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Civil Immigration Enforcement and the Office of Immigration Litigation- District Court Section

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Introduction

Jeff Sessions

Attorney General of the United States

The American people demand a lawful system of immigration that serves the national interest. It is the duty of the Department of Justice to enforce all federal laws as passed by Congress, including the Immigration and Nationality Act. To meet this challenge, the Department must use all of the tools that it has at its disposal, both criminal and civil. The Civil Division's Office of Immigration Litigation -District Court Section (OIL-DCS) plays a critical role in that regard. Acting as both a sword and shield in the ninety-four judicial districts and related circuits, OIL-DCS brings affirmative cases and defends some of the most significant legal challenges to our client agencies' immigration enforcement policies and practices.

Working through and with U.S. Attorney's Offices, the OIL-DCS National Security and Affirmative Litigation Unit prosecutes civil denaturalization cases that have brought justice to those who unlawfully obtained United States citizenship. In April, I congratulated an OIL-DCS trial team for securing the denaturalization of a jihadist organizer who is an al-Qaeda operative. OIL-DCS is currently prosecuting the denaturalization case of a convicted al-Qaeda conspirator residing in Illinois. These civil cases are a crucial link in the Department's strategic enforcement framework and convey the strong message that the United States will vigorously defend the integrity of its citizenship to all who would unlawfully seek the greatest of our immigration benefits. In other cases, OIL-DCS has denaturalized violent criminals, human traffickers, human rights abusers, child sex abusers, and fraudsters. These types of cases promote the law enforcement objectives of retribution, incapacitation, and deterrence. Moreover, the denaturalization of such persons facilitates the Department of Homeland Security's ability to institute removal proceedings so that they can be expeditiously removed from the United States, making them less capable of harming the interests of the American people.

Given the complexities and breadth of the Immigration and Nationality Act, OIL-DCS has a thriving and growing practice of providing advice and support to U.S. Attorney's Office-led Title 18 prosecutions and Title 8 civil actions. OIL-DCS supports and works closely with the Executive Office for United States Attorneys on a number of its training, advisory, and policy initiatives to the benefit of all. Defensively, OIL-DCS handles a broad array of civil litigation. It has a substantial complex litigation practice that defends our client agencies' civil detention authority, expedited removal authority, and other capabilities that are fundamental to protecting our nation's borders. OIL-DCS also defends programmatic challenges to a number of national security-related vetting processes for immigration benefits seekers and foreign worker programs. It is also handling a majority of lawsuits that challenge presidential actions that are taken to secure our borders.

As you read through this issue of the *USA Bulletin*, you will see many ways that OIL-DCS directly contributes to the Department's mission and acts as a force multiplier to the U.S. Attorney's Offices in terms of partnership, practical advice, and thoughtful leadership in the field of immigration enforcement. I hope that you find the material informative and that it demonstrates the complementary relationship between the important criminal and civil enforcement work of the Department.

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The United States Attorneys' Office Community and the Office of Immigration Litigation-District Court Section

Monty Wilkinson

Director

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Since its creation in 1953, the Executive Office for U.S. Attorneys (EOUSA) has supported the ninety-three U.S. Attorneys and their offices, in part, by facilitating coordination between EOUSA and other organizational units of the Department, by providing training through the Office of Legal Education, and by promoting the priorities of the Attorney General. The Office of Immigration Litigation-District Court Section (OIL-DCS) is a highly active litigation section in the Civil Division. OIL-DCS handles district court-originated immigration matters in all ninety-four federal district courts and related circuits and provides centralized expertise on immigration matters.

This issue of USA Bulletin demonstrates the close working relationship between the U.S. Attorneys' community and OIL-DCS. Authors in this issue include representatives from OIL-DCS, the U.S. Attorneys' offices, and EOUSA. Together, we have produced a resource to assist Department practitioners in engaging in their important immigration-related work with greater efficiency and efficacy.

