—that 212(c) does not provide an anchor for the extension of relief to deportable aliens—to the comparable grounds approach itself, *i.e.*, if 212(c) cannot provide any anchor for the extension of relief to deportable aliens, then any method for this extension, not just the comparable grounds approach, would seemingly be impermissible under the appropriate interpretation of the statute. This finding of the Court, although never made explicitly as a formal “holding,” pervades the entirety of the opinion, yet at the same time contradicts the Court’s action in remanding the case for a determination of those circumstances where 212(c) *may* be extended to deportable aliens.

Second, and ancillary to the first concern, is *Judulang’s* failure to address the underlying question of what authority could sanction the extension of 212(c) to deportable aliens. The Court made quite clear that this authority would not extend from the statute itself, as 212(c) is a provision explicitly meant only to waive excludability.\(^ {129}\) Perhaps in the context of the general question of authority, Congress’s amendment of the statute before repeal to include reference to deportation grounds is relevant, but this point is not easily squared with the Court’s categorical rejection of the statute as a source of relevant authority.\(^ {130}\) The equal protection rationale of *Francis* stands as a source of limited authority, as the Court did not specifically address that issue, but at least two Justices expressed concerns on this point. Justice Kennedy, at oral argument, expressed doubts over the legitimacy of *Francis’s* equal protection analysis,\(^ {131}\) while Justice Alito opined that perhaps the best path forward was that charted by the Ninth Circuit in *Abebe*.\(^ {132}\) The Court’s decision did not rest on *Francis*, and did not explicitly overrule or abrogate *Abebe*, so the question of equal protection as a source of authority is open. Yet the more fundamental issue with *Francis* is the fact that the decision addressed equal protection concerns over the treatment of different classes of

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\(^{128}\) *Id.* at 488; see also *id.* at 480 (“by its terms, § 212(c) did not apply when an alien was being deported.”); *id.* at 483 n.7 (“The BIA’s comparable-grounds policy . . . is not an interpretation of any statutory language—nor could it be, given that § 212(c) does not mention deportation cases”); *id.* at 485 n.9 (“The case would be different if Congress had intended for § 212(c) relief to depend on the interaction of exclusion grounds and deportation grounds. But the Government has presented us with no evidence to this effect, nor have we found any.”).

\(^{129}\) *Id.* at 488.

\(^{130}\) *Id.* at 488 n.11.


\(^{132}\) *Id.* at 16.
deportable aliens; it did not hold that differential treatment of inadmissible and deportable aliens in the 212(c) context would constitute a violation of equal protection.133 Whether or not such a violation is cognizable, Francis provides no support, on its face or by its rationale, for extending 212(c) to deportation cases.

Perhaps the executive has inherent authority to grant discretionary relief from removal as part of its general obligations in the context of immigration law, but there is no solid grounding for this authority in the text of the Constitution or the case-law of the Supreme Court. Whatever authority the executive might have under the INA to institute or terminate proceedings, this prosecutorial discretion is unlikely to encompass an unbounded authority to grant statutory relief from removal in the absence of statutory eligibility for that relief. There are, then, outstanding points of authority on which the Board and other immigration agencies can rest their extension of 212(c) into deportation proceedings, but the Supreme Court was remiss in failing to address this important question.

The flaws in the Court’s decision can thus generally be attributed to the narrowness of its holding. The Court elected to render a decision on one single issue under the 212(c) heading, the permissibility of the comparable grounds analysis, without delving into the related issues regarding whether relief can be extended to deportable aliens and, if so, what the executive’s authority for that extension would be. In declining to render decisions on these points, and simply noting Judulang and St. Cyr as guideposts for the agency, it also necessarily failed to offer any clear-cut guidance to the agency on the appropriate path forward. Such a decision may have been appropriate in the context of an existing statute where the intricacies and nuances of application could be teased out through subsequent litigation. Where the relevant statutory provision has been repealed for nearly two decades, however, this approach is singularly misguided.

