Dismantling the Due Process Dichotomy in Crimmigration Cases

Josh A. Roth[†] & Stephen Yale-Loehr[††]

The U.S. Constitution entitles every *person* to due process. But nearly fifty years ago, the Supreme Court distinguished the due process entitlement of noncitizens from that of citizens. This Article takes a novel approach to due process for noncitizens in certain so-called "crimmigration" cases by further distinguishing the citizen-noncitizen dichotomy. The Article argues that, as applied to lawful permanent residents, certain provisions of the Immigration and Nationality Act are unconstitutional. The article proceeds in three parts.

Part I summarizes the existing caselaw regarding due process for noncitizens. Part II explores two aspects of crimmigration law: immigration fraud and terrorism. This Part conducts a comparative analysis of the various statutes that penalize fraud and terrorism in the immigration and criminal codes. Part III employs the *Mathews v. Eldridge* balancing test and argues that in immigration fraud and terrorism cases, lawful permanent residents are entitled to additional procedural safeguards to remedy identified due process violations. This Part then formulates distinct procedural safeguards for lawful permanent residents in crimmigration cases involving fraud and terrorism.

Introduction 390
I. Due Process for Noncitizens 391
A. Supreme Congressional Deference 391
B. Distinguishing Due Process: A Case Study on Legal Notice 393
II. Crimmigration 395
A. Immigration Fraud 396
1. Removability 397
2. Crime 399
B. Acts of Terrorism 400
1 Removability 400
2. Crime 405
III. The Remedy 408
A. The *Mathews v. Eldridge* Factors 409
1. The Government's Interest 410
2. The Lawful Permanent Resident's Interest 412
3. The Risk of Erroneous Adjudications 414

† Josh A. Roth '24 is a litigation associate at Winston & Strawn LLP in New York, NY and a former member of the *Cornell Law Review*.

†† Stephen Yale-Loehr is a Professor of Immigration Law Practice at Cornell Law School and co-author of *Immigration Law and Procedure*, the leading 22-volume treatise on U.S. immigration law.

B. New Procedural Safeguards 416
1. *Convictions as a Prerequisite for Fraud-Related Removability* 416
2. *Affirmative Defenses for Terrorism-Related Removability* 421
Conclusion 425

Introduction

Despite the Constitution's rare distinction between citizens and noncitizens, the Supreme Court often interprets one. Seminal immigration cases suggest that noncitizens have a limited right to assert the constitutional protections citizens enjoy. This is no novel issue. Scholars have analyzed, critiqued, and advocated against these cases for years.[1]

Almost *ad nauseam*, the Supreme Court reaffirms that immigration proceedings are not criminal, thus barring the Sixth Amendment's applicability. But recent decades show that the lines between immigration and criminal law are fading. Statutes applicable to noncitizens found in the Immigration and Nationality Act (INA) describe and penalize criminal behavior. Scholars have argued against the constitutionality of maintaining a lesser burden of proof for what is effectively a criminal penalty.[2] Those arguments have merit. This Article takes a novel approach to due process in certain so-called "crimmigration"[3] cases by further distinguishing the citizen-noncitizen dichotomy. The Article proceeds in three parts.

Part I summarizes the existing caselaw regarding due process for noncitizens. Part II explores two aspects of crimmigration law: immigration fraud and terrorism. This Part conducts a comparative analysis of the various statutes that penalize fraud and terrorism in the immigration and criminal codes. Part III employs the *Mathews v. Eldridge* balancing test and argues that in certain crimmigration cases, lawful permanent residents are entitled to additional procedural safeguards to remedy identified due process violations.[4] This Part then formulates distinct procedural safeguards for lawful permanent residents in crimmigration cases involving fraud and terrorism.

---

1. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Louis Henkin, *The Constitution and United States Sovereignty: A Century of "Chinese Exclusion" and Its Progeny*, 100 HARV. L. REV. 853 (1987); Maryam K. Miyamoto, *The First Amendment After* Reno v. American-Arab Antidiscrimination Committee: *A Different Bill of Rights for Aliens?*, 35 HARV. CIV. RTS. CIV. LIB. L. REV. 183, 183-84 (2000).

2. *See, e.g.*, Robert Pauw, *A New Look at Deportation as a Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 343-44 (2000); John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, *"Death is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361 (2009).

3. Crimmigration generally refers to legal issues involving criminal behavior with immigration consequences. *See infra* notes 44-48 and accompanying text.

4. This argument is not limited to lawful permanent residents or to cases involving fraud or terrorism. We focus on this collection of statutes and its applicability to lawful permanent residents as a mechanism to explore the issue and to propose constitutional remedies. We defer to future scholars on other crimmigration issues generally and as applied to nonimmigrant visas or undocumented noncitizens.

I. Due Process for Noncitizens

The U.S. Constitution entitles every *person* to due process.[5] But this broad protection is narrowed by the spectrum of how much process a person is due, based on circumstance and immigration status.[6] What procedural safeguards, including which burden of proof to impose, is a subjective test executed by balancing the interests in a particular instance.[7] Applying the correct burden of proof in a legal proceeding is a matter of due process.[8] Criminal proceedings have a "beyond a reasonable doubt" burden, while civil proceedings might either have a "preponderance" or "clear and convincing" burden.[9] In *Woodby v. INS*,[10] the Supreme Court held that deportability must be proven by "clear, unequivocal, and convincing evidence."[11]

A. Supreme Congressional Deference

The Supreme Court accords Congress and the Executive Branch tremendous deference on immigration issues. In essence, these decisions are subject to minimal judicial review and are only slightly limited by other provisions of the Constitution.[12] The power of inherent sovereignty–also called plenary

---

5. U.S. Const. amend. V. *See also* Miyamoto, *supra* note 1, at 853 ("the Bill of Rights makes no reference to citizens at all. Instead, it refers to 'persons' or 'the people'") (citing U.S. Const. amend. I–X). Other portions of the Constitution distinguish between "persons" and "citizen," further suggesting that the Framers intended this clause to apply to citizens and noncitizens.

6. Mathews v. Eldridge, 424 U.S. 319 (1976). *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 78-79 (1976) (holding that immigration status determines how much process is due to an individual). Outside the immigration law context is the legal fiction of "military due process," wherein servicemembers are accorded elastic levels of constitutional protections. *See* Seymour W. Wurfel, *"Military Due Process": What is It?*, 6 Vand. L. Rev. 251 (1953) (describing the conceptualization of military due process by the U.S. Court of Military Appeals, later adopted by the U.S. Supreme Court); Rachel E. VanLandingham, *Military Due Process: Less Military & More Process*, 94 Tul. L. Rev. 1, 12-14 (2019) (describing the military as "a special society with special justice").

7. Mathews v. Eldridge, 424 U.S. 319 (1976). *See also infra* Part III.a.

8. *See* Alex Stein, *Constitutional Evidence Law*, 61 Vand. L. Rev. 65, 79-82 (2008) (providing evidence that due process mandates the "beyond a reasonable doubt" standard in criminal convictions and the "clear and convincing evidence" standard for deprivations of civil liberties).

9. *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979) (clear and convincing evidence in a civil proceeding to commit an individual to a mental hospital for an indefinite period); Rivera v. Minnich, 483 U.S. 574 (1987) (preponderance of the evidence for a generic paternity dispute).

10. 385 U.S. 276 (1966) (affirming legislation that prohibited Chinese immigrants from reentering the United States).

11. *Id.* at 277.

12. *See generally* Charles Gordon et al., 1 Immigration Law and Procedure § 9.07 (2023); Bridges v. Wixon, 326 U.S. 135, 160-61 (1945) (Murphy, J., concurring) ("the deportation power of Congress 'is unaffected by considerations which in other contexts might justify the striking down of legislation as an unwarranted abridgment of constitutionally guaranteed rights of free speech and association.' From this premise it follows that Congress may constitutionally deport aliens for whatever reasons it may choose, limited only by the due process requirement of a fair hearing. The color of their skin, their racial background or their religious faith may conceivably be used as the basis for their banishment"). *Cf.* Trump v. Hawaii, *infra* note 22-23 & accompanying text.

power–has consistently trumped the constitutional protections of equal protection and due process.

Scholars have naturally questioned this. For example, the late Professor Louis Henkin contended that *The Chinese Exclusion Case*[13] was a stark diversion from contemporaneous treatment of congressional power.[14] He argued that the sovereignty of the United States was established in 1789 after the Constitution was adopted and that until 1889, there was "no suggestion that the international sovereignty of the United States implied powers for the federal government not enumerated in the Constitution."[15] Henkin also suggested that the Supreme Court's decision in *Chinese Exclusion* was rooted in racism against Chinese immigrants.[16] Despite this, judicial deference for congressional regulation of immigration was prolific, later even incorporating the political question doctrine.[17]

Maryam Miyamoto questions whether an unwritten Bill of Rights, distinct from that found in the Constitution, applies to noncitizens.[18] A century of Supreme Court decisions suggests Miyamoto is right. Often, these decisions contradict other constitutional protections, such as freedom of speech and association. In *Chinese Exclusion*, the Supreme Court affirmed the Chinese Exclusion Act, which barred immigrants based on national origin (Chinese descent) from entering the country.[19] Four years later, the Court clarified in *Fong Yue Ting v. United States*[20] that noncitizens were protected by the Constitution, but simultaneously held that Congress could deport them based on national origin derived from arbitrary standards not subject to any heightened scrutiny.[21] And more recently, in *Trump v. Hawaii*,[22] the Supreme Court affirmed an executive order that a dissenting Justice described as "rooted in dangerous stereotypes about . . . a particular group's . . . desire to harm the United States."[23]

Nearly a century after *Chinese-Exclusion*, in *Graham v. Richardson*,[24] the Supreme Court characterized immigrants as "discrete and insular minorities."[25] This seemingly benefitted immigrants and has never been overruled;

---

13. 130 U.S. 581 (1889).
14. Louis Henkin, *supra* note 1, at 854.
15. *Id.*
16. *Id.* at 856 ("at that time, state and local spokesmen deployed the influx of Chinese immigrants and invited federal control") (citing T. Alexander Alienikoff & David Martin, Immigration Process and Policy 1-81 (1985) (describing a "less-than-noble" story of the treatment of Chinese noncitizens)).
17. For a comprehensive analysis of the political question doctrine as it applies to immigration law and policy, see Caprice L. Roberts, *Rights, Remedies, and Habeas Corpus – The Uighurs, Legally Free While Actually Imprisoned*, 24 Geo. Immigr. L.J. 2, 19-20 (2009).
18. Miyamoto, *supra* note 1, at 183-84.
19. 130 U.S. 581, 581 (1889).
20. 149 U.S. 698 (1893).
21. *Id. See also* Gordon et al., *supra* note 12, at § 9.05 (describing the Court's analysis of Fong's due process argument and its rejection based on the "absolute and unqualified" right to expel or deport foreigners).
22. 585 U.S. 667, 201 L. Ed. 2d 775 (2018).
23. 201 L. Ed. 2d at 121 (Breyer, J., dissenting).
24. 403 U.S. 365 (1971).
25. *Id.* at 372 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition . . .

as it stands today, immigrants are still discrete and insular minorities. Fatally, this decision was effectively rendered moot when the Supreme Court held in *Mathews v. Diaz*[26] that the amount of due process a person deserved depended on their citizenship status.[27] Concededly, this designation has proved effective in challenging *state* laws that discriminate on citizenship status.[28] But courts do not apply the same scrutiny to federal laws, such as those analyzed in this Article.[29]

B. Distinguishing Due Process: A Case Study on Legal Notice

In *Mathews v. Diaz*,[30] Justice Stevens distinguished the due process rights afforded to noncitizens from citizens:

> "The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country."[31]

For example, the Supreme Court has held that physical presence entitles the person to "more" due process; so, a noncitizen physically present in the United States is entitled to a hearing if the government wants to deport them.[32] On the other hand, a noncitizen applying for a visa from their home country is not entitled to a hearing if the government denies their request.[33]

---

curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry")).

26. 426 U.S. 67 (1976).

27. *Id. See also infra* Part III.

28. *See, e.g.*, Intercommunity Just. & Peace Ctr. v. Norman, 402 F. Supp. 3d 405, 415 (S.D. Ohio 2019) ("[t]he Supreme Court has applied strict scrutiny to state laws that treat lawful permanent residents and other authorized immigrants differently than other similarly situated individuals").

29. For instance, the Ninth Circuit recently rejected an equal protection challenge to 8 U.S.C. § 1326, which criminalizes the unlawful reentry of noncitizens who lack legal status, in that it discriminated against and disparately impacted Mexicans and other Central and South Americans. United States v. Carrillo-Lopez, 2023 U.S. App. LEXIS 12831, *7, *17 (9th Cir. May 22, 2023) (stating how a "deferential standard, akin to rational basis review" applied to immigration cases). A year prior, the Northern District of Illinois rejected the same argument, and pointed to numerous cases in which rational basis scrutiny was applied as a matter of "special judicial deference." United States v. Viveros-Chavez, No. 21-CR-665, 2022 WL 2116598, at *2 (N.D. Ill. June 13, 2022). (citing Lopez-Ramos v. Barr, 942 F.3d 376 (7th Cir. 2019) (statutory scheme conferring citizenship to some children born abroad); Klementanovsky v. Gonzales, 501 F.3d 788 (7th Cir. 2007) (statute providing for removal waiver depending on whether noncitizen has left country); United States v. Montenegro, 231 F.3d 389, 395 (7th Cir. 2000) (statute criminalizing hostage taking in connection with international terrorism); and City of Chicago v. Shalala, 189 F.3d 598 (7th Cir. 1999) (statute disqualifying noncitizens from various welfare programs)).

30. 426 U.S. 67 (1976).

31. *Id.* at 78-79.