This issue underscores the critical need for close coordination between OIL-DCS and the USAOs in light of the complex interplay between civil immigration enforcement, criminal enforcement, and national security. The need for building an even stronger coalition between OIL-DCS and the USAOs is reinforced by Attorney General Jeff Sessions' emphasis on immigration enforcement as a Department priority. We hope the guidance and ideas in this issue will lend support to your efforts for years to come.

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Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship

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I. Introduction

The Justice Department is committed to protecting our nation's national security and will aggressively pursue denaturalization . . . to strategically enforce the nation's immigration laws

Attorney General Jefferson B. Sessions III¹

United States citizenship is a privilege whose value and importance has been described as “the highest hope of civilized men.”² The Supreme Court has suggested that the benefits derived from U.S. citizenship are priceless, such that depriving one of U.S. citizenship would result in consequences more severe than the taking of property or the imposition of fines or other penalties.³ To safeguard the integrity of the “priceless treasure” of U.S. citizenship, Congress has legislated several prerequisites to naturalization.⁴ The value of U.S. citizenship, similar to other immigration benefits, lures otherwise ineligible applicants to attain naturalization—and thereby benefit from its privileges—illegally or fraudulently.

¹ Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Justice Department Secures the Denaturalization of a Senior Jihadist Operative Who Was Convicted of Terrorism in Egypt (Apr. 20, 2017) (referencing a denaturalization order secured by the Office of Immigration Litigation-District Court Section, National Security and Affirmative Litigation Unit).

² *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

³ *Id.*

⁴ *Fedorenko v. United States*, 449 U.S. 490, 507 (1981) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950) (Black, J., dissenting)).

Congress has provided the government with two distinct statutory tools—one a criminal provision and the other a civil remedy—to seek the revocation of naturalization to safeguard the integrity of U.S. citizenship. While both statutes result in the revocation of the defendant’s naturalization, a civil denaturalization action under [8 U.S.C. § 1451\(a\)](#) is not restrained by the statutory and constitutional requirements of a similar criminal denaturalization action under [18 U.S.C. § 1425](#).⁵

Actions to revoke naturalization unlawfully obtained or obtained by fraud are an integral part of the government’s arsenal of remedies to enforce the immigration laws, deter immigration fraud, and protect the national security and public safety of the United States. As the Department of Justice renews its commitment to immigration enforcement⁶ and the President has directed all executive departments and agencies “to employ all lawful means to enforce the immigration laws of the United States,”⁷ civil denaturalization will play a prominent role in securing the integrity of our immigration system. This article explores the procedures and advantages of bringing a civil denaturalization under [8 U.S.C. § 1451\(a\)](#), and encourages Federal prosecutors to consider referring cases for civil denaturalization when a case is declined for prosecution. Such a strategy will ensure that the Department of Justice uses all means to enforce our nation’s immigration laws.

The Department of Justice’s Office of Immigration Litigation-District Court Section (OIL-DCS), and, in particular, its National Security and Affirmative Litigation Unit, is the subject-matter expert and oversees civil denaturalization actions on behalf of the United States. OIL-DCS has significant experience bringing civil denaturalization actions against violent criminal offenders, national security risks, fraudsters, human traffickers, child sexual exploiters, and others who pose the most serious threat to public safety.⁸ This Article will also highlight examples of recent cases that demonstrate how civil denaturalization actions are an important component to upholding the rule of law in our immigration system. OIL-DCS is also available to advise and assist with criminal denaturalization actions.

II. Denaturalization in Civil or Criminal Proceedings

An individual may gain U.S. citizenship only through one of two means: by birth or by naturalization. Although the government cannot revoke citizenship by birth, the Immigration and Nationality Act (INA) provides that individuals who unlawfully acquired their U.S. citizenship through naturalization shall have such citizenship revoked by federal district courts under certain limited circumstances. This revocation process is more commonly called “denaturalization.”

Civil denaturalization is typically accomplished through an action under [8 U.S.C. § 1451\(a\)](#). Criminal denaturalization, on the other hand, follows a criminal conviction for naturalization fraud under [18 U.S.C. § 1425](#), which in addition to any criminal penalty requires a court to revoke the defendant’s naturalization.⁹ In either situation—and unlike all other immigration benefits that may be revoked through administrative proceedings—denaturalization requires a judicial order.