V. Eligibility for 212(c) in Deportation Proceedings Post-Judulang

Whatever flaws there are in the Court’s decision in Judulang, the opinion clearly mandates a change of policy in how the Board and other immigration authorities determine the eligibility of deportable aliens for 212(c) relief. The purpose of this section is to weigh the possible policy directions that the agencies could take against the holdings and logic of Judulang and St. Cyr.

A. Limit Eligibility for 212(c) Relief to Inadmissible Aliens

The easiest and cleanest path forward, from an interpretive perspective, would be to limit 212(c) eligibility to aliens charged with inadmissibility, the

133. Francis, 532 F.2d at 269.
only class of aliens who the statute explicitly covers. Such a determination
would be consistent with the Supreme Court’s statement in Judulang that
there is no textual basis for the extension of 212(c) relief to aliens charged
with deportability.134 Such a limiting interpretation would also be consistent
with the long-standing distinction between inadmissibility and deportability
made by the INA, and the interpretations of the courts of appeals that have
limited the availability of other section 212 waivers to their specific terms,
_i.e._, aliens charged with inadmissibility. Categorically excluding deportable
aliens from 212(c) relief would also be the least arbitrary and easiest policy to
apply, as it would eliminate all the complexities that have grown up beside
the comparable grounds analysis, remove the risks of arbitrary denials based
on DHS’s decision to lodge one ground of deportation rather than another,
and treat all deportable aliens exactly the same way. Finally, because this
interpretation would be based on the Supreme Court’s own statement
regarding the correct interpretation of section 212(c), there are no cognizable
arguments that adopting this policy would run afoul of the retroactivity
limitations inherent in St. Cyr. As a definitive judicial construction of the
statute, the Court’s holding could presumptively be applied to all pending
cases.135 Thus, from a practical and administrative standpoint, this approach
has much to recommend it as a path forward.

Yet such a determination by the agency to eliminate 212(c) relief for all
deportable aliens would go far beyond the Court’s narrow holding in
Judulang. The Court did not explicitly hold 212(c) is unavailable to such
aliens, despite its statement that there is no textual anchor for such an
extension of relief. In fact, the Court’s decision assumes that it will remain
available to at least some deportable aliens, leaving it to the Board to find a
rational way of distinguishing among those who should be eligible and those
who should not.136 A dramatic change in policy would also be in tension with
St. Cyr, who was himself a deportable alien, and would likely operate,
practically if not legally, in an impermissibly retroactive fashion as applied to
certain classes of deportable alien. The narrowness of the Court’s holding is
likely relevant in this context, as it should be taken as a sanction for the
extension of 212(c) to deportable aliens and a passing-of-the-buck to the
Board to figure out the best way to justify the extension. If the Court had
really wanted to disqualify all deportable aliens from 212(c) relief, it could

134. _See Judulang_, 132 S. Ct. at 488.
135. _See_ Landgraf _v._ USI Film Products, 511 U.S. 244, 278 n.32 (1994) (“While it was accurate
in 1974 to say that a new rule announced in a judicial decision was only _presumptively_ applicable to
pending cases, we have since established a firm rule of retroactivity.”); Harper _v._ Virginia Dept. of
Taxation, 509 U.S. 86, 97-98 (1993) (“When this Court does not reserve the question whether its
holding should be applied to the parties before it, [] an opinion announcing a rule of federal law is
properly understood to have followed the normal rule of retroactive application and must be read to
hold . . . that its rule should apply retroactively to the litigants then before the Court.”) (internal
citations and quotation marks omitted).
136. _Judulang_, 132 S. Ct. at 484, 485, 490.
have done so and eliminated the more nuanced basis of its decision. Having left that question unanswered, at least as a function of its explicit holding in *Judulang*, limiting eligibility for 212(c) relief to inadmissible aliens would be an unwise policy choice by the relevant agencies. It would also be the easiest way to ensure continued litigation in this area, including another trip to the Supreme Court, an outcome surely to be disfavored in light of that Court’s implicit assumption that 212(c) should remain available in deportation proceedings.