32. Kwong Hai Chew v. Colding, 344 U.S. 590, 590 (1953).

33. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 537 (1950).

This malleability of how much process is due is not exclusive to noncitizens. This section briefly analyzes legal notice as a matter of due process, highlighting its elasticity depending on a litigant's immigration status or context of the proceeding.

Standards for legal notice are ubiquitously applicable, indiscriminate of a party's immigration or citizenship status. But the *type* of proceedings (e.g., criminal or immigration) seemingly influences judicial interpretation of legal notice as a matter of due process. The Supreme Court has consistently held that legal notice must be "reasonably calculated" to inform the party of the contents of the notice.[34] In *Yamataya v. Fisher*,[35] a noncitizen challenged legal notice as a matter of due process because she did not speak English and was effectively unaware of her scheduled hearing.[36] The Court rejected this argument, holding that her illiteracy in English was "her misfortune" and failed to show that her due process rights were violated.[37]

This rule on English language notices is less stringent when taken outside the context of immigration law and into criminal law, even if the defendant is a noncitizen. For example, in *United States v. Chmielowski*,[38] a Polish immigrant was charged with attempted illegal entry after previously being deported, a violation of 8 U.S.C. § 1326(a).[39] For his removal proceedings (separate from the criminal proceedings), the government provided an English-only "Notice of Hearing in Deportation Proceedings" with a list of contact information for pro bono attorneys.[40] Despite this, Chmielowski appeared before the immigration court pro se because he didn't understand the contents of the notice. In the criminal proceeding, the district judge held that the immigration judge violated Chmielowski's due process rights when he proceeded on the merits without evidence that "these documents were translated for [the defendant] so as to be meaningful."[41]

The elasticity of the English-being-sufficient rule isn't exclusive to noncitizens. In *United States v. Leyba*,[42] an attorney sought to withdraw as a criminal-appellee's counsel. The Second Circuit held that when a defendant was not literate in English, due process requires such notice to be provided in "a language understood by the client" or telephonically with the aid of a translator.[43]

In sum, while malleable in the context of immigration law, the amount of due process afforded to a person is indiscriminate in the context of criminal law. This principle implicates the core issue addressed by this Article: "crimmigration."

---

34. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 306 (1950).
35. 189 U.S. 86 (1903).
36. *Id.* at 87.
37. *Id.*
38. No. 15-CR-185-EAW-HKS, 2016 U.S. Dist. LEXIS 202333 (W.D.N.Y. May 13, 2016).
39. *Id.* at *16.
40. *Id.*
41. *Id.*
42. 379 F.3d 53 (2d Cir. 2004).
43. *Id.* at 56.

II. Crimmigration

Juliet Stumpf first conceptualized crimmigration in her 2006 article, *The Crimmigration Crisis*.[44] This concept evolved quickly, and now even has its own casebook.[45] Its author, César Cuahtémoc García Hernández, describes crimmigration as the convergence of criminal law and procedure and immigration law and procedure.[46] In the wake of the terrorist attacks on September 11, 2001, Stumpf predicted a "future grounded in the present in which criminal law is poised to swallow immigration law."[47] She described how the two bodies of law were separate nominally, but in substance were effectively the same.[48] Evidence suggests she was correct.

In *Padilla v. Kentucky*,[49] the Supreme Court tacitly accepted that the distinction between criminal and immigration law was not so fortified. There, the Court held that criminal defense attorneys were per se ineffective if they failed to advise a client of the immigration consequences of a conviction.[50] After *Padilla*, criminal defense attorneys became obligated to verse themselves in 8 U.S.C. § 1227(a)(2), the statute classifying criminal-related deportability grounds.[51] But even if the conviction is for an offense that doesn't render the noncitizen removable, the criminal conduct might still be relevant to any discretionary removal relief they seek.[52]

This is largely what crimmigration has evolved into: adjudications of criminal behavior in non-criminal courts, and without criminal procedural safeguards. In criminal proceedings, due process is at its strongest, regardless of the defendant's immigration or citizenship status. In removal proceedings, due process ebbs in favor of the government. The immigration statute permits the Department of Homeland Security to adjudicate criminal behavior with non-criminal burdens of proof.[53]

Many criminal-related removal grounds are based on a criminal conviction.[54] But this is not always the case. Provisions of the INA render a

---

44. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 368 (2006).

45. César Cuahtémoc García Hernández, Crimmigration Law (2d ed. 2021).

46. *Id. See also* César Cuahtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. Rev. 1457, 1467 (defining crimmigration as the intertwinement of crime control and migration control) (citing Joanne van der Leun & Maartje van der Woude, *A Reflection on Crimmigration in the Netherlands: On the Cultural Security Complex and the Impact of Framing*, in Social Control and Justice: Crimmigration in the Age of Fear 41, 43 (Maria João Guia et al. ed. 2013)).

47. Stumpf, *supra* note 44, at 376.

48. *Id.*

49. 559 U.S. 356 (2010).

50. *Id.* at 374-75.

51. *See infra* Part II.a-b (discussing 8 U.S.C. § 1227 in depth); *see also* Jeffrey Blivaiss, *Potential Consequences for a Noncitizen with a State Criminal Conviction*, A.B.A. Crim. Just. Mag. (Feb. 3, 2023) (extending the responsibility imposed by *Padilla* to state prosecutors by postulating how "a state prosecutor ensure[s] that a defense attorney complies with *Padilla* while protecting the public interest by obtaining punishment against a criminal").

52. Matter of Devison, 22 I. & N. Dec. 1362 (B.I.A. 2000).

53. 8 C.F.R. § 1240.8.

54. *See, e.g.*, 8 U.S.C. §§ 1182(a)(2)(A) (predicating inadmissibility on a "conviction of . . . a crime involving moral turpitude . . . or a violation . . . relating to a controlled

noncitizen removable if convicted of a crime involving moral turpitude (of which fraud is the archetype[55]) or a terrorism-related offense.[56] But other provisions of the INA permit the Department of Homeland Security to adjudicate fraud and terrorism without a criminal conviction and without a criminal-law burden of proof.[57] Still, both types of adjudications end identically, rendering a noncitizen removable.

The subsections below conduct a comparative analysis of the statutes penalizing fraud and terrorism to question whether the distinction described above is warranted.

A. Immigration Fraud

The federal government can adjudicate immigration fraud in either of two ways: (1) as a matter of removability[58] and (2) as a crime. These adjudications are not mutually exclusive. A noncitizen's inadmissibility or deportability sometimes requires a conviction of a crime involving moral turpitude.[59] Other times, a noncitizen may be rendered removable for fraud without a criminal conviction at all.[60] But never would a noncitizen be convicted of fraud without also being subject to removal.

When a lawful permanent resident first arrives, his or her application is screened for possible fraud.[61] If the Department of Homeland Security contends that a noncitizen is inadmissible or removable for fraud, that must be proven by clear and convincing evidence.[62] But if the Department discovers fraud after granting permanent resident status, the burden of proof is lowered to a preponderance.[63]

---

substance"), 1227(a)(2)(A) (predicating deportability on a crime involving moral turpitude or any crime for which a sentence of one year or more may be imposed).

55. *See infra* note 66.

56. *See* 8 U.S.C. §§ 1182(a)(2)(A) (criminal inadmissibility grounds), 1182(a)(3) (national security inadmissibility grounds), 1227(a)(2)(A) (criminal deportability grounds), 1227(a)(4) (national security deportability grounds).

57. *See* 8 U.S.C. §§ 1182(a)(6)(C) (fraud-related inadmissibility subject to a "clear and convincing" standard under 8 C.F.R. 1240.8), 1227(3) (fraud-related deportability subject to the same standard).

58. Before enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, there were substantial differences in the procedures for inadmissibility and deportability proceedings. Gordon et al., *supra* note 12, at § 63.01[3]. For all intents and purposes, these distinctions no longer exist. *Compare id.* chapters 65 and 72. Nonetheless, the statutes' text still nominally distinguish inadmissibility and deportability, and this Article uses "inadmissibility" or "deportability" in reference to that statute or "removability" when describing circumstances that encompass both inadmissibility and deportability.

59. *See supra* note 54. *See also infra* note 66 (discussing how fraud is the archetype of a crime involving moral turpitude).

60. *See supra* note 57.

61. *See, e.g.*, U.S. Gov't Accountability Off., U.S. Citizen and Immigr. Serv., Additional Actions Needed to Manage Fraud Risks (Sept. 19, 2022), https://www.gao.gov/products/gao-22-105328 [https://perma.cc/LY6F-HDMR] ("U.S. Citizenship and Immigration Services investigates potential immigration fraud. For example, USCIS investigates concerns that some marriages are formed to evade U.S. immigration law and illegally obtain immigration benefits, such as permanent residence").

62. *See* 8 C.F.R. § 1240.8.

63. *See infra* note 79 and accompanying text. There are no "double jeopardy" concerns for noncitizens because the Supreme Court has consistently held that immigration proceedings

Fraud is the archetype of a crime involving moral turpitude. This invites the question: why is fraud allowed to be adjudicated at a non-criminal standard of proof in immigration proceedings?

1. Removability

There are various penalties for noncitizens found to have committed fraud in immigration procedures. Under INA § 274C, 8 U.S.C. § 1324(c), a noncitizen who knowingly forges, counterfeits, or falsely makes any document to obtain an immigration benefit may be fined up to $5,000 depending on the circumstances.[64] On top of the civil penalties, the noncitizen may be deported.[65]

There are five distinct immigration provisions penalizing immigration fraud with removability:

- INA § 212(a)(2) (crime involving moral turpitude)[66]
- INA § 212(a)(6)(C) (misrepresentation as a citizen)[67]
- INA § 237(a)(1)(G) (marriage fraud)[68]
- INA § 237(a)(2)(A) (crime involving moral turpitude)[69]
- INA § 237(a)(3)(C)-(D) (document fraud)[70]

---

are not criminal. Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206 (1953); United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537 (1950); Fong Yue Ting v. United States 149 U.S. 698 (1893).

64. INA § 274C(d)(3), 8 U.S.C. § 1324c(d)(3).

65. INA § 237(a)(3)(C)(i), 8 U.S.C. § 1227(a)(3)(C)(i) (rendering a noncitizen who is subject to a final order for violation of INA § 274C as deportable). While not the focus of this Article, this statute is facially inconsistent with 8 C.F.R. § 1240.8 and arguably unenforceable. Final orders under INA § 274C, 8 U.S.C. § 1324c, need only be proved by a preponderance of the evidence. But INA § 237(a)(3)(C)(i), 8 U.S.C. § 1227(a)(3)(C)(i), renders a noncitizen subject to that final order as deportable. This contradicts the requirement of 8 C.F.R. § 1240.8 that removability must be proven by clear and convincing evidence.

66. *See also* 8 U.S.C. § 1182(a)(2). The U.S. Supreme Court has consistently regarded fraud as the archetype of a crime involving moral turpitude. *See* Jordan v. De George, 341 U.S. 223, 232 (1951) ("crimes in which fraud was an ingredient have always been regarded as involving moral turpitude"); *see also* GORDON ET AL., *supra* note 12, at § 71.05 (describing "moral turpitude" as "famously ambiguous" but pointing to the DOJ requirement of "reprehensible conduct and a mental state of knowledge").

67. *See also* 8 U.S.C. § 1182(a)(6)(C)(i) ("Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible"); INA § 212(a)(6)(c)(ii)(I), 8 U.S.C. § 1182(a)(6)(c)(ii)(I) ("Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible").

68. *See also* 8 U.S.C. § 1227(a)(1)(G) ("An alien shall be considered to be deportable as having procured a visa or other documentation by fraud . . . and to be in the United States in violation of this chapter . . . if (i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage . . . or (ii) it appears . . . that the alien has failed or refused to fulfill the alien's marital agreement which . . . was made for the purpose of procuring the alien's admission as an immigrant").

69. *See also* 8 U.S.C. § 1227(a)(2)(A); *supra* note 66 and accompanying text.

70. *See also* 8 U.S.C. § 1227(a)(3)(C)(i) ("An alien who is the subject of a final order for violation of section 1324c of this title is deportable"). Final orders under 8 U.S.C. § 1324c only require a preponderance of the evidence.

The government must establish removability with clear and convincing evidence.[71] Clear and convincing evidence is a burden higher than a preponderance, but lower than beyond a reasonable doubt. The Board of Immigration Appeals (B.I.A.) has defined it as a degree of proof not necessarily conclusive, but what will produce a firm belief or conviction by the court.[72] Evidence is sufficient to conclude that the government established removability if it is "based upon record facts viewed in the light of common sense and ordinary experience."[73] Inferences and conclusions derived from circumstantial evidence, or the totality of the record, are "routine and necessary" for the immigration judge.[74]

A noncitizen is inadmissible under INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C), if the noncitizen fraudulently or willfully misrepresented a material fact to procure a visa, other documentation, or admission into the United States or other benefit provided under the INA.[75] The test for whether misrepresentations are material is whether they had a natural tendency to influence the decisions of the government.[76] The government need not show that the statement influenced the agency, only that the misrepresentation *could* affect or influence the governmental decision.[77]

To terminate a grant of asylum after it was granted, the burden of proof imposed on the government is lowered. In 2014, the B.I.A. held in *Matter of P-S-H-*[78] that asylee status may be terminated if a preponderance of the evidence shows there was fraud in the asylum application.[79] Additionally, the "knowing" requirement need not be established to satisfy a showing of the presence of fraud.[80]

---

71. *See* 8 C.F.R. § 1240.8.

72. Gordon et al., *supra* note 12, at § 42.08 (citing Matter of Patel, 19 I. & N. Dec. 774 (B.I.A. 1988) (internal quotations omitted).