Although civil denaturalization is an action in equity, equitable defenses are generally unavailable

⁵ See Timothy M. Belsan, et al., *OIL-DCS Availability for Assistance and Support in Denaturalization Prosecutions under 18 U.S.C. § 1425*, U.S. ATTORNEYS’ BULL., July 2017, at 24.

⁶ See Memorandum from Jefferson B. Sessions III, Att’y Gen. of U.S., U.S. Dep’t of Justice, to All Fed. Prosecutors, U.S. Dep’t of Justice (Apr. 11, 2017).

⁷ Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

⁸ See Timothy M. Belsan, et al., *Civil Immigration Enforcement in National Security Cases*, U.S. ATTORNEYS’ BULL., July 2017, at 18.

⁹ [8 U.S.C. § 1451\(e\)](#) (2012).

to a defendant.¹⁰ When a “court determines that the government has met its burden of proving that a naturalized citizen obtained his citizenship illegally [or by concealment] or willful misrepresentation, it has no discretion to excuse the conduct” and must enter a judgment of denaturalization.¹¹

III. Initiation of a Civil Denaturalization Action and the Role of the U.S. Attorney’s Office

In most cases, an immigration agency first determines that an individual unlawfully obtained his U.S. citizenship, although many cases are uncovered by law enforcement agencies during criminal investigations. Where the agency determines that a *prima facie* case exists for denaturalization, the agency may refer the matter to the Department of Justice for consideration. OIL-DCS has expertise in the subject matter and oversees such litigation, handling the most challenging and high-profile civil denaturalization cases.

Although the U.S. Attorney’s Manual assigns primary responsibility for civil denaturalization cases to OIL-DCS,¹² the U.S. Attorney’s Office for the relevant district plays a key role, and in its discretion, a principal role in every civil denaturalization case. Because the INA specifically delegates the authority to the U.S. Attorney to institute denaturalization proceedings,¹³ OIL-DCS seeks the written authorization of the U.S. Attorney to proceed with them. OIL-DCS typically will also request that an Assistant U.S. Attorney be assigned to a denaturalization action to serve as local counsel and can include the U.S. Attorney and AUSA on all pleadings.¹⁴

Formal referral of a potential denaturalization action requires the submission of an Affidavit of Good Cause (AGC). The AGC is a statutory procedural prerequisite to ensure that an individual is not subjected to legal proceedings without a preliminary showing of good cause.¹⁵

AGCs may be prepared by employees of U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), the Federal Bureau of Investigation (FBI), or any other agency able to demonstrate the required good cause. The statute does not limit who may prepare and submit AGCs for potential denaturalization actions. The AGC may be styled as a declaration, but should be signed under penalty of perjury in accordance with 28 U.S.C. § 1746. The affiant or declarant is not required to have personal knowledge of the facts but must show with particularity the grounds on which the action rests based on facts disclosed by official records to which the declarant had access.¹⁶

OIL-DCS does not have prosecutorial authority to bring criminal denaturalization cases under 18 U.S.C. § 1425; however, it regularly consults with U.S. Attorney’s Offices on the handling of such cases. For criminal cases, referral is made to the appropriate U.S. Attorney’s Office.¹⁷

¹⁰ See *Luria v. United States*, 231 U.S. 9, 27–28 (1913) (citing, e.g., *Parsons v. Bedford*, Breedlove & Robeson, 28 U.S. 433, 447 (1830); and citing *Irvine v. Marshall*, 61 U.S. 558, 565 (1857); also citing *Root v. Lake Shore & M.S.R. Co.* 105 U.S. 189, 207 (1881)); *Trop v. Dulles*, 356 U.S. 86, 98 (1958).

¹¹ *Fedorenko v. United States*, 449 U.S. 490, 517 (1981).

¹² See U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 4-7.200 (2016); 28 C.F.R. § 0.45(k) (2016).

¹³ See 8 U.S.C. § 1451(a).