B. **212(c) Should be Available in Deportation Proceedings Only Nunc Pro Tunc or Where Admissibility is at Issue**

Rather than eliminate 212(c) eligibility for deportable aliens, the agency could adopt a limited extension into the deportation context in circumstances where the waiver would be granted *nunc pro tunc* or where the alien’s admissibility is the central focus of the proceeding. On the first point, the policy adopted in *Matter of L* and *Matter of G-A-* could be adhered to, permitting an application for 212(c) relief *nunc pro tunc* where an alien’s conviction pre-dates his last entry into the United States. In those circumstances, where an alien would have been inadmissible if stopped at the border but was, inexplicably, permitted to enter and only then placed into deportation proceedings, allowing the pursuit of a 212(c) waiver would reflect nothing more than what Attorney General Jackson had termed a “correction of a record of entry.”137 Extending 212(c) to this circumstance is faithful to both the text and the spirit of the statute, and rationally limits eligibility to a discrete class of deportable aliens who are eligible exactly because they should have been charged with being inadmissible. Eligibility thus turns on the inadmissibility statute itself, and not on any chance correspondence between the charged ground of deportation and the grounds of inadmissibility.

Aliens could also be permitted to seek a waiver in deportation proceedings where their admissibility is at issue. For instance, aliens in deportation proceedings applying for adjustment of status should be permitted to seek 212(c) relief, as they are, in pursuing adjustment, subject to all the grounds of inadmissibility at section 212(a) of the INA.138 Additionally, aliens charged with being subject to deportation on the grounds that they were inadmissible when they entered could be permitted to pursue relief under section 212(c). This would effectively operate much like the allowance for *nunc pro tunc* relief and, once the inadmissibility of the alien is waived, the charge of deportability would be eliminated. The issue of travel would still have to be resolved, as 212(c), by its terms, applies only when an alien has traveled

abroad and is seeking admission, but this could be done by requiring the filing of the 212(c) application prior to travel abroad, as contemplated by the regulations.

The question of travel also leads back to the long-abandoned practice of “pre-examination.” Another way forward would be to permit aliens who are deportable and inadmissible based on the same conduct to apply for 212(c) prior to any departure from the United States. If the application is approved, the alien can depart the United States and then again seek admission with a pre-approved waiver of any ground of inadmissibility. By this operation, the alien could be readmitted pursuant to 212(c), while mostly adhering to the text and spirit of that provision. Although this practice was not carried forward into the 1952 Act because of Congressional opposition to its application, there is no reason that the agency could not, at this point, resuscitate it as a method for dealing with the remaining 212(c) cases.

In any event, these circumstances illustrate at least one path forward: permitting 212(c) relief in deportation proceedings where, by the nature of the charge or the conduct of the alien, or because of the application pursued, admissibility is the central issue. Because admissibility would be the focus, this approach would also eliminate concerns about trying to root the executive’s authority to extend 212(c) into the deportation context. If 212(c) is best read, in the Court’s opinion, as operating as a waiver of inadmissibility, then it is immaterial that the relevant “denial” of admission would occur in the context of a deportation proceeding where the alien’s admissibility would otherwise be the main issue. This shift in focus is also consistent with any retroactivity concerns, as the Court noted that deportable aliens did not have any settled expectation of a particular form of inquiry into their eligibility for 212(c) relief prior to the blanket institution of the comparable grounds approach.

C. Base 212(c) Eligibility on Whether the Alien’s Conduct Would Have Rendered Him Inadmissible

The agency could also take the hint from the Supreme Court and make 212(c) relief available in deportation proceedings where the offense or conviction that serves as the basis of the charge of deportability would also have exposed the alien to inadmissibility, i.e., the focus would be on the conduct of the alien, and whether that conduct would fit within a ground of inadmissibility, rather than on whether the charge of deportability itself is comparable to a ground of inadmissibility. As noted in Section IV, although the Supreme Court did not mandate adoption of this type of approach, it more

139. See INA § 212(c), 8 U.S.C. § 1182(c) (1994).
140. See 8 C.F.R. § 1212.3(b).
142. Id. at 489 n.12.
than once noted the logic behind it and at least implicitly endorsed it as a rule for going forward. This type of policy would make a broad swath of deportable aliens eligible for 212(c) relief. The only circumstances where relief would not be available would be: 1) where the alien’s conduct or conviction would not have rendered him deportable at the time of commission or conviction, and 2) where the charged conduct or conviction falls within one of the grounds of inadmissibility that are expressly barred from consideration for 212(c) relief. By focusing on the underlying conduct of the alien, rather than the ground of removal, this approach would eliminate any arbitrary distinctions in the eligibility for 212(c) relief between the classes of deportable and inadmissible aliens.