73. Gao v. B.I.A., 482 F.3d 122, 134 (2d Cir. 2007) (citing Siewe v. Gonzales, 480 F.3d 160, 168 (2d Cir. 2007)).

74. Siewe v. Gonzales, 480 F.3d 160, 167 (2d Cir. 2007); *see also* Anderson v. Bessemer City, 470 U.S. 564, 574 (1985) (stating that a finding is not clearly erroneous if the finding is plausible in light of the record viewed in totality); Matter of A.J. Valdez & Z. Valdez, 27 I. & N. Dec. 496, 496-97 (B.I.A. 1985) (affirming the immigration judge's finding that "under the questionable circumstances of this case, it was implausible that the noncitizens were unaware of the inaccuracies in the documents they signed"); Matter of D-R-, 25 I. & N. Dec. 445, 454 (B.I.A. 2011) ("while there is no evidence that the noncitizen ordered any extrajudicial killings, the totality of the record supports the conclusion that he assisted in such killing").

75. INA § 212(a)(6)(C)(i)-(iii), 8 U.S.C. § 1182(a)(6)(C)(i)-(iii).

76. Kungys v. United States, 485 U.S. 759, 772 (1988); *see also* Matter of Bosuego, 17 I. & N. Dec. 125, 130 (B.I.A. 1980) (stating that a misrepresentation is material if it "tends to shut off a line of inquiry which is relevant to the noncitizens eligibility and which might well have resulted in a proper determination that he be excluded").

77. *See* Monter v. Gonzales, 430 F.3d 546, 553 (2d Cir. 2005) (citing *Kungys*, 485 U.S. at 770).

78. 26 I. & N. Dec. 329 (B.I.A. 2014).

79. *Id.* at 329.

80. *Id. See also infra* Part III.b.i (discussing *P-S-H-* in greater detail).

2. Crime

To secure a criminal conviction, the government must prove all elements of the offense beyond a reasonable doubt.[81] For a conviction of immigration fraud under 18 U.S.C. § 1546, the government must prove that the defendant (1) knowingly (2) made a false statement on an immigration document or other document prescribed by statute that (3) materially affects the adjudication of an immigration benefit.[82] A defendant acts "knowingly" when he or she acts intentionally and voluntarily, rather than by ignorance, mistake, accident, or negligence.[83] The clause concerning "other documents prescribed by statute" permits convictions for statements made on any document designated by statute or regulation for entry into the United States.[84]

A conviction of immigration fraud under the U.S. Code may result in various criminal penalties, including fines or up to twenty-five years in prison.[85] Circumstances exacerbating the sentence include whether the offense was committed to facilitate international terrorism, drug trafficking, or whether the defendant was convicted of similar actions in the past.[86] Although criminal prosecutions under 18 U.S.C. § 1546 are not always brought against noncitizens found deportable under INA § 237(a)(3)(C), 8 U.S.C. § 1227(a)(3)(C), the facts relied on in those criminal prosecutions mirror the facts that render the noncitizen removable.[87]

Criminal sanctions for immigration fraud are not exclusively applicable to immigrants but this applies to a very narrow sector of citizens–immigration attorneys and legal support staff. In this context, citizens are not held to a higher standard of conduct or legal obligation to verify the information communicated to them by their client.[88] Similar to the "knowingly" requirement imposed on noncitizens, for a jury to convict an immigration attorney of immigration fraud, the jury must find the attorney knew of false material facts when presenting immigration documents before a court.[89] On top of criminal penalties, an immigration attorney found to have committed fraud may be disbarred.[90]

---

81. United States v. Archer, 671 F.3d 149, 160 (2d Cir. 2011).

82. 18 U.S.C. § 1546.

83. *See Archer*, 671 F.3d at 157.

84. United States v. Rahman, 189 F.3d 88, 118 (2d Cir. 1999) (referring to 8 U.S.C. §§ 1181-1181(a) and 8 C.F.R. §§ 211.2(a), 212.1 for examples of qualifying documents). The *Rahman* court accords the Fifth Circuit's analysis of the same issue in United States v. Osiemi, 980 F.2d 344, 346 (5th Cir. 1993) ("Before the 1986 amendment, the statute proscribed possession of any visa, permit, or other document 'required' for entry into the United States. By deleting the word 'required' and by adding the words, 'prescribed by statute or regulation,' Congress expanded the proscription of the statute from being limited to required entry documents to *any* documents prescribed either by statute or by regulation for entry into the United States") (emphasis in original).

85. 18 U.S.C. § 1546(a).

86. *Id.*

87. *See infra* Part III.b.i (conducting a comparative analysis of removability and criminal cases for immigration fraud).

88. United States v. Maniego, 710 F.2d 24, 28 (2d Cir. 1983).

89. *Id.*

90. Model R. Pro. Conduct r. 8.4 (A.B.A. 2018). Curiously, the same language concerning "moral turpitude" is found to qualify the kind of offenses subjecting attorneys to such

B. Acts of Terrorism

Often, victims of terrorism are collateral damage in proceedings designed to prevent terrorists from entering the United States. Supporters of this over-inclusivity contend that the United States is "better safe than sorry." But like immigration fraud, the current infrastructure impinges on the due process rights of lawful permanent residents. In terrorism-related criminal proceedings, defendants have several affirmative defenses available to them, and the government must prove guilt beyond a reasonable doubt. But in removal proceedings, not only is the burden of proof lowered, but lawful permanent residents are also stripped of any meaningful mechanism to defend themselves.[91]

1. Removability

Under the INA, a noncitizen who engages in terrorist activity or solicits funds or things of value for, or commits acts affording material support to, a terrorist organization, or to any member of such an organization, is ineligible to apply for asylum as having engaged in terrorist activities, unless the noncitizen can demonstrate by clear and convincing evidence that he or she did not know, and should not reasonably have known, that the organization was a terrorist organization.[92] A noncitizen found to have engaged in terrorist activity or materially contributed to a terrorist organization is deportable.[93]

The INA creates three categories of "terrorist organizations."[94] The first category, a Foreign Terrorist Organization ("FTO"), is designated by the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury.[95] FTOs are known as "tier I terrorist organizations" because they are delineated in subsection one of INA § 212(a)(3)(B)(vi), 8 U.S.C. § 1182(a)(3)(B)(vi). FTOs are often "household" names like Islamic State of Iraq and the Levant ("ISIL"), al-Qa'ida, and al-Shabaab.[96] Designation of a group as an FTO must be revoked if the Secretary of State finds that (1) the

discipline. This same language is found under INA § 237, 8 U.S.C. § 1227, qualifying the kinds of offenses subjecting noncitizens to deportation. *See* INA § 237, 8 U.S.C. § 1227.

91. For a comprehensive analysis of various constitutional protections, such as freedom of speech and association, and their (in)application to noncitizens pursuant to terrorism-related grounds, see John W. Whitehead, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 Am. U. L. Rev. 1081 (2002).

92. INA §§ 208(b)(2)(v); 212(a)(3)(B)(i)(I); 212(a)(3)(B)(iv)(IV)(cc); 212(a)(3)(B)(iv)(VI)(dd); 212(a)(3)(B)(vi)(III), 8 U.S.C. §§ 1158(b)(2)(v); 1158(a)(3)(B)(i)(I); 1158(a)(3)(B)(iv)(IV)(cc); 1158(a)(3)(B)(iv)(VI)(dd); 1158(a)(3)(B)(vi)(III).

93. *See* INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) (rendering deportable any noncitizen described by INA § 212(a)(3)(B) or (F), the standards governing inadmissibility on security related grounds).

94. INA § 212(a)(3)(B)(vi), 8 U.S.C. § 1182(a)(3)(B)(vi).

95. Pursuant to an Executive Order by President Clinton, the U.S. Secretary of Treasury may designate an organization as a FTO by blocking all property and interests in property of those who have committed or pose a significant risk of committing acts of violence that have the purpose or effect of disrupting the Middle East peace process. Exec. Order No. 12,947, Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process, 60 Fed. Reg. 5079 (January 25, 1995).

96. A comprehensive list of current and former FTOs is retrievable at https://www.state.gov/foreign-terrorist-organizations/ [https://perma.cc/5TE3-VSB9].

circumstances justifying the designation have changed to warrant a revocation or (2) the national security of the United States warrants a revocation.[97]

The second category, an organization on the Terrorist Exclusion List ("TEL"), is designated by the Secretary of State for immigration purposes in consultation with, or upon the request of, the Attorney General or the Secretary of the Department of Homeland Security.[98] TEL organizations are also called "tier II terrorist organizations."

The last category is an "undesignated terrorist organization."[99] Also called "tier III terrorist organizations," this category was added to the INA by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA Patriot Act") in 2001.[100] Tier III terrorist organizations are broadly defined as "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup that engages in" terrorist activity as defined under the INA.[101] The INA's language suggests that designations as a tier III terrorist organizations are retroactive; the USA Patriot Act's amendments to the INA are generally retroactive.[102] While there is an exception to retroactivity for certain activities involving a tier I or tier II terrorist organization,[103] such an exception to the terrorism bar expressly does not apply to a noncitizen's material support of a tier III terrorist organization.[104] While there is no consensus among the federal courts, the Ninth and Sixth Circuits have agreed with this interpretation on retroactivity.[105]

Without an official register of tier III terrorist organizations, an Immigration Judge must make an *ad hoc* determination of whether an organization is a tier III terrorist organization.[106] The immigration judge decides whether the evidence suggests that the mandatory terrorism bar applies—that is, a noncitizen is barred from applying for relief under INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v) for being described under INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) and INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B). An assessment of whether a group is a tier III terrorist organization focuses on whether the group engaged in terrorist activities as defined under INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv) during the relevant period during which the individual applying for immigration benefits was involved.

The INA defines "terrorist activity" as, among other things, "any activity which is unlawful under the laws of the place where it is committed" (or

97. INA § 219(a)(6)(A), 8 U.S.C. § 1189(a)(6)(A).
98. *See* INA § 212(a)(3)(B)(vi)(II), 8 U.S.C. § 1182(a)(3)(B)(vi)(II).
99. INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III).
100. Pub. L. No. 107–56, 115 Stat. 272, 347-48 (2001) [hereinafter USA PATRIOT Act].
101. INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III).
102. *See* USA PATRIOT Act, *supra* note 100, at § 411(c)(1)(A).
103. *Id.* at § 411(c)(3)(A).
104. *Id.* at § 411(c)(3)(B)(ii).
105. *See, e.g.*, Bojnoordi v. Holder, 757 F.3d 1075, 1077 (9th Cir. 2014); Daneshvar v. Ashcroft, 355 F.3d 615, 627 (6th Cir. 2004).
106. Josh A. Roth, *The Leadership Limitation on Persecutors and Terrorist Organizations*, 108 Cornell L. Rev. Online 60, 67 (2023).

which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves:

(I) the hijacking or sabotage of any conveyance;

(II) the seizing or detaining, and threatening to kill, injure, or continue to detain another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained;

(III) a violent attack upon an internationally protected person;

(IV) an assassination;

(V) the use of a biological or chemical agent, or nuclear device, or the use of an explosive, firearm, or other weapon or dangerous devices with the intent to endanger the safety of one or more individuals or to cause substantial damage to property; or

(VI) a threat, attempt, or conspiracy to do any of the foregoing.[107]

The INA defines "engaged in terrorist activity" as committing a qualifying act in either an individual capacity or as a member of an organization. These qualifying acts include:

(I) to commit or to incite to commit, under circumstances indicating the intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity; to gather information on potential targets for terrorist activity;

(III) to solicit funds or other things of value [for a terrorist activity or a terrorist organization];

(IV) to solicit any individual [to engage in terrorist activity or for membership in a terrorist organization]; or

(V) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons . . . explosives, or training [for the commission of a terrorist activity or to a terrorist or terrorist organization].[108]

The immigration law standard for material support is vague, but the INA provides some guidance. For example, providing a safe house or transportation; providing funds or other material financial benefit; facilitating a transfer of funds; providing weapons; or enabling communications for a terrorist organization could all qualify as material support under the INA.[109] A noncitizen otherwise eligible for removal relief is barred from applying for that relief under INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v) for being described under INA §§ 212(a)(3)(B) and 237(a)(4)(B), 8 U.S.C. §§ 1182(a)(3)(B) and 1227(a)(4)(B).[110] The Department of Homeland Security raises this so-called "terrorism bar" when it believes the evidence indicates the noncitizen

107. *See* INA § 212(a)(3)(B)(iii)(I)-(V), 8 U.S.C. § 1182(a)(3)(B)(iii)(I)-(V).
108. *See* INA § 212(a)(3)(B)(iv)(I)-(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(I)-(VI).
109. INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).
110. *See* INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v).

is ineligible. Upon showing that the terrorism bar applies, the noncitizen must overcome the presumption that he or she is inadmissible.

As mentioned, for purposes of the INA, the Department of Homeland Security must show that "the evidence indicates" that the individual is barred from immigration benefits.[111] No decision from a circuit court or the B.I.A. has quantified the amount, strength, or type of evidence that the Department of Homeland Security must produce to meet its burden.[112] Somewhat helpfully, however, the Board did recently emphasize that "indicates" means "some evidence" from which a reasonable factfinder could conclude that one or more grounds for mandatory denial of relief may apply.[113] Once established however, the noncitizen must show by a preponderance of the evidence that the terrorism bar does not apply.[114]

Immigration judges routinely qualify organizations as tier III terrorist organizations, and these decisions are routinely affirmed by the B.I.A. and circuit courts.[115] But the circuits are split on the issue of an unwritten "leadership authorization" prong in the analysis of whether a group is a tier III terrorist organization.[116]

In 2017, the Third Circuit held in *Uddin v. Attorney General*[117] that if the Department of Homeland Security sought to designate a group as a tier III terrorist organization, it must first show that the organizational leadership authorized the acts purported to be terroristic.[118] The Third Circuit was seemingly uncomfortable with the broad application of the terrorism bar, so it required a showing that the leadership personnel of whatever organization the Department wanted to label as a terrorist group had authorized the terrorist acts committed by its members.[119] Three years before, the Seventh Circuit had ruled similarly, holding in *Khan v. Holder*[120] that "[a]n entire organization does not automatically become a terrorist organization just because some members of the group commit terrorist acts. The question is one of "authorization."[121]

---

111. 8 C.F.R. § 1240.8(d).