¹⁴ See *United States v. Olivar*, 648 F. App’x 675, 676 (9th Cir. 2016) (finding U.S. Attorney’s signature on authorization letter “sufficient to satisfy jurisdictional requirements” of 8 U.S.C. § 1451(a)). For the sake of clarity, the Ninth Circuit recommended that the U.S. Attorney’s Office be represented on the complaint in future cases. *Id.*

¹⁵ See § 1451(a); see also *United States v. Zucca*, 351 U.S. 91, 95, 99–100 (1956) (noting that Congress required the AGC because “[e]ven if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged).

¹⁶ See *Nowak v. United States*, 356 U.S. 660, 662 (1958).

¹⁷ See, e.g., 8 C.F.R. § 340.2(b) (2017).

IV. Benefits of Bringing a Civil Denaturalization Suit Versus Prosecuting Naturalization Fraud Criminally

If a court convicts a naturalized citizen under [18 U.S.C. § 1425](#), it must also revoke that person's naturalization under [8 U.S.C. § 1451\(e\)](#), and do so in the same action.¹⁸ Section 1425 criminalizes one who “knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship.”¹⁹ Despite the automatic nature of a criminal denaturalization, there are constitutional and statutory limitations inherent in such actions. Comparatively, therefore, the broader scope of actions warranting an [8 U.S.C. § 1451\(a\)](#) denaturalization and the non-criminal due process protections often results in civil denaturalization actions being the most effective remedy.

For example, a prosecution under [18 U.S.C. § 1425](#) presents a number of constraints that the government does not face when bringing a civil denaturalization. First, not all convictions for immigration fraud result in denaturalization. Indeed, a conviction under any criminal section other than [18 U.S.C. § 1425](#) does not bring the automatic revocation of citizenship under section 1451(e). Thus, such convictions—even those for immigration fraud under [18 U.S.C. § 1546](#)—must be followed by a separate civil revocation action. Second, as in any criminal prosecution, the government in a [section 1425](#) prosecution has the burden to establish the offense and its elements beyond a reasonable doubt. As a criminal offense, this includes the government's burden to establish the *mens rea* required to support conviction.²⁰ Third, the accused has the right to all of the constitutionally guaranteed due process rights—including the right to not testify—that are not available in a civil denaturalization proceeding. Last, criminal revocation actions are subject to a ten-year limitations period from the commission of the offense.²¹

On the other hand, unlike [18 U.S.C. § 1425](#), a civil denaturalization does not impose a punishment on the naturalized U.S. citizen and seeks merely to “deprive[] him of his ill-gotten privileges.”²² The government carries a heavy burden of proof in a civil denaturalization, which requires “clear, unequivocal, and convincing” proof that does not leave the issue in doubt.²³ The Supreme Court has even suggested that the burden is akin to the criminal standard.²⁴ As a civil action, however, many of the due process protections afforded in a criminal proceeding, such as a jury trial and a right to counsel, are not mandated.²⁵ Moreover, there is no statute of limitations for bringing a civil denaturalization.²⁶

¹⁸ See, e.g., [United States v. Inocencio](#), 328 F.3d 1207, 1210 (9th Cir. 2003) ([T]he purpose of [8 U.S.C. § 1451\(e\)](#) is to ensure the *automatic* revocation of naturalization upon a conviction for naturalization fraud under [18 U.S.C. § 1425](#).); [United States v. Moses](#), 94 F.3d 182, 188 (5th Cir. 1996) (affirming that section 1451(e)'s provision to revoke citizenship is mandatory).

¹⁹ [18 U.S.C. § 1425\(a\)](#) (2012).

²⁰ See [United States v. Alameh](#), 341 F.3d 167, 175 (2d Cir. 2003) (requiring additional proof of defendant's knowledge that he was not entitled to citizenship).

²¹ [18 U.S.C. § 3291](#).

²² [Johannessen v. United States](#), 225 U.S. 227, 242 (1912).

²³ [Fedorenko v. United States](#), 449 U.S. 490, 505 (1981) (quoting [Schneiderman v. United States](#), 320 U.S. 118, 125 (1943)).