The biggest problem with this approach ties back to the question of what authority the executive has for extending 212(c) relief to any deportable aliens. There is no warrant in the text of 212(c) for extending relief to aliens charged with deportability, save, perhaps, the reading offered in the foregoing section where the admissibility of the deportable alien is the central issue. The equal protection rationale of Francis, although not disturbed by the Supreme Court, is a tenuous reed on which to base such authority. In that case, the Second Circuit did recognize the Board’s limiting interpretation of the statute as mandated by its text, and Congress otherwise does have broad authority to regulate immigration and create distinctions between different classes of aliens. There is no currently accepted free-standing executive power to grant relief to aliens outside the bounds set by Congress, and as the statute cannot be read to extend to deportable aliens the executive cannot extend it absent the type of constitutional concerns advanced in Francis. All this is simply to say that in order to pursue this approach, the executive would have to offer some sort of rationale or basis of authority for extending 212(c) to deportable aliens.

What if no authority was found for this extension? Rather than extend 212(c) relief to deportable aliens, the executive could conceivably adopt a policy whereby it would exercise its prosecutorial discretion in deportation cases consistent with the terms of 212(c). For instance, the government could either decline to pursue proceedings against a deportable alien who would be eligible for 212(c) under a conduct-based approach, or terminate proceedings once that “eligibility” was established. The executive has the broad authority to exercise its discretion in this fashion, and this type of program could skirt the more troublesome issue of the text of the statute and the source of executive authority to extend 212(c) past the language of the statute. At the same time, there are drawbacks, as the “relief” from removal would reside solely in the discretion of the government to forego formal proceedings. Rather than obtaining a formal grant of relief, as 212(c) or cancellation of

143. Id. at 481, 485-86, 490.
removal would be, an alien in this circumstance would simply receive indefinitely deferred action.

D. Congressional Action

The preceding three subsections have focused on potential avenues the executive agencies could take in gauging the eligibility of deportable aliens for relief under 212(c). A final possibility for resolution of this issue bears mentioning: Congress could step in and take action that would effectively moot the need for further agency interpretation. Congress could eliminate 212(c) relief for all aliens, eliminate it for just deportable aliens, or it could explicitly extend 212(c) relief to deportable aliens on set statutory terms.

First, the continued availability of 212(c) relief for aliens in general is due solely to Congress’s failure to specify the temporal range of the 1996 repeal.144 Congress could have, in 1996, mandated the repeal of 212(c) for all proceedings instituted after IIRIRA’s effective date, but its ambiguity on whether this is what it intended led the Supreme Court to conclude that 212(c) should remain available for aliens with pre-IIRIRA guilty pleas. At this stage, Congress could, as part of ongoing attempts at immigration reform, permissibly eliminate the availability of 212(c) relief in all removal proceedings instituted after a date certain.145 Such a step would be no less permissible in light of St. Cyr, as that decision was based on ambiguity in IIRIRA and Congress’s intent, not on a holding that Congress could not have eliminated 212(c) relief altogether. Eliminating 212(c) relief in this manner would, of course, upset the expectations of both inadmissible and deportable aliens in this post-St. Cyr world, but there is nothing in St. Cyr itself that would call into question the permissibility of this repeal. This clean break would settle all outstanding 212(c) issues, with any future litigation centered on the retroactivity question.