112. Roth, *supra* note 106, at 67.

113. Matter of M-B-C-, 27 I. & N. Dec. 31, 37 (B.I.A. 2017).

114. *See, e.g.*, Viegas v. Holder, 699 F.3d 798, 801-02 (4th Cir. 2012) (affirming that the Department of Homeland Security's evidence indicated that the terrorism bar applied before the noncitizen had the burden to show the bar didn't apply); Matter of R-S-H-, 23 I. & N. Dec. 629, 640 (B.I.A. 2003) (where the evidence indicates that a mandatory bar applies, the noncitizen must establish by a preponderance of the evidence that the bar doesn't apply).

115. *See, e.g.*, Bojnoordi v. Holder, 757 F.3d 1075, 1076 (9th Cir. 2014) (affirming B.I.A. decision that Mojahedin-e Khalq, or MEK, was a tier III terrorist organization); Islam v. Sec'y, Dep't of Homeland Sec., 997 F.3d 1333, 1346 (11th Cir. 2021) (affirming USCIS determination that the Bangladesh National Party, a political party, was a tier III terrorist organization); A.A. v. Att'y Gen., 973 F.3d 171, 175-76 (3d Cir. 2020) (affirming B.I.A. decision that Jaysh al-Sha'bi, a government-controlled militia, was a tier III terrorist organization). Similar cases exist across the circuits, and all follow similar analyses.

116. Three circuits have agreed that there is such a prong, while the other circuits have yet to rule on the issue. For a thorough discussion on this issue's history and development, see Roth, *supra* note 106, at 67-75.

117. 870 F.3d 282 (3d Cir. 2017).

118. *Id.* at 290.

119. *Id.* at 284.

120. 766 F.3d 689 (7th Cir. 2014).

121. *Id.* at 699.

But unlike the 2014 ruling in *Khan*, the 2017 ruling in *Uddin* transcended its circuit.[122] In 2021, the Eleventh Circuit adopted *Uddin* in *Islam v. Sec'y, Dept' of Homeland Sec.*,[123] a case that analyzed the same organization at issue in *Uddin*: the Bangladesh National Party (BNP).[124]

Crimmigration cases on tier III terrorist organizations are not limited to the common paradigm of radical Islamic terrorism. In fact, many organizations that DHS contends are tier III terrorist organizations fit the archetype of organizations engaged in war crimes. One such organization is the *Mouvement des Forces Démocratiques du le Casamance* ("MFDC"), a rebel group in Senegal. The U.S. Department of State ("DOS") publishes an annual Country Report on Human Rights Practices, covering internationally recognized individual, civil, and political rights.[125] Decades of successive reports from both DOS and private human rights groups show a pattern of facts by MFDC fitting the statutory definition of terrorist activity.[126]

Like the BNP, the Department of Homeland Security has a cogent argument that under the INA, the MFDC is a tier III terrorist organization based on its commission of terrorist activity by using weapons with the intent to harm individuals.[127] Nothing in the reports–whether by a government bureau such as the State Department or a non-government organization such as Amnesty International–suggests that the MFDC's actions were acceptable in the context of Senegal's civil war, and thus should not be considered terrorism.

The government and NGO reports documenting the MFDC's acts of terrorism are compelling, and likely satisfy the INA's requirement for tier III terrorist organizations, even with the implied leadership authorization prong. But this evidence is not so compelling to show that any *particular member* of the

---

122. The Third Circuit cited "common sense" as support for its ruling, *see* Uddin, 870 F.3d at 284, which is seemingly affirmed by other circuits adopting *Uddin* as guidance.

123. 997 F.3d 1333, 1346 (11th Cir. 2021).

124. *Id.* at 1346. For a detailed analysis of the logical fallacies surrounding removal proceedings about the BNP, see Josh A. Roth, *Rules for Thee but Not for Me: The Irony of Tier III Terrorist Organizations*, 28-1 Bender's Immigr. Bull. 01 (Jan. 1, 2023).

125. For more information on the U.S. Department of State Human Rights Reports, see https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/ [https://perma.cc/3GTP-FWWX].

126. For example, in 1993, the MFDC claimed credit for murdering government officials and politicians who remained loyal to the central Senegal government. U.S. Dep't of State, U.S. Department of State Country Report on Human Rights Practices 1993 – Senegal (Jan. 30, 1994). Between 1997 and 1999, DOS consistently reported that MFDC forces were responsible for killing civilians, forced disappearances, and torture. U.S. Dep't of State, U.S. Department of State Country Report on Human Rights Practices 1999 – Senegal (Feb. 25, 2000). MFDC forces killed thirteen civilian villagers because of their support for government authorities. *Id.* In 1999, Amnesty International published a report concerning civilian killings by MFDC forces in Casamance, in which it reported that women and children have been victims of torture and arbitrary killings, apparently perpetrated by MFDC based on ethnic criteria. Amnesty International, Casamance civilians shelled by the Mouvement des forces démocratiques de Casamance (MFDC), Democratic Forces of Casamance Movement (June 29, 1999), https://www.amnesty.org/en/documents/afr49/005/1999/en/ [https://perma.cc/7522-NRLE].

127. *See* N'Diaye v. Barr, 931 F.3d 656, 663 (8th Cir. 2019) (upholding the B.I.A.'s finding that the MFDC in Senegal was a tier III terrorist organization because it "killed, wounded, and mutilated citizens, committed assassinations, and engaged in other violence" at the time the noncitizen supported the MFDC).

MFDC engaged in terrorist activities. Unlike the series of *Holy Land* cases discussed below that eventually transitioned from a civil designation as a terrorist organization to criminal convictions of its members, evidence for the MFDC or BNP only implicates the organization. Without more, a prosecutor likely could not secure a criminal conviction for any member.

2. Crime

In the criminal code, the United States qualifies international terrorism as violent acts occurring mostly outside the territorial jurisdiction of the United States.[128] The acts must be dangerous to human life and appear to intimidate or coerce a civilian population; influence the policy of a government through intimidation or coercion; or affect the conduct of a government by mass destruction, assassination, or kidnapping.[129] The United States defines domestic terrorism similarly to its definition of international terrorism, differentiating that the act occurs mainly inside the territorial jurisdiction of the United States.[130]

Along with acts of terrorism, federal law criminalizes the provision of material support or resources used in an act of terrorism. Unlike the vague standards under the INA, criminal law defines material support strictly:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[131]

Based on the effect of one's provision of material support, the penalty can be life imprisonment.[132] The provision of material support is extended beyond person-to-person interactions and includes providing material support to terrorist organizations.[133]

The series of federal civil cases about the Holy Land Foundation for Relief and Development (HLF) transcends the realm of immigration law, ultimately

128. 18 U.S.C. § 2331(1).

129. *Id.*

130. 18 U.S.C. § 2331(5). *But see infra* notes 144-48 and accompanying text (describing how "domestic terrorism" is not actually a prosecutable offense).

131. 18 U.S.C. § 2339A(b)(1).

132. 18 U.S.C. § 2339A(a). For example, if the provision of material support results in the death of a person, the defendant can be sentenced to life in prison. Otherwise, a defendant can be fined or imprisoned for up to fifteen years. *See id.*

133. Notably, this statute does not distinguish between the tiers of terrorist organizations when considering whether a defendant provided material support. Because generally only immigration judges make *ad hoc* determinations of whether a group is a tier III terrorist organizations, this invites a conundrum if a prosecutor wanted to convict a defendant under 18 U.S.C. § 2339B for provision of material support to a purported tier III terrorist organization. In that case, a district judge would undergo a tier III analysis and that determination might then be binding within that circuit, contradicting the entire nature of "undesignated" terrorist organizations.

evolving into its sister case, *United States v. El-Mezain*,[134] in which the HLF founders were convicted of criminal terrorism-related offenses. The HLF was found to be a financial arm of HAMAS,[135] sparking an intensive inquiry into the HLF's roots and subsequent blocking of its assets.[136] The HLF formally opposed this designation and sued the United States.[137]

The evidence in *Holy Land I* showed that since its creation in 1989, the HLF had substantial connections to HAMAS that justified its designation as a terrorist group.[138] Even without its designation as a terrorist group, a myriad of evidence can establish that the HLF could have been designated as a tier III terrorist organization as a group of two or more individuals which engaged in terrorist activity as described in INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv). For example, in its decision in *Holy Land I*, the court explained that the Treasury Department's designation of the HLF as a terrorist organization was based on evidence showing that HLF leaders took part in meetings with HAMAS leaders and that HLF had financial connections to HAMAS, including the funding of HAMAS controlled charitable organizations and providing financial support to the orphans and families of Hamas martyrs and prisoners.[139] The court of appeals affirmed HLF's designation as a terrorist organization, and the Supreme Court denied HLF's petition for writ of certiorari, tacitly fortifying its designation as a terrorist organization.[140] This civil designation as a terrorist organization froze the HLF's assets and muddied its reputation throughout the United States. Had the HLF's leaders not been criminally tried, they would have likely been deported like the noncitizens in any of the tier III terrorist organization cases above.[141]

Following the HLF's designation as a terrorist organization, the United States initiated criminal investigations into its founders. In 2008, HLF leaders Mohammad El–Mezain, Ghassan Elashi, Shukri Abu Baker, Abdulrahman Odeh, and Mufid Abdulqader, were tried and convicted of conspiracy to provide and provision of material support to HAMAS; conspiracy to provide and

134. 664 F.3d 467 (5th Cir. 2011).

135. On October 8, 1997, Secretary of State Madeleine K. Albright designated HAMAS as an FTO, or tier I terrorist organization, under INA § 219(a)(1), 8 U.S.C. § 1189(a)(1). 62 Fed. Reg. 52,650 (Oct. 8, 1997). To date, HAMAS remains a tier I organization as described under INA § 212(a)(3)(B)(vi)(i).

136. On December 4, 2001, the U.S. Department of Treasury's Office of Foreign Asset Control designated the HLF as a Specifically Designated Terrorist Group (SDTG) under Executive Order No. 12,947 and subsequently blocked all HLF assets. 67 Fed. Reg. 12,644-01 (Mar. 19, 2002). *See also* Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 62 (D.D.C. 2002) ("Holy Land I"), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003) ("Holy Land II").

137. *Holy Land I*, 219 F. Supp. 2d at 62.

138. *Id.*

139. *Id.* at 70-71.

140. *Holy Land II*, 333 F.3d at 167; *see also* Holy Land Found. for Relief & Dev. v. Ashcroft, 540 U.S. 1218 (2004) (denying certiorari).

141. The HLF cases are not without their problems. The American Civil Liberties Union criticized the adjudications in a 166-page article detailing how the cases were essentially a front for anti-Muslimism in the wake of the attacks of September 11, 2001. *See* Am. C.L. Union, Blocking Faith, Freezing Charity – Chilling Muslim Charitable Giving in the "War on Terrorism Financing" (2009). That argument is not meritless, but neither is the considerable evidence used to affirm the HLF's designation as a financial arm of HAMAS and its leaders' close ties to wanted terrorists.

provision of funds, goods, and services to HAMAS; conspiracy to commit money laundering; and substantive money laundering; in violation of 18 U.S.C. §§ 2339B(a)(1), 1956(a)(2)(A), and 1956(h); and 50 U.S.C. §§ 1701–1706 et seq.[142] The government used the same evidence used to qualify the HLF as a terrorist organization to convict the founders.

The *Holy Land Foundation* cases are unique in that a civil designation as a terrorist organization directly led to criminal convictions of its leaders. This disparity is no doubt credited to the distinction in burdens of proof.[143]

In considering a spectrum of due process rights, one must consider domestic terrorism as applied to citizens. Domestic terrorism is not a crime, per se.[144] The statute defining domestic terrorism, 18 U.S.C. § 2331, does not describe elements of a crime.[145] One district court judge recently described this conundrum as a "donut hole in the statute . . . [allowing] the government [to] obtain search warrants in an investigation of something that is not a crime."[146] Perhaps unsurprisingly, this judge was analyzing a search warrant request concerning a recent notable instance of prosecutable domestic terrorism under federal statutes: the January 6 insurrection.[147]

The common paradigm of domestic terrorism is perhaps better qualified as seditious conspiracy, recently used to successfully prosecute the founder of the Oath Keepers.[148] Even so, various states have enacted their own domestic terrorism statutes, consistent with the federal definition, demonstrating that indeed, domestic terrorism is a crime.[149] In late 2020, seven members of the Wolverine Watchmen were charged with various offenses relating to a plot to kidnap then-governor Gretchen Whitmer.[150] After two years, three members were convicted on various charges, notably including the provision of material

142. United States v. El-Mezain, 664 F.3d 467, 485 (5th Cir. 2011).

143. *See infra* notes 260-265 (discussing DOJ statistics on immigration-related criminal matters referred to the United States Attorney's Office and showing a high rate of declinations for federal prosecution due to insufficient evidence).

144. Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 Nw. U. L. Rev. 1061, 1061-63 (2020).

145. *See* Peter G. Berris et al., Cong. Rsch. Serv., R46829, *Domestic Terrorism: Overview of Federal Criminal Law and Constitutional Issues* 1 (July 2, 2021), https://crsreports.congress.gov/product/details?prodcode=R46829 [https://perma.cc/ME35-K3F4].