²⁴ [Klapprott v. United States](#), 335 U.S. 601, 612 (1949) (This burden is substantially identical with that required in criminal cases—proof beyond a reasonable doubt.).

²⁵ See [United States v. Mandycz](#), 447 F.3d 951, 962 (6th Cir. 2006) (citing [United States v. Schellong](#), 717 F.2d 329, 336 (7th Cir. 1983); citing also [United States v. Koreh](#), 144 F.R.D. 218, 220 (D.N.J. 1992); and citing [INS v. Lopez-Mendoza](#), 468 U.S. 1032, 1038–39 (1984); citing additionally [Nelson v. INS](#), 232 F.3d 258, 261 (1st Cir. 2000)); see also [United States v. Firishchak](#), 468 F.3d 1015, 1026 (7th Cir. 2006) (finding that, because denaturalization proceedings are equitable proceedings, defendants are not entitled to a jury trial).

²⁶ See [Costello v. United States](#), 365 U.S. 265, 283 (1961) (Congress has not enacted a time bar applicable to proceedings to revoke citizenship procured by fraud.).

Furthermore, civil revocation may be established by conduct other than convictions under [18 U.S.C. § 1425](#) (*see infra* Section V). This includes: convictions, or even admissions, for a number of enumerated criminal acts; the *commission* of unlawful acts that adversely reflect upon the naturalized U.S. citizen's moral character; or even the *commission* of other non-criminal acts that establish the defendant was precluded from demonstrating the good moral character necessary to naturalize. In the case of establishing the *commission* of an act to support denaturalization that is neither admitted nor established by a criminal court, the court hearing the civil denaturalization case will essentially hold a “mini-trial” on the question.²⁷ Thus, the government can use the civil denaturalization action to establish the commission of any act that warrants denaturalization.

Because of the advantages of a civil denaturalization pursuant to [8 U.S.C. § 1451\(a\)](#), prosecutors should strongly consider referring any declination for [18 U.S.C. § 1425](#) for consideration as a civil denaturalization action. In particular, prosecutions declined based on the ten-year statute of limitations are often viable in civil proceedings. Moreover, pursuing civil denaturalization actions may be appropriate when a criminal denaturalization action results in an acquittal, as the causes of action between the two suits are not identical.²⁸

V. Grounds for Civil Revocation of Naturalization

In civil proceedings, there are two general grounds for denaturalization: “illegal[] procure[ment],” and “procure[ment] by concealment of a material fact or by willful misrepresentation.”²⁹ Nearly all specific bases for denaturalization fit into one of these two general categories.³⁰ “Illegal procurement” occurs when an individual failed to comply with any of “the congressionally imposed prerequisites to the acquisition of citizenship” so that the individual was statutorily ineligible at the time of naturalization.³¹ Such prerequisites include a requirement that the applicant establish good moral character during a specified period of time preceding naturalization.³² The second general ground for denaturalization—procurement of naturalization by concealment of a material fact or by willful misrepresentation—centers on fraud and concealment during the naturalization process itself.³³

A. Grounds for Civil Revocation: Illegal Procurement

Denaturalization under the illegal procurement ground does not require a showing of fraud or misrepresentation, the only issue is that the naturalized individual was statutorily ineligible for naturalization at the time of naturalization. Once it is determined that a naturalized citizen obtained his or her citizenship illegally, the court has no discretion to excuse the conduct and must revoke citizenship.³⁴ While Congress has imposed several substantive requirements that an applicant must satisfy in order to naturalize, there are three such requirements that most often warrant revocation for illegal procurement:

²⁷ See [Agarwal v. Napolitano](#), 663 F. Supp. 2d 528, 542 n.7 (W.D. Tex. 2009).

²⁸ See [Sourino v. United States](#), 86 F.2d 309, 311 (5th Cir. 1936). Although a post-acquittal civil denaturalization action may be permissible, whether OIL-DCS will bring a civil denaturalization case is subject to numerous equitable and legal factors that are beyond the scope of this article. Nevertheless, if you believe any case warrants consideration for a civil denaturalization action, please reach out to OIL-DCS at denaturalization@usdoj.gov.