Second, rather than eliminate 212(c) for all aliens, Congress could simply specify that those charged with deportability may not pursue relief. This would be no less permissible than a blanket repeal of 212(c), and would have the added bonus of returning the meaning of 212(c) to the explicit terms of its text. Congress could, additionally, institute some new form of relief for deportable aliens that would be comparable to 212(c),146 such as a new waiver of deportability under section 237 of the INA, but an enactment disallowing 212(c) relief for deportable aliens would be no less permissible without some new form of relief to accompany it.

144. St. Cyr, 533 U.S. at 315-20.
145. See id. at 316 (citing Landgraf, 511 U.S. at 268).
146. Cancellation of removal is not comparable to 212(c), as any aggravated felony conviction is a disqualification under that form of relief, whereas certain aliens with aggravated felony convictions may still be eligible for 212(c) relief.
Finally, Congress could extend 212(c) relief to deportable aliens by statutory enactment, along the same lines that it is currently available to inadmissible aliens, i.e., with all deportable aliens eligible except for those whose ground of deportability is akin to the grounds of inadmissibility that bar 212(c) eligibility. This proposal would eliminate any need to develop an agency policy for determining which deportable aliens are eligible, would grant the agency clear authority for the extension of 212(c) to deportable aliens, and would undercut any assertions that allegedly similarly situated classes of aliens are being treated differently.

Congressional action such as that outlined above would constitute the most definitive resolution of the outstanding 212(c) issues, but it is by far the least likely. Congress has shown little inclination to return to the pressing issues of immigration reform, and the opportunity to clarify the seventeen year old repeal of 212(c) is unlikely to entice action. For better or worse, the ongoing saga of 212(c) will be an administrative, not legislative, issue.

This section is best closed by hazarding an opinion regarding the best path forward. Consistent with Judulang’s own seeming reliance on the viability of an offense-based approach, this would seem like the best policy for adjudicators to establish. Under this approach, 212(c) should be made available to deportable aliens where the underlying conduct or offense that has exposed them to deportability would have fallen within a ground of inadmissibility. This focus on whether conduct would fit within a ground of inadmissibility is distinct from the prior focus on whether the grounds of deportability and inadmissibility are sufficiently comparable to permit relief, and eliminates all relevant distinctions between the classes of inadmissible and deportable aliens. The commission of the same offense and the same conduct will result in 212(c) eligibility regardless of whether an alien is charged with deportability or inadmissibility.

There would still be nuances to tease out were the agency to adopt this policy. There may be temporal limitations to eligibility, for instance, that are dictated by St. Cyr’s focus on reliance. For example, if an alien pled guilty to an offense prior to the repeal of 212(c), but that conviction did not render him deportable at the time it was entered, he cannot be said to have any reliance interest on the continued available of 212(c) relief. If his conduct subsequently subjects him to the grounds of deportation because of changes in the law, he should not be permitted to pursue 212(c) relief. In short, an alien must have not only pled to the relevant offense prior to the repeal of 212(c), but that offense must have subjected him to deportability at that time, and be able to fit within a ground of inadmissibility.

The issue of “travel” is also relevant. As written, 212(c) applies where a lawful permanent resident is returning to the United States after a brief trip
abroad, not under an order of deportation. 147 Should deportable aliens have to travel in order to obtain relief under section 212(c)? The regulations provide that the application may be filed prior to an alien’s departure from the United States, so the agency could, in extending 212(c) to deportable aliens, require them to travel after the filing and thereby seek admission upon their return. 148 This would remain faithful to the language of 212(c), even at the risk of being a formal application of the text. Or the agency could dispense with travel altogether on the basis of the Francis equal protection rationale, that travel is not a rational distinction between these classes of aliens, and thus should not be deemed a necessary aspect of eligibility for relief. In that circumstance, the question of eligibility would rest only with whether a pre-1996 plea subjected an alien to a ground of deportability and encompassed conduct that could also have been fit within a ground of inadmissibility.