146. Matter of Search of One Apple iPhone Smartphone, No. 21-SW-253 (ZMF), 2022 WL 4479799, at *2 (D.D.C. Sept. 6, 2022).

147. *Id.*; *see also* Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial,* Nat'l Pub. Radio; https://www.jan-6.com/january-6-timeline [https://perma.cc/7YLW-VVA7] (last visited Apr. 19, 2023).

148. Off. of Pub. Aff., U.S. Dep't of Justice, *Leader of Oath Keepers and Oath Keepers Member Found Guilty of Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach* (Nov. 29, 2022), https://www.justice.gov/opa/pr/leader-oath-keepers-and-oath-keepers-member-found-guilty-seditious-conspiracy-and-other"\l":~:text=Elmer%20Stewart%20Rhodes%20III%2C%20the,6%2C%202021.

149. *See, e.g.*, Vt. Stat. Ann. tit. 13, § 1703 (West); N.Y. Penal Law § 490.27 (McKinney); Ga. Code Ann. § 16-11-221 (West). For a discussion on contemporary enforcement of domestic terrorism, see Yolanda Rondon, *Treatment of Domestic Terrorism Court Cases: Class and Mental Health in the Criminal System*, 26 Am. U. J. Gender Soc. Pol'y & L. 741 (2018).

150. Mich. Dep't of Att'y Gen., *AG Nessel Charges 7 under Michigan's Anti-Terrorism Act as Part of Massive Joint Law Enforcement Investigation* (Oct. 8, 2020), https://www.michigan.gov/ag/news/press-releases/2020/10/08/ag-nessel-charges-7-under-michigans-anti-terrorism-act-as-part-of-massive [https://perma.cc/8CBQ-59JU].

support for terrorist acts.[151] Two members were convicted in federal court of conspiracy to possess weapons of mass destruction.[152] In September 2023, three members were acquitted despite the prosecutor's best efforts to show that they helped "bring terrorism to Antrim County."[153]

If groups such as the Oath Keepers, the Wolverine Watchmen, or other gangs were subject to immigration law, they could easily be qualified as tier III terrorist organizations under INA § 219, 8 U.S.C. § 1189, and contemporary case law. This would implicate all members, despite their subsequent acquittal. But U.S. jurisprudence on domestic terrorism is not nearly as evolved as it is in the international context. Congress is willing to brand a noncitizen as a terrorist for a mere financial contribution to a political party.[154] But in the domestic context, one must attempt to kidnap a governor or physically overthrow the federal government before it contemplates such a title. As this Article contends, the citizen-noncitizen dichotomy impinges on the due process rights of lawful permanent residents.

III. The Remedy

Lawful permanent residents are entitled to more procedural safeguards in removal proceedings than other noncitizens because they are "most like citizens."[155] The judicial remedies proposed in this section follow the Supreme Court's decision in *Mathews v. Diaz*. In *Mathews*, Justice Stevens explicitly distinguished citizens and noncitizens, and hinted at an internal distinction of noncitizens:

> "The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification."[156]

Later in the opinion Justice Stevens suggested that distinguishing some noncitizens (here, lawful permanent residents) from others is not only constitutional, but to be expected:

---

151. Mich. Dep't of Att'y Gen., *Members of Wolverine Watchmen Convicted on All Charges* (Oct. 26, 2022), https://www.michigan.gov/ag/news/press-releases/2022/10/26/members-of-wolverine-watchmen-convicted-on-all-charges [https://perma.cc/3EGR-RXYV].

152. Tresa Baldas & Arpan Lobo, *Jury Convicts Adam Fox, Barry Croft Jr. in Whitmer Kidnapping Plot* (Aug. 23, 2022), Detroit Free Press, https://www.freep.com/story/news/local/michigan/2022/08/23/whitmer-kidnap-case-verdict-guilty-adam-fox-barry-croft-jr/7873790001/ [https://perma.cc/52PF-XMVX].

153. Meredith Deliso, *Last 3 Men Charged with Plotting to Kidnap Michigan Gov. Gretchen Whitmer Found Not Guilty*, ABC News (Sept. 15, 2023), https://abcnews.go.com/US/3-men-charged-plotting-kidnap-michigan-gov-gretchen/story?id=103154701 [https://perma.cc/B49A-GWK7].

154. *See* Roth, *supra* note 124 (describing as paradoxical how an immigrant's membership and financial contribution to the Bangladesh National Party can simultaneously be the basis for asylum and the basis for barring that asylum claim).

155. *See infra* note 158 and accompanying text.

156. Mathews v. Diaz, 426 U.S. 67, 78 (1976).

> "Since it is obvious that Congress has no constitutional duty to provide all aliens with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others."[157]

Justice Stevens concluded with *why* this distinction is permissible. Like this Article contends, Justice Stevens suggested that due process for noncitizens exists on a spectrum, and that noncitizens who are "most like citizens" are entitled to heightened due process:

> "[I]t remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not. In short, citizens and those who are most like citizens qualify."[158]

Due process is difficult to quantify with bright-line rules. But in the same year the Supreme Court decided *Mathews v. Diaz*, it created a balancing test for due process in *Mathews v. Eldridge*.[159] This test requires courts to consider the private party's interest, the government's interest, and the risk of erroneous determinations.[160] The Court described the factors as:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[161]

The following subsection employs the *Eldridge* test in the discrete contexts of immigration fraud and terrorism.

A. The *Mathews v. Eldridge* Factors

This subsection considers the following: (1) the government's interest in maintaining the current crimmigration procedures; (2) the lawful permanent resident's interest in an accurate determination; (3) the risk of an erroneous deprivation of that interest; and (4) the proper balance between the government's interest against the applicant's interest, including whether the Constitution requires heightened due process for lawful permanent residents in crimmigration proceedings.

157. *Id.* at 82.
158. *Id.* at 83.
159. 424 U.S. 319 (1976).
160. *Id.* at 335.
161. *Id.*

1. The Government's Interest

As discussed, the Supreme Court accords tremendous deference to Congress on immigration issues.[162] Scholars have described how this "plenary power" eclipses other constitutional protections, such as freedom of speech and association.[163] But this power is not absolute, and the plenary power doctrine is flawed.[164] *Chinese Exclusion* affirmed discrimination based on national origin.[165] The Supreme Court affirmed this constitutional contradiction in *Fong Yue Ting v. United States*,[166] holding that arbitrary and discriminatory immigration decisions were constitutional and not subject to heightened scrutiny.[167]

The Supreme Court's 1886 decision in *Yick Wo v. Hopkins*[168] seemingly contradicts this analysis. There, Chinese residents were discriminated against in the provision of laundry licenses, which the Court held was unconstitutional.[169] At that time, however, the Equal Protection Clause only applied to states. It wasn't until 1954 that the Court incorporated the concept of equal protection against the federal government.[170] Despite this social and judicial evolution, plenary power is still a governmental interest for the Department of Homeland Security.

In *Landon v. Plasencia*,[171] Justice O'Connor described the governmental interest in efficient adjudication of immigration laws as "weighty."[172] But *Plasencia* does not necessarily hold true in fraud- or terrorism-related crimmigration proceedings for lawful permanent residents. Justice O'Connor specifically described as weighty the governmental interest in "efficient administration of the immigration laws *at the border*."[173] The Court's definition of "at the border" is not literal, and recently in *Dep't of Homeland Sec. v. Thuraissigiam*,[174] the Court stated that noncitizens who arrive at ports of entry and then live in the

---

162. *See* Mills et al., *supra* note 2, at 368; *see also* Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) ("Over no conceivable subject is the legislative power of Congress more complete [than immigration]").

163. *See, e.g.*, Miyamoto, *supra* note 1, at 183-84; Diana G. Li, *Due Process in Removal Proceedings After* Thuraissigiam, 64 STAN. L. REV. 793 (2022); Marissa Hill, *No Due Process, No Asylum, and No Accountability: The Dissonance Between Refugee Due Process and International Obligations in the United States*, 31 AM. U. INT'L L. REV. 445 (2016).

164. Mills et al., *supra* note 2, at 369 ("Plenary power is inconsistent with the Tenth Amendment and the constitutional democracy of the United States"); *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (contending that the doctrine is not only inconsistent with the foundational enumerated powers principles, but also based on nationalist and racist views of federal power); *supra* note 16 (describing how *Chinese Exclusion* was arguably based on racist views toward Chinese immigrants); Henkin, *supra* note 1, at 853.

165. The Chinese Exclusion Case, 130 U.S. 581 (1889).

166. 149 U.S. 698 (1893).

167. *Id.*

168. 118 U.S. 356 (1886).

169. *Id.*

170. Bolling v. Sharpe, 347 U.S. 497 (1954).

171. 459 U.S. 21 (1982).

172. *Id.* at 34. *See also* GORDON ET AL., *supra* note 12, at § 9.06 (describing how *Plasencia* "appeared to significantly extend the reach of noncitizens' constitutional claims.").

173. *Id.* (emphasis added).

174. 140 S. Ct. 1959 (2020).

country for years pending their removal are still treated as if stopped at the border for due process purposes.[175] But even post-*Thuraissigiam*, lawful permanent residents are not "at the border" in either the literal or figurative sense. There are significant differences in due process requirements and expectations when at the border or not.[176] So for the *Plasencia* Court's use of the phrase "at the border" not to be superfluous, *Plasencia* must only apply to the efficient administration of immigration laws implicating noncitizens who are either figuratively or literally at the border. Lawful permanent residents are neither.[177] When the United States confronts prospective entrants or asylees at the border, very little can be ascertained about them from a national security standpoint. Without facial recognition software linked to a database of known terrorists or criminals, border agents must rely heavily on the paperwork or testimony provided by the entrant. So crucial decisions must be made in a timely, *efficient* manner to preserve the interests of the United States and those of the entrant.

By contrast, lawful permanent residents have already been vetted through a lengthy, intrusive, and expensive process that would reasonably reveal any of the concerns the hypothetical border agent above would search for.[178] Thus, the efficiency interest is lessened when the Department of Homeland Security files removal proceedings against a lawful permanent resident. Moreover, by the time a lawful permanent resident is granted such status, the United States has invested substantial resources in processing the application. The return on this investment manifests in increasing the size of the U.S. labor force, increasing economic productivity, and strengthening the nation's diversity.[179] Congressman Don Beyer, Chairman of the Congressional Joint Economic Committee, described how immigrants were essential to the U.S. economy, especially during the COVID-19 pandemic.[180] Congressman Beyer described how noncitizen labor was necessary to sustain the national food supply, in that thirty-precent of farm laborers, crop producers, meat processors, and commercial bakeries, were noncitizens.[181] So, while the government's plenary power and interest in efficient administration suggest a high interest in adjudicating

175. *Id.* at 1982.

176. Even outside the immigration law context, the bounds of the Fourth Amendment are stretched at the border. Searches that would require consent or a warrant are permitted with reasonable suspicion. *See* United States v. Ramsey, 431 U.S. 606 (1977) (permitting warrantless searches of international mail pursuant to reasonable suspicion); United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (permitting body cavity searches pursuant to reasonable suspicion); United States v. Flores-Montano, 541 U.S. 149 (2004) (permitting pat-down searches with no warrant or any level of suspicion).

177. *See generally* Gerald M. Kouri Jr., *Getting Back In: The* Plasencia *Decision and the Permanent Resident Alien's Right to Procedural Due Process*, 36 U. Miami L. Rev. 969 (1982).

178. *See generally* Gordon et al., *supra* note 12, at § 31.04.

179. Cecilia Rouse et al., *The Economic Benefit of Extending Permanent Legal Status to Unauthorized Immigrants*, White House Blog (Sept. 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/09/17/the-economic-benefits-of-extending-permanent-legal-status-to-unauthorized-immigrants/#:~:text=This%20diversity%20has%20been%20celebrated,size%20of%20the%20labor%20force.

180. Don Beyer, *Immigrants are Vital to the U.S. Economy*, Joint Econ. Comm'n, https://www.jec.senate.gov/public/_cache/files/6750b0f0-c851-4fee-9619-295582fd44e8/immigrants-are-vital-to-the-us-economy-final.pdf [https://perma.cc/3ZGN-VQGC] (last visited Apr. 12, 2023).

181. *Id.* at 2.

immigration fraud and terrorism independent of criminal courts, the government also has an interest rooted in receiving a return on its investment from granting an individual lawful permanent resident status. This suggests that the government itself should desire a heightened level of surety before removing a lawful permanent resident from the country.

In crimmigration cases, one must consider the discrete governmental interest in the "crime" being adjudicated. This Article discusses fraud and terrorism as a mechanism for its argument, and the governmental interest in each crime is distinct. In *Hamdi v. Rumsfeld*,[182] Justice O'Connor stated that it was "obvious and inarguable that no governmental interest is more compelling" than national security because it is the "primary responsibility and purpose of the federal government."[183] But federal courts don't consider immigration fraud the same way. For instance, the Ninth Circuit described the governmental interest in preventing document fraud to be as considerable as the noncitizen's interest in not being deported in *Plasencia*.[184]

Where immigration fraud falls on the spectrum of governmental interest need not be answered specifically. It is sufficient to state that it is less than the governmental interest in national security.[185]

2. The Lawful Permanent Resident's Interest

The relevant *Eldridge* factor here is "the private interest that will be affected by the official action."[186] Like the government's interest in efficient administration, the Supreme Court has described the individual's interest as "weighty" because the lawful permanent resident stands to "lose the right to stay and live and work in this land of freedom."[187] In *Bridges v. Wixon*,[188] Justice Douglas conceded that while deportation wasn't criminal, its implications were like it, and a lawful permanent resident's interest was similar to that of a criminal defendant:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.[189]

---

182. 542 U.S. 507 (2004).