²⁹ [8 U.S.C. § 1451\(a\)](#) (2012).

³⁰ See *id.* But see [§ 1440\(c\)](#) (providing that where individual naturalized based on service in U.S. military, “separat[ion] from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years” is an additional ground for denaturalization).

³¹ See [Fedorenko v. United States](#), 449 U.S. 490, 506 (1981).

³² See [§ 1427\(a\)\(3\)](#); [8 C.F.R. § 316.10\(a\)](#) (2017).

³³ See [Kungys v. United States](#), 485 U.S. 759, 767 (1988).

³⁴ [Fedorenko](#), 449 U.S. at 517–18; [United States v. Ginsberg](#), 243 U.S. 472, 474 (1917) (Courts are without authority to sanction changes or modifications [to Congress’s terms and conditions on naturalization]; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.).

(1) the person must have been previously lawfully admitted for permanent residence; (2) the person must establish good moral character; and (3) the person must not have been a member of certain political parties or an advocate of certain political positions.

First, to qualify for naturalization, an applicant must have been lawfully admitted to the United States for permanent residence.³⁵ This requires, among other things, that the applicant had a valid visa at the time that he was admitted to permanent residence.³⁶ More often than not in denaturalization cases, fraud or a willful misrepresentation in securing the invalid visa or admission into the United States is an issue. The Supreme Court has held that visas obtained through material misrepresentations are not valid visas and would render any subsequent naturalization obtained from those visas to be illegally procured.³⁷ Indeed, the INA renders an alien inadmissible if, “by fraud or [by] willfully misrepresenting a material fact, [the alien] seeks to procure [or has procured] a visa, other documentation, or admission into the United States”³⁸ Such a person would never have been lawfully admitted to the United States as a permanent resident and thus could not meet the residence requirements of 8 U.S.C. § 1427(a)(1).

In addition to section 1182(a)(6)(C)(i), Congress has defined a number of additional classes of aliens that are inadmissible. This includes aliens who “engaged in a terrorist activity,” were “member[s] of a terrorist organization, . . . endorse[d] or espouse[d] terrorist activity,” or “received military-type training” from a terrorist organization.³⁹ Because an applicant who engaged in terrorist activities as defined in section 1182(a)(3)(B)(i) prior to admission into the United States could not have been lawfully admitted to the United States as a permanent resident, such a person would not have been qualified for naturalization under 8 U.S.C. § 1427(a).

Second, to be eligible for naturalization, an applicant must establish good moral character for the period of the required continuous residence in the United States (commonly referred to as the “statutory period”).⁴⁰ Unless the applicant is in one of the specified classes that requires a shorter period of continuous residence, the statutory period begins five years immediately preceding the filing of the Form N-400 Application for Naturalization and continues until citizenship is granted.⁴¹ The relevant good moral character period, therefore, includes the period of time between the naturalization interview and the administration of the oath of allegiance.⁴²

While the good moral character inquiry focuses primarily on conduct during the statutory period, there are two notable exceptions. First, the conviction for any aggravated felony occurring after November 29, 1990—even if the conviction was prior to the statutory period—renders the applicant ineligible to establish good moral character.⁴³ Second, events occurring prior to the good moral character period are not precluded from consideration if “the conduct of the applicant during the statutory period does not reflect that there has been reform of character.”⁴⁴

Congress has not defined what constitutes good moral character, but it has identified classes of individuals who lack good moral character, defined in 8 U.S.C. § 1101(f). The most common categories for purposes of civil denaturalization include:

³⁵ 8 U.S.C. § 1427(a).

³⁶ *Fedorenko*, 449 U.S. at 514–15.

³⁷ *See id.* at 515.

³⁸ § 1182(a)(6)(C)(i).

³⁹ § 1182(a)(3)(B)(i).

⁴⁰ *See* § 1427(a)(3).