Finally, the reference to Francis inevitably brings one back to the threshold question of authority—what authority does the agency have for extending 212(c) to this class of aliens? Francis provides a potential basis, even if its equal protection rationale is weak and not of immediate relevance to whether permissible distinctions can be made between inadmissible and deportable aliens. Another approach would be to simply ignore the question of authority altogether in providing relief to both inadmissible and deportable aliens on identical grounds. However distasteful this might be to legal purists, there is some force to the argument that the Supreme Court encouraged just this in Judulang. Although explicitly noting that 212(c) itself provides no source of authority for granting relief to deportable aliens, the Court did not strain to come up with the appropriate source, yet at the same time did not abrogate Francis and clearly contemplated the eligibility of at least some deportable aliens for 212(c) relief. One way to read this silence is by assuming that the question of authority just is not relevant at this late date. This form of relief has been repealed for seventeen years, the jurisprudence has become a mess, and there are only a finite and shrinking number of aliens for whom 212(c) is even a possibility. In this circumstance, Judulang is perhaps best taken as a directive to clean up this mess in the easiest and most equitable manner possible, while creating no future 212(c) jurisprudential waves in going about this task. The policy outlined above would do just that, leaving the needling question of administrative authority to academic commentators.

CONCLUSION

It is uncontroversial to say that the administration of the immigration laws should comport with basic standards of due process and fundamental

147. INA § 212(c), 8 U.S.C. § 1182(c) (1994).
148. See 8 C.F.R. § 1212.3(b).
fairness, and that their application should not lead to arbitrary decisions regarding an alien’s ability to remain in the United States. This principle well illustrates the development of the agency’s 212(c) policy that gave rise to the Supreme Court’s “arbitrary and capricious” holding in Judulang. In the infancy of that development, under both the Seventh Proviso and 212(c), relief from removal was extended by the executive to encompass deportable classes of aliens not covered by the explicit language of 212(c). As that development accelerated, first under Francis and then under the Board’s comparable grounds analysis, more deportable aliens became eligible for relief. As 212(c) stood at the time of Judulang, a very large class of deportable aliens was eligible for relief not because of any statute Congress had enacted, but solely because the Board had determined that the extension of relief to deportable aliens would be a fairer and more just way to administer the immigration laws. That the final policy can be described as arbitrary in the distinctions it created between different sets of deportable aliens should not obscure this underlying fact—the decision in Judulang is the end result of the agency’s decision to liberalize relief under 212(c).

This deconstruction of Judulang thus serves an important role in undercutting the simplistic and largely erroneous narratives of immigration adjudication offered by the New York Times, litigators, and academics. It does not establish the sanctity of agency adjudication or assert that however the agency decides a case that decision is fair or equitable, but it does point to nuances under the surface of our immigration system that must be paid attention to if a fair and honest assessment of that system is to be made. Meaningful reform can only be accomplished if both the benefits and drawbacks of our current system are understood, and they cannot be understood when hidden beneath self-serving assertions made simply to bolster existing prejudices about how the system operates. Inviting one to read the true story of 212(c) embodied in Judulang entails seeing and understand how agency adjudication can drift from narrower limitations and, despite attempting to bring more individuals within the purview of discretionary relief, end in an arbitrary policy that, while granting eligibility to a broad swath of aliens, does not create meaningful distinctions between those who are and are not eligible.

Beyond the role of Judulang in fixing the biased narrative of immigration adjudication, there is an obvious practical dimension to the case; after all, the Supreme Court was concerned about the technical issue of how to extend a certain form of relief to a class of aliens. Although a number of policy options are open to the executive agencies in moving forward post-Judulang, the most appropriate policy would be to focus on the underlying offense of the deportable alien and whether that offense would fit within a ground of inadmissibility. This approach, as more fully developed in this article, meets the Supreme Court’s concerns over the arbitrary application of the compa-
rable grounds analysis and, in light of the opinion’s frequent favorable references to this sort of approach, would likely meet with approval by the Court if challenged. Guessing at the odds of future certiorari review is almost always a fool’s game, and *Judulang* itself seemed like an unexpected exercise ten years after *St. Cyr*, but the easiest and most equitable way to lead 212(c) to its final resting place is by heeding the implicit thrust of the Court’s decision.