183. *Id.* at 508 (internal citations omitted); *see also* Bibicheff v. Holder, 55 F. Supp. 3d 254, 265 (E.D.N.Y. 2014) (dismissing a Fourth Amendment due process claim because of the "government's strong interest in protecting national security at its borders").

184. Walters v. Reno, 145 F.3d 1032, 1043 (9th Cir. 1998) ("It is clear that the plaintiffs' interests in this case are significant. *See Plasencia*, 459 U.S. at 34 . . . The government's interests in the administration of its immigration laws and in preventing document fraud are likewise considerable") (citations in original).

185. *See infra* Part III.b (distinguishing additional procedural safeguards for removal proceedings involving fraud from those involving national security).

186. Mathews v. Eldridge, 424 U.S. 319, 335-36 (1976).

187. Landon v. Plasencia, 459 U.S. 21, 27 (1982). *See also* Mills et al., *supra* note 2, at 369 (aligning the private interest of asylees to avoid persecution with the death penalty principle that "death is different." Thus, the private interest is as high as possible).

188. 326 U.S. 135 (1945).

189. *Id.* at 154.

More recently, in 2010, the Supreme Court reacknowledged this substantial overlap, stating that deportation is "intimately related to the criminal process" and that the law "has enmeshed criminal convictions and the penalty of deportation for nearly a century."[190]

Removal implicates not only a deprivation of liberty and property interests but can also be "inhumane and life threatening."[191] Robert Pauw has suggested that such deprivation impinges on the fundamental rights to marry as one chooses and live together as a family.[192]

Another factor increasing the lawful permanent resident's interest is their time and resources invested in the immigration process. Lawful permanent residents who immigrated on family-sponsored green cards may suffer from a two decades-long delay.[193] Others may have their applications delayed without reason, requiring a federal lawsuit[194] or a writ of mandamus[195] to compel the United States Citizen and Immigration Services (USCIS) to act. These causes of action often fail; federal courts defer to USCIS discretion[196] and grant mandamus only in extraordinary cases.[197]

Bell v. Burson[198] provides an analogous framework for this problem. There, the Supreme Court held that the procedural due process required to *terminate* one's driver's license was distinct from the procedural requirements of the initial *grant* of the license.[199] It held that a statute categorically barring the issuance of licenses to motorists without liability insurance would not violate the Fourteenth Amendment.[200] But once licenses were issued, it invoked a property interest, the deprivation of which, must satisfy due process.[201] So licensed motorists later found to be uninsured were entitled to a hearing before the state could revoke the license.[202]

In short, the interest in not being removed from the country is inherently high. This interest amplifies for lawful permanent residents.[203] Like licensed

190. Padilla v. Kentucky, 559 U.S. 356, 365-66 (2010).

191. Sandra E. Bahamonde, *Due Process for U.S. Permanent Residents: The Right to Counsel*, Int'l L. Student Ass'n J. Int'l & Compar. L. 86, 95 (2013).

192. Pauw, *supra* note 2, at 343-44.

193. U.S. Dep't of State, Visa Bull. July 2023, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-july-2023.html [https://perma.cc/2RLP-GZT2] (last visited June 28, 2023)(reflecting priority dates for immigrants from China (mainland) as April 22, 2007; India as Sept. 15, 2005; Mexico as Aug. 1, 2000; and Philippines as Aug. 22, 2002).

194. *See, e.g.*, Ahmed v. Holder, 12 F. Supp. 3d 747, 750 (E.D. Pa. 2014) (compelling USCIS to adjudicate an applicant's adjustment of status request after placing it on hold for six years).

195. Boussana v. Johnson, 2015 U.S. Dist. LEXIS 76087, at *27 (S.D.N.Y. June 11, 2015) (granting mandamus after an eight-year delay).

196. *E.g.*, Oljirra v. Mayorkas, No. 12-CV-0994 (PJS/JSM), 2013 U.S. Dist. LEXIS 52048, at *15 (D. Minn. Apr. 11, 2013) (holding that a five-year delay was reasonable).

197. *E.g.*, Boussana v. Johnson, 2015 U.S. Dist. LEXIS 76087, at *19 (S.D.N.Y. June 11, 2015) ("Mandamus is a drastic and extraordinary remedy that is reserved for really extraordinary causes") (internal quotations omitted).

198. 402 U.S. 535 (1971).

199. *Id.* at 539-43.

200. *Id.* at 539.

201. *Id.*

202. *Id.* at 542-43.

203. Mills et al., *supra* note 2, at 369.

motorists in *Bell*, lawful permanent residents have a higher interest in maintaining their residency status than other categories of noncitizens awaiting green card approval.

3. The Risk of Erroneous Adjudications

Federal courts are limited in their ability to review immigration law. The Fourteenth Amendment guarantees every litigant the right "to present his case and have its merits fairly judged."[204] But the elasticity of procedural rules and nearly unbridled discretion of immigration judges poses substantial risks of erroneous adjudications.

Noncitizens in removal proceedings often simultaneously apply for asylum or other forms of relief.[205] These proceedings are often adjudicated on a finding of whether a noncitizen was credible.[206] Paramount to satisfying a statutory requirement for an immigration benefit is the noncitizen's credibility, because the noncitizen's testimony is often the sole source of information justifying the benefit. Under the REAL ID Act,[207] an immigration judge may base an adverse credibility determination on *any* inconsistencies, inaccuracies, or falsehoods, even if the inconsistency, inaccuracy, or falsehood does not go to the heart of the applicant's claim.[208] In considering the totality of the circumstances, the REAL ID Act permits an immigration judge to consider any or all of the following when evaluating the noncitizen's credibility: demeanor,

---

204. U.S. CONST. amend. XIV. *See also* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-87 (1975) (describing the elements of a fair hearing, including an unbiased tribunal; an opportunity to present reasons why the action should not be taken; the right to call witnesses; to know the evidence against oneself; and to have the decision based only on the evidence).

205. *See, e.g.*, INA § 208, 8 U.S.C. § 1158 (asylum); INA § 239B, 8 U.S.C. § 1229b (cancellation of removal), INA § 239C, 8 U.S.C. § 1229c (voluntary departure); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (withholding of removal) and Article III of the Convention Against Torture (CAT). *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (implemented in the removal context in principal part at 8 C.F.R. § 1208.16(c)–.18). The CAT is a non-self-executing treaty. *See, e.g.*, Pierre v. Gonzales, 502 F.3d 109, 119-20 (2d Cir. 2007); Matter of H-M-V-, 22 I. & N. Dec. 256, 259-60 (B.I.A. 1998). Adjudicators do not apply the CAT itself, but rather the implementing regulations. The latter, for example, contain important United States ratification "reservations, understandings, declarations, and provis[ions]" with respect to the definition of "torture" not contained in the text of the Convention Against Torture itself. *See* 8 C.F.R. § 1208.18(a); *see also id.* § 1208.16(c)(1) ("The definition of torture contained in § 1208.18(a) of this part shall govern all decisions made under regulations under Title II of the [INA] about the applicability of Article 3 of the Convention Against Torture"). For ease of reference, however, we use "CAT" to refer to the implementing regulations.

206. GORDON ET AL., *supra* note 12, at § 33.04[5][f] ("Perhaps the most common reason for a denial of asylum is an adverse credibility finding by the [immigration judge] or B.I.A.").

207. Pub. L. No. 109–13, 119 Stat. 231, 302 (2005). The REAL ID Act increased the burden of proof for asylees and authorized immigration judges to require that potential asylees provide evidence to corroborate their asylum claim in addition to their testimony, and to consider inherent plausibility, internal consistency, and demeanor when evaluating a witness' credibility. *See id.*

208. Xiu Xia Lin v. Mukasey, 534 F.3d 162, 165 (2d Cir. 2008) (citing 8 U.S.C. § 1158(b)(1)(B)(iii)) (emphasis added).

candor, responsiveness, inherent plausibility, lack of corroborating evidence, and consistency.[209]

The Federal Rules of Evidence are guidelines rather than binding law. For example, if a litigant seeks to authenticate evidence in federal court, he or she must produce evidence sufficient to support a finding that an item is what the proponent claims it is.[210] In immigration proceedings, the pertinent question about evidence is not admissibility but what weight the immigration judge should give it.[211] The Board of Immigration Appeals (B.I.A.) instructs immigration judges to grant evidence the appropriate weight in totality of the facts of each case, as well as the "nature and strength" of that evidence.[212] Often, noncitizens subject to removal present as evidence letters from family or friends corroborating their testimony about their alleged persecution. Such evidence would generally be prohibited as hearsay but are permissible in immigration court.[213]

Because an immigration judge is limited in capacity to "authenticate" a document, the pragmatic approach is to give the document minimal weight in corroborating the noncitizen's testimony.[214] In fact, the rules are so elastic that an immigration judge might simultaneously (1) admit evidence into the record and (2) permit an inference of its fabrication.[215]

In 2022, the Supreme Court further hamstrung the judiciary from reviewing immigration court decisions in *Patel v. Garland*.[216] Pankajkumar Patel sought a discretionary waiver for accidentally checking a block on his driver's license application indicating that he was a U.S. citizen, a purported violation of INA 212(a)(6)(C)(ii)(I).[217] The immigration judge (and later, the B.I.A.) rejected Patel's argument that he did not do so with the "subjective intent of obtaining the . . . benefit" requirement of *Matter of Richmond*.[218] The only evidence supporting Patel's argument was his own testimony–his credibility.[219] The Eleventh Circuit held that because the finding of Patel's incredibility

209. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii); *see also* Matter of J-Y-C-, 24 I. & N. Dec. 260, 262-63 (B.I.A. 2007); Diallo v. U.S. Dep't of Just., 548 F.3d 232, 234 (2d Cir. 2008).

210. Fed. R. Evid. 901(a).

211. *See* Matter of Y-S-L-C-, 26 I. & N. Dec. 688, 690 (B.I.A. 2015); *see also* U.S. Dep't of Just., Exec. Off. of Immigr. Rev., Immigration Judge Benchbook: Evidence Guide, https://www.justice.gov/eoir/page/file/988046/download [https://perma.cc/7G9V-UWDK] (last visited May 3, 2023).

212. Matter of Thomas, 21 I. & N. Dec. 20, 24 (B.I.A. 1995).

213. *But see* Matter of H-L-H- & Z-Y-Z-, 25 I. & N. Dec. 209, 215 (B.I.A. 2010) (stating that letters from interested parties not subject to cross-examination "do not provide substantial support" for the noncitizen's contentions).

214. *See id.* at 215 n.5 ("failure to attempt to prove the authenticity of a document through [certification] or any other means is significant").

215. *See* Ying Li v. Bureau of Citizenship & Immigr. Servs., 529 F.3d 79, 83 (2d Cir. 2008) (affirming an adverse credibility finding and permitting an inference of fabrication because the noncitizen's account could be established solely by perjury).

216. 142 S. Ct. 1614 (2022).

217. *Id.* at 1620.

218. 26 I. & N. Dec. 779, 786-87 (B.I.A. 2016).

219. Patel v. Garland, 142 S. Ct. at 1620 ("though Patel testified that he had provided his alien registration number on his application, which would have identified him as a noncitizen, the actual application showed that he had not. The judge also noted that Patel

stemmed from an application of discretionary relief, it could not review that determination.[220] By affirming, the Supreme Court made the B.I.A. judge, jury, and executioner of all forms of discretionary relief, indiscriminate of obvious constitutional, substantive, or procedural errors.

The elasticity of evidence encourages adjudicators to dispose of a case as a matter of credibility rather than consider the potential for fraud. For discretionary cases, this proves fatal. Like Mr. Patel, lawful permanent residents may seek discretionary relief for issues–intentional or not–in their prior immigration applications. But *Patel* is indiscriminate of *who* is subject to the immigration court's unbridled discretion. These circumstances increase the risk of erroneous adjudications in which *Patel* bars review of a decision implicating a lawful permanent resident.

Lawful permanent residents endure an administrative gauntlet to achieve the right to call themselves as such. Thus, additional procedural safeguards are required to mitigate the threat of erroneous adjudications in crimmigration cases implicating lawful permanent residents.

B. New Procedural Safeguards

In arguing that deportation often resembles a punishment and thus should receive heightened procedural safeguards, Robert Pauw distinguished applying the "full panoply" of safeguards in criminal trials from civil prosecutions that are "quasi-criminal."[221] But in 1896, the Supreme Court acknowledged that some civil penalties are so punitive that the "full panoply" of criminal procedural safeguards should apply.[222] For immigration fraud and terrorism, the penalties are the same: deportation. But as discussed, the *Eldridge* factor of the government's interest is not. The interest in national security (deporting or refusing to admit potential terrorists) outweighs its interest in fraud (deporting or refusing to admit potential fraudsters).[223] Thus, the necessary procedural safeguards for fraud and terrorism adjudications are distinct. The subsections below argue that: (1) fraud-related removal proceedings should require a criminal conviction for the alleged fraud as a prerequisite to removal; and (2) terrorism-related removal proceedings should provide affirmative defenses to lawful permanent residents.

1. Convictions as a Prerequisite for Fraud-Related Removability

Part II.A demonstrated that the due process requirements of adjudicating immigration fraud differ depending on whether they are adjudicated in

---

had falsely represented his manner of entry into the United States on an application for asylum"). Unsurprisingly, no criminal proceedings were initiated against Mr. Patel. *See infra* notes 263-265 and accompanying text.

220. Patel v. Garland, 142 S. Ct. at 1621 (citing Patel v. United States Atty. Gen., 971 F. 3d 1258, 1272-73 (11th Cir. 2020)).

221. Pauw, *supra* note 2, at 337.

222. Wong Wing v. United States, 163 U.S. 228 (1896) (holding that the punitive measure of hard labor imposed for unlawful presence in the United States entitled Wong Wing to Fifth and Sixth amendment rights to due process).

223. *See supra* notes 182-185 and accompanying text.

removal proceedings or criminal proceedings. This section shows that such a distinction is unwarranted because the standards for sufficiency of the evidence are practically identical. The core issue raised in Part II.A is that fraud is the archetype of a crime involving moral turpitude, and yet the INA permits non-criminal adjudications of immigration fraud. While "Congress regularly makes rules that would be unacceptable if applied to citizens,"[224] this Section argues that because (1) immigration fraud is criminal and (2) the evidence in removal proceedings is just as adequate in criminal proceedings, then to satisfy due process requirements, fraud-related removability grounds as applied to lawful permanent residents must come only after a criminal conviction for that fraud.

The legislative history of 18 U.S.C. § 1546 suggests that a wide array of evidence may sustain a conviction. In enacting the Immigration Reform and Control Act of 1986,[225] Congress reshaped the statute to expand on acts that qualify for a conviction. Along with creating each offense currently listed in subsection (b), Congress modified subsection (a) by replacing "other documents required for entry into the United States" with "border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States."[226] After signing this bill into law, President Reagan commented that it was "the most comprehensive reform of our immigration laws" and the result of a five-year task given to Congress to "increase enforcement of immigration laws."[227]

In evaluating fraud allegations, admission of circumstantial evidence is granted significant latitude in criminal cases.[228] Evidence can sustain a conviction if, based on the totality of the evidence, a reasonable jury could find that the evidence proved the defendant's guilt beyond a reasonable doubt.[229] The government may rely solely on circumstantial evidence, and the government need not preclude every reasonable hypothesis consistent with the defendant's innocence.[230] That said, the government must show "more than evidence of a general cognizance of criminal activity, suspicious circumstances, or mere association with others engaged in criminal activity."[231]

In immigration proceedings, evidence is sufficient to conclude that the government established removability if it is "based upon record facts viewed in

224. Mathews v. Diaz, 426 U.S. 67, 80 (1976).

225. The reform discussed here is the last major change of statutory language to what was recodified as 18 U.S.C. § 1546. Subsequent changes to the statutory language are not substantial to this analysis.

226. 132 Cong. Rec. H10068-01 (1986). *See also* 18 U.S.C. § 1546(a)-(b).

227. Statement of the President Upon Signing S. 1200, Nov. 10, 1986, *reprinted in* 1986 U.S.C.C.A.N. 5856-1, 5856-1.

228. Butler v. Watkins, 80 U.S. 456, 457 (1871).

229. United States v. Hawkins, 547 F.3d 66, 76 (2d Cir. 2008) (affirming a conspiracy conviction because a reasonable jury could find the person guilty beyond a reasonable doubt based on "the evidence in its totality").

230. United States v. D'Amato, 39 F.3d 1249, 1256 (2d Cir.1994); United States v. Chang An–Lo, 851 F.2d 547, 554 (2d Cir. 1988).

231. United States v. Archer, 671 F.3d 149, 157 (2d Cir. 2011) (citing United States v. Samaria, 239 F.3d 228, 233 (2d Cir. 2001)).

the light of common sense and ordinary experience."[232] Inferences and conclusions derived from circumstantial evidence, or the totality of the record, are "routine and necessary" for immigration judges.[233]

For example, in 2003, a noncitizen from India appeared before an immigration judge with an attorney and was granted asylum.[234] Six years later, in 2009, the attorney and others from that firm were convicted of immigration fraud under 18 U.S.C. § 1546 for making false statements in the asylee's application and providing a fabricated medical certificate from India.[235]

In 2011, the Department of Homeland Security learned of the attorney's conviction and started removal proceedings against the asylee, claiming that the fraud rendered him deportable.[236] The asylee was ordered removed. On appeal, the main issue for the B.I.A. was whether the Department had to show the asylee knew of the fraud to render him deportable.[237] The B.I.A. determined that immigration fraud under the INA was a strict liability offense.[238] Thus, the asylee's deportation order was affirmed and his asylee status rescinded.[239] In this case, the United States never charged the asylee with a criminal offense as they did his attorney–likely because had they done so, the prosecution would not have been able to establish a *mens rea*. Equivalent dispositions in civil proceeding do not exist for citizens. Deportation is a de facto deprivation of the right to possess property and in many cases an automatic deprivation of liberty. An asylee's removal resembles a criminal penalty, especially when they are deported to a country to which the United States has agreed would persecute them. Cases in which the government contends asylum was granted based on fraud illustrate a discrete issue; if the grant was based on fraud, one can reasonably argue the applicant never faced persecution. But this Article contends that to renege on that grant, a higher level of scrutiny should apply to the second adjudication, not a lower one. If the government seeks to deport someone to a country it once agreed the asylee faced persecution, it better be sure it is correct.

Analyses of 18 U.S.C. §1546's enforcement suggests that like INA prosecutions, no single factor is conclusive to secure a conviction for criminal behavior. For example, in *United States v. Archer*,[240] an attorney was convicted of visa fraud and conspiracy to commit visa fraud because four of his prior clients

232. Gao v. B.I.A., 482 F.3d 122, 134 (2d Cir. 2007) (citing Siewe v. Gonzales, 480 F.3d 160, 168 (2d Cir. 2007)).

233. Siewe, 480 F.3d at 167; *see also* Anderson v. Bessemer City, 470 U.S. 564, 574 (1985) (stating that a finding is not clearly erroneous if the finding is plausible in light of the record viewed in totality); Matter of D-R-, 25 I. & N. Dec. 445, 454 (B.I.A. 2011) ("while there is no evidence that the noncitizen ordered any extrajudicial killings, the totality of the record supports the conclusion that he assisted in such killing"); Matter of A.J. Valdez & Z. Valdez, 27 I. & N. Dec. 496, 500 (B.I.A. 1985) (affirming the immigration judge's finding that "under the questionable circumstances of this case, it was implausible that the noncitizens were unaware of the inaccuracies in the documents they signed").

234. Matter of P-S-H-, 26 I. & N. Dec. 329, 329 (B.I.A. 2014).

235. *Id.* at 332.

236. *Id.* at 329.

237. *Id.*

238. *Id.*

239. *Id.*

240. 671 F.3d 149 (2d Cir. 2011).

testified that they spoke little English, knew nothing about any requirements of the immigration program, and their visa applications contained false information of which they were unaware and did not provide.[241] Moreover, the attorney routinely requested adjournments or withdrew applications for these clients when the Department of Homeland Security insisted on interviewing the client.[242]

In *United States v. Fomichev*,[243] a noncitizen was convicted of unlawful use of an identification document after circumstantial evidence showed he was competent in English when he presented an employer with a fake permanent resident card and social security card.[244] In a similar case, *United States v. Ongaga*,[245] a noncitizen was convicted of visa fraud after making a false statement that he entered the United States under the laws of the place where his marriage took place and not to procure an immigration benefit.[246] The government relied on three key piece of circumstantial evidence: (1) evidence showed his wife received payment from his brother; (2) he maintained a relationship with another woman; and (3) the defendant was never observed at his wife's residence.[247]

In *United States v. Cardenas*,[248] two non-citizen defendants were convicted of visa fraud after making false statements on various immigrations forms.[249] Evidence introduced at trial showed that the defendants were fluent in English, thus defeating the argument that they did not "knowingly" sign false statements.[250] In *United States v. Alameh*,[251] a non-citizen was convicted of fraudulently obtaining citizenship by marriage.[252] In determining that the government had met its burden of proof, the court affirmed the jury's use of circumstantial evidence, including the facts that the defendant's wife met the defendant on the same day they were married, the defendant's wife never lived at the address on her marriage certificate, and two other "green card marriages" occurred on that day.[253] The defendant was sentenced to two years' probation (one month of which confined), one-month community service, and his citizenship was revoked.[254]

These cases show that circumstantial facts can justify a criminal conviction for immigration fraud. In *Archer*, the attorney-defendant likely could have established reasonable doubt of his participation in the fraud if his clients had understood English. Similarly, the noncitizen-defendant in *Fomichev* likely could have established reasonable doubt that he provided fraudulent

241. *Id.* at 156.
242. *Id.* at 161.
243. 899 F.3d 766 (9th Cir.), *opinion amended on denial of reh'g*, 909 F.3d 1078 (9th Cir. 2018).
244. *Id.* at 773.
245. 820 F.3d 152 (5th Cir. 2016).
246. *Id.* at 161.
247. *Id.*
248. 761 F. App'x 34 (2d Cir. Jan. 31, 2019).
249. *Id.* at 38.
250. *Id.* at 37.
251. 341 F.3d 167 (2d Cir. 2003).
252. *Id.* at 171.
253. *Id.* at 171, 177.
254. *Id.* at 171.

documents to an employer had he *not* understood extensive English. In *Archer*, the noncitizens' ignorance of the fraud was used by the prosecution to support its argument. Similar tactics were used in a different light in *United States v. Phillips*,[255] a Tenth Circuit case about materially false information in a client's asylum application.[256]

In these cases, the government had to prove the attorney-defendants' guilt with "more than evidence of a general cognizance of criminal activity, suspicious circumstances, or mere association with others engaged in criminal activity."[257] Independently, any of the three factors in *Alameh* or *Ongaga* on which the jury relied in convicting the defendant likely could not satisfy the "more than evidence of a general cognizance of criminal activity, suspicious circumstances, or mere association with others engaged in criminal activity" standard from *Archer*. Any of those factors independently, however, likely could have satisfied the "preponderance of the evidence" standard in immigration removal proceedings.

The founding principles of criminal law dictate that penalties serve the purposes of deterrence, rehabilitation, incapacitation, and retribution.[258] Deportation serves the purposes of deterrence and incapacitation, and arguably rehabilitation and retribution.[259] The asylee's removal order in *P-S-H-* effectively serves the same penalty as the criminal penalties in *Alameh* or *Cardenas*, and the parties' actions were materially identical (e.g., relying on materially false information in immigration proceedings). But different burdens of proof applied in the two types of proceedings. So, in *P-S-H-*, the United States was able to de facto criminally penalize the asylee for acts it criminally prosecuted his attorney for, but with a lower burden of proof. In *P-S-H-*, both the asylee and his attorney were sequestered from society because of the fraud, but it was a much easier case against the asylee because the Department of Homeland Security did not need to prove knowledge of the fraud, and the burden of proof was a "preponderance of the evidence" rather than "beyond a reasonable doubt."

Regardless of the legal context, the quality of evidence available in fraud adjudications–largely circumstantial evidence–satisfies the burden of proof for criminal convictions and thus also for removal proceedings. It logically follows that evidence sufficient to render an immigrant removable should be sufficient to secure a conviction for the same offense. Therefore, instances when an immigrant is rendered removable but criminal charges are not pursued suggests the evidence was weak to begin with.

The Executive Office for United States Attorneys (EOUSA) publishes yearly reports capturing the results of prosecutorial efforts for the preceding

255. 543 F.3d 1197 (10th Cir. 2008).

256. *Id.* at 1201.

257. United States v. Archer, 671 F.3d 149, 157 (2d Cir. 2011) (citing United States v. Samaria, 239 F.3d 228, 233 (2d Cir. 2001)).

258. Misty Kifer et al., *The Goals of Corrections: Perspectives from the Line*, 28 Crim. Just. Rev. 47, 47 (2003) (citing Harry E. Allen & Clifford E. Simonsen, Corrections in America: An Introduction (2001)).

259. Alternatively, one might argue that contemporary criminal penalties are ineffective in rehabilitation and that retribution is a foundational pillar for criminalizing behavior.

fiscal year by all United States Attorney's Offices (AUSA).[260] One statistical category is "Criminal Matters Declined" which includes immediate and later declinations.[261] An "immediate declination" occurs when an investigative agency (e.g., the FBI, DHS, etc.) presents a referral to the USAO that does not warrant federal prosecution based on the facts and circumstances presented; a "later declination" occurs when a matter has been opened by the USAO and the USAO subsequently declines to prosecute.[262] In 2022, the Department of Justice declined to prosecute 832 immigration-related criminal matters, over sixty percent of which were rejected for "insufficient evidence."[263] Prior years' reports show consistent data. For example, in fiscal year 2021, 872 immigration-related criminal matters were declined, with sixty-six percent for insufficient evidence.[264] In fiscal year 2020, 1,181 immigration-related criminal matters were declined, with fifty-three percent for insufficient evidence.[265] Thus, removal proceedings for lawful permanent residents accused of immigration fraud should impose additional procedural safeguards to mitigate erroneous adjudications.

This additional safeguard satisfies due process in fraud-related removability cases as a matter of equity. The government's burden to remove the title "lawful permanent resident" should track the administrative gauntlet noncitizens undergo to receive it. Proving fraud is straightforward, especially given then often-voluminous records accumulated throughout the green card process. As discussed, the Justice Department declines to prosecute a strong majority of federal immigration cases due to insufficient evidence.[266] Many cases in which lawful permanent residents are deported likely would have fallen in that category, had the proceedings been initiated. This threatens the permanence of lawful *permanent* resident status. By balancing the interests, the risk of erroneous deportations is unnecessarily high for individuals with a "weighty" interest in retaining lawful permanent resident status. Compared to the government's interest in adjudicating fraud committed by lawful permanent residents, the noncitizen's interest prevails. So, when the government seeks to deport a lawful permanent resident under an immigration fraud statute, due process requires, as a prerequisite, for the government to secure a criminal conviction for the same conduct.

2. Affirmative Defenses for Terrorism-Related Removability

Part II.B demonstrated the significant differences between terrorism-related criminal proceedings and removal proceedings. This argument does not proffer

260. *See, e.g.*, OFF. OF THE U.S. ATT'Y, *Annual Stat. Report Fiscal Year 2022*, available at https://www.justice.gov/media/1279221/dl?inline [https://perma.cc/WUF4-URZV].

261. *Id.* (tbl. 14).

262. *Id.*

263. OFF. OF THE U.S. ATT'Y, *Annual Stat. Report Fiscal Year 2022* (tbl.14), available at https://www.justice.gov/media/1279221/dl?inline [https://perma.cc/WUF4-URZV].

264. *See* OFF. OF THE U.S. ATT'Y, *Annual Stat. Report Fiscal Year 2021* (tbl.14), available at https://www.justice.gov/media/1208881/dl?inline [https://perma.cc/WUF4-URZV].

265. OFF. OF THE U.S. ATT'Y, *Annual Stat. Report Fiscal Year 2020* (tbl.14), available at https://www.justice.gov/media/1138376/dl?inline [https://perma.cc/WUF4-URZV].

266. *See supra* notes 256-58.

a remedy equivalent to that of immigration fraud (i.e., a conviction for terrorism-offense as a prerequisite to removability). Rather, it suggests that the current system infringes on the rights of lawful permanent residents by impairing their ability to adequately defend themselves in removal proceedings. In *Some Kind of Hearing*,[267] Judge Henry Friendly contended that one of the core procedural safeguards to satisfy due process is "an opportunity to present reasons why the proposed action should not be taken."[268] This section argues that depriving lawful permanent residents of the affirmative defenses to terrorism offenses in immigration proceedings that are afforded in criminal proceedings violates their due process rights.

In a recent analysis of domestic terrorism, Diane Webber suggested that the existing legal infrastructure could be harnessed to prosecute citizens and noncitizens equally for acts of terrorism.[269] As discussed, the Supreme Court considers the national security interest—specifically, preventing terrorist attacks—to be the pinnacle of government interest.[270] The University of Maryland's National Consortium for the Study of Terrorism and Responses to Terrorism[271] helps explain why: five acts of terrorism that occurred between 1995 and 2017 accounted for 1,853 fatalities and over 12,000 injuries.[272] In short, acts of terrorism present a threat of death and destruction that is nowhere to be found in cases of immigration fraud, so the specific remedies cannot be identical. So, while due process requires a remedy to the issues faced by lawful permanent residents in terrorism-related removal proceedings, the stakes are simply too high to require the United States to obtain a criminal conviction for a terrorism-related offense before rendering a noncitizen removable.

Rather than providing lawful permanent residents the "full panoply" of procedural safeguards in criminal trials, this Article contends that the appropriate constitutional remedy is affording lawful permanent residents codified defenses congruent with those afforded to criminal defendants. Unlike with fraud, there is no waiver to inadmissibility or deportability if a noncitizen is barred for a terrorism related reason, except one specially granted by the Secretary of State or Secretary of Homeland Security.[273] But like a finding of

267. Friendly, *supra* note 204.

268. *Id.* at 1281.

269. *See generally* Diane Webber, *Preparing to Commit Domestic Terrorist Activity: Does the United States Have Adequate Tools to Stop This?*, 34 Am. U. Int'l L. Rev. 205 (2018).

270. *See supra* note 183 and accompanying text.

271. Nat'l Consortium for the Study of Terrorism and Responses to Terrorism, https://www.start.umd.edu/ [https://perma.cc/A2EH-LW2A] (last visited May 24, 2023).

272. Nat'l Consortium for the Study of Terrorism and Responses to Terrorism, Global Terrorism Database, https://www.start.umd.edu/gtd/search/Results.aspx?page=1&casualties_type=&casualties_max=&region=1&count=100&charttype=line&chart=fatalities&expanded=no&ob=TotalNumberOfFatalities&od=desc#results-table (last visited May 24, 2022) (referencing the World Trade Center attack on Sept. 11, 2001; the Arlington, VA attack on Sept. 11, 2001; the Oklahoma City attack on Apr. 19, 1995; the Las Vegas, NV attack on Oct. 1, 2017; and the Orlando, FL attack on Jun. 12, 2016).

273. INA § 212(d)(3)(B), 8 U.S.C. § 1182(d)(3)(B) (unreviewable discretionary waiver can be granted by the Secretary of State or Secretary of Homeland Security in consultation with the Attorney General). USCIS advises the following factors be considered in determining whether a waiver under this section applies: (1) the risk of harm to society if the applicant is admitted; (2) the seriousness of the applicant's prior immigration or criminal law violations, if any; and (3) the applicant's reasons for wanting to enter the United States. U.S. Citizenship

fraud, connecting a noncitizen to terrorism does not dispose of their removal relief claim, either. In cases involving organizations such as the MFDC, if the DHS prevails in showing that the MFDC is a terrorist organization, the noncitizen is barred from asylum unless they show by clear and convincing evidence that they did not know or should not reasonably have known that the organization was engaged in terrorist activity when they engaged in solicitation or afforded material support.[274] In determining whether a noncitizen has shown that they reasonably should not have known the group engaged in terrorist activities, courts consider factors such as the frequency and extent of public reporting of the group's terrorist acts and the noncitizen's position within the group, age, education, sophistication, and access to information.[275]

Overcoming this burden of proof is highly fact-specific, and the affirmative defenses proposed in this section satisfy the due process requirements for lawful permanent residents. There are two primary defenses to terrorism-related crimes: lawful combatant immunity and duress.[276] Naturally, the United States has a strong interest in identifying terrorist groups and its members, but this interest doesn't negate the standards of due process found in other criminal procedures. Many prosecutions of terrorism-related offenses stem from undercover operations, implicating the potential for entrapment. Defendants raising entrapment as a defense essentially argue that they should not be punished because the government induced them to commit the charged offense.[277]

For example, in 2009, Mohammad Hammadi entered the United States with $900 to his name and a minimal understanding of English.[278] Two years later without gainful employment, Hammadi was approached by a man whose family he knew and had met in Syria. Unbeknownst to Hammadi, the man was an FBI informant.[279] Hammadi agreed to work with the informant and ended up transferring weapons and money for a faux terrorist cell and reportedly plotted to murder a U.S. Army Captain that he knew from Iraq.[280] The court rejected Hammadi's criminal entrapment defense because the government's conduct didn't "shock the conscience." The court also cited the "wide latitude" that sting operations enjoy.[281]

The misnomer of "lawful combatant immunity" is an affirmative defense to criminal charges related to terrorist activity, such as those under 18 U.S.C.

& Immigr. Serv., 9 Pol'y Manual ch. 4(B) (2023), https://www.uscis.gov/policy-manual/volume-9-part-o-chapter-4 [https://perma.cc/L4D6-VK6J].

274. INA §§ 212(a)(3)(B)(iv)(IV)(cc), 212(a)(3)(B)(iv)(VI)(dd), 8 U.S.C. §§ 1182(a)(3)(B)(iv)(IV)(cc), 1182(a)(3)(B)(iv)(VI)(dd).

275. *See, e.g.*, Hosseini v. Nielson, 911 F.3d 366, 373-74 (6th Cir. 2018) (finding that Hosseini did not meet his burden where he heard rumors the MEK engaged in attacks on the Islamic government's leaders and supporters and he "eagerly sought out information about various political viewpoints" at the time the MEK killed "some seventy high-ranking Iranian officials" in a bombing).

276. *See infra* notes 282-285.

277. *See, e.g.*, United States v. Al–Cholan, 610 F.3d 945, 950 (6th Cir. 2010).

278. United States v. Hammadi, 737 F.3d 1043, 1045 (6th Cir. 2013).

279. *Id.*

280. *Id.*

281. *Id.* (citing United States v. Rizzo, 121 F.3d 794, 801 (1st Cir.1997) and Rochin v. California, 342 U.S. 165 (1952)).

§ 2339A.[282] Customary law of armed conflict and specific provisions of international treaties concerning treatment of prisoners of war afford combatants a defense in prosecution for actions that otherwise might qualify as an act of terrorism.[283] In 2011, the U.S. Court of Military Commission Review expressly recognized this affirmative defense:

> "[l]awful enemy combatants and those lawfully aiding or providing material support to lawful enemy combatants receive various privileges under international law, including combatant immunity."[284]

The common law defense of duress excuses otherwise criminal behavior committed under coercion. The defense requires a showing that the offender acted under the immediate threat of death or serious bodily injury, a bona fide fear that the threat would be carried out, and that they could not reasonably escape or inform authorities.[285]

As discussed above, INA definitions of terrorism or provision of material support can be extremely attenuated, like a small contribution to a terrorist organization.[286] Under immigration law however, duress is not a defense. In 2018, the B.I.A. held in *Matter of A-C-M-*[287] that duress as a defense is unavailable to noncitizens found inadmissible or deportable for providing material support to a terrorist organization.[288]

A-C-M- is a seminal case that shows immigration law's conflation of innocent acts with that of terrorism. In 1990, an El Salvadoran women was kidnapped by guerilla terrorists and forced to undergo weapons training and perform forced labor in the form of cooking, cleaning, and generic housework.[289] She sought asylum in the United States and was placed in removal proceeding. At her merits hearing, the Department of Homeland Security did not dispute that she was essentially a slave to the terrorist organization but

---

282. United States v. Harcevic, 999 F.3d 1172, 1179 (8th Cir. 2021) (holding that a guilty plea deprived the defendant from such immunity because it was a defense waived pursuant to the guilty plea).

283. United States v. Khadr, 717 F. Supp. 2d 1215, 1218 (C.M.C.R. 2007) (citing Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

284. United States v. Hamdan, 801 F. Supp. 2d 1247, 1253 (C.M.C.R. 2011).

285. In re Chiquita Brands Int'l, Inc., 284 F. Supp. 3d 1284, 1324 (S.D. Fla. 2018). Whether duress is an affirmative defense to criminal acts of terrorism is still undecided, but this court did entertain the idea, ultimately avoiding the question. *Id.* at 1305-06 ("The question of whether Congress intended to allow a duress defense to a Section 2339A material support crime based on the knowing or intentional facilitation of terror-related murder, as charged here, raises an intricate policy-laden question of statutory interpretation, juxtaposed against longstanding common law precedent which universally excluded duress as a defense to intentional homicide, a rule extended in some jurisdictions to cases of attempted murder and the aiding and abetting of murder. The Court ultimately finds is unnecessary to reach this question here, however, because it concludes, on the evidentiary record presented, that Chiquita fails to carry its burden of showing the existence of a genuine issue of material fact on each element of the defense, and necessarily suffers summary judgment upon it").

286. *See supra* note 154.

287. 27 I. & N. Dec. 303 (B.I.A. 2018).

288. *Id.* at 304 (finding "no basis" that there is a self-defense or duress exception in INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B)).

289. *Id.*

argued that the INA did not contain a duress exception.[290] The Board agreed, even though the woman's acts of material support were minor.

One theory supporting this is that Congress is uncomfortable excusing terrorism-related behavior under the duress defense because terrorism is connoted with death and destruction. In criminal law, it generally is. But under immigration law, victims of the same terrorist organizations that the United States seeks to defend itself against are treated as terrorists themselves, with no defenses available to them.[291]

The INA broadly defines "terrorist activities" and "engaged in terrorist activities."[292] Within it is the "material support bar" used to deny relief to the respondent in *Matter of A-C-M-*.[293] Scholars have analyzed the potential of a duress waiver and cautioned against it because it would not protect noncitizens who provided material support that, while not necessarily done under duress, was "minimal, non-violent support, such as providing food or copying flyers."[294] So, in addition to providing the affirmative defense of duress, adding an express waiver for any non-homicide or non-violent acts of "material support" would ensure just adjudication of terrorism under the INA while maintaining the high interest the United States has in national security.

In sum, because lawful permanent residents are "most like citizens,"[295] they must have a right in terrorism-related removal proceedings to "present reasons why the proposed action should not be taken."[296] This constitutional demand is satisfied by codifying a right for lawful permanent residents to assert affirmative defenses, congruent with those afforded to criminal defendants.

Conclusion

This Article proposes remedies in two types of immigration proceedings to make sure they satisfy due process. These remedies are novel but not revolutionary. Fifty years ago, the Supreme Court explicitly distinguished the due process rights of citizens and noncitizens. This Article merely goes one step further. In crimmigration proceedings, the noncitizen category must be further distinguished, and lawful permanent residents must be afforded additional procedural safeguards. The *Mathews v. Eldridge* factors in crimmigration proceedings involving lawful permanent residents suggest a heightened interest for both the government and the lawful permanent resident, but with equal potential for erroneous adjudications. Thus, the Constitution requires additional procedural safeguards.

---

290. *Id.*

291. For a comprehensive analysis of the arguments for and against duress in removal proceedings, see Elizabeth A. Keyes, *Duress in Immigration Law*, 44 Seattle U. L. Rev. 307 (2021).

292. *See supra* Part II.b.

293. *See* Matter of A-C-M-, *supra* note 288 and accompanying text.

294. *See* Tyler A. Lee, *When "Material" Loses Meaning: Matter of A-C-M- and the Material Support Bar to Asylum*, Colum. Hum. Rts. L. Rev. 378, 419-20.

295. Mathews v. Diaz, 426 U.S. 67, 83 (1976).

296. Friendly, *supra* note 204, at 1281.

In the context of immigration fraud, the government should have to secure a criminal conviction for the alleged fraud as a prerequisite for removability. In terrorism-related removal proceedings, lawful permanent residents should have a right to assert affirmative defenses congruent with those afforded to criminal defendants.

Crimmigration presents challenging issues of law and social policy, and these issues are difficult to wrangle given the Supreme Court's deference to congressional decisions on immigration. But the existing infrastructure for certain so-called crimmigration cases impinges on the due process rights of lawful permanent residents.