⁴¹ *See* § 1427(a)(1). For example, applicants are subject to a three-year residency requirement if they obtained lawful permanent residence by marriage to a U.S. citizen or by reason of status as a spouse or child of a U.S. citizen who battered them or subjected them to extreme cruelty. *See* § 1430.

⁴² 8 C.F.R. § 316.10(a)(1) (2017).

⁴³ *See* 8 U.S.C. § 1101(f)(8); *see* § 1101(a)(43) (defining aggravated felony).

⁴⁴ § 1427(e); 8 C.F.R. § 316.10(a)(2).

- Individuals convicted of certain offenses committed during the statutory period for which the person was convicted, or admits committing, as defined *inter alia* by the following grounds of inadmissibility under the INA.⁴⁵ Among them are the following:
 - Human smuggling.⁴⁶
 - “[A] crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.”⁴⁷

The Western District of Missouri recently entered a consent judgment denaturalizing Rex Bryan Haultain, a tennis coach and native of New Zealand, who, after naturalizing, was convicted of pre-naturalization solicitation of child pornography from a student. The court revoked Mr. Haultain’s naturalization for concealment of his unlawful activity during naturalization proceedings and for illegal procurement, as he would have been unable to demonstrate the requisite good moral character. In the settlement agreement, Mr. Haultain consented to denaturalization and agreed to stipulate to a removal order once the denaturalization judgment was entered, thereby expediting his removal after release from criminal custody in 2019.⁴⁸

- Controlled substance violations (as defined in [21 U.S.C. § 802](#)), or a conspiracy or attempt to violate such a crime.⁴⁹
- Multiple criminal convictions.⁵⁰
- Controlled substance trafficking.⁵¹

Courts have differing interpretations regarding whether convictions of certain offenses pursuant to section 1101(f)(3) requires that both the crime and the conviction (or admission) occur during the statutory period for a finding of a lack of good moral character. The Seventh Circuit concluded that the offense must occur within the statutory period but that the proof may come at any time, to include *after* the applicant is naturalized.⁵² The Ninth and Eleventh Circuits suggested that the conviction or admission of the offense must occur during the statutory period.⁵³ Even if a court requires the conviction or admission of the offense to also occur during the statutory period, the naturalized U.S. citizen is still subject to denaturalization under the residual provision of [8 U.S.C. § 1101\(f\)](#) (described *infra* and in [8 C.F.R. § 316.10\(b\)\(3\)\(iii\)](#)).⁵⁴

- “One who has given false testimony for the purpose of obtaining any benefits under [the INA].”⁵⁵

The Supreme Court held that section 1101(f)(6) does not contain a materiality requirement.⁵⁶ The only requirements for a finding of lack of good moral character for false testimony pursuant to [8 U.S.C. § 1101\(f\)\(6\)](#) are: (1) that it be affirmative oral testimony and not omissions; (2) that the false testimony

⁴⁵ See [8 U.S.C. § 1101\(f\)\(3\)](#).

⁴⁶ [§ 1182\(a\)\(6\)\(E\)](#).

⁴⁷ [§ 1182\(a\)\(2\)\(A\)](#).

⁴⁸ [United States v. Haultain](#), No. 5:15-CV-6141-FJG, 2016 WL 4745189 (W.D. Mo. Apr. 6, 2017).

⁴⁹ [§ 1182\(a\)\(2\)\(A\)\(i\)\(II\)](#).

⁵⁰ [§ 1182\(a\)\(2\)\(B\)](#).

⁵¹ [§ 1182\(a\)\(2\)\(C\)](#).

⁵² [United States v. Suarez](#), 664 F.3d 655, 659-60 (7th Cir. 2011).

⁵³ See [United States v. Dang](#), 488 F.3d 1135, 1140–41 (9th Cir. 2007); [United States v. Jean-Baptiste](#), 395 F.3d 1190, 1193 (11th Cir. 2005).

⁵⁴ See [Jean-Baptiste](#), 395 F.3d at 1191.

⁵⁵ [8 U.S.C. § 1101\(f\)\(6\)](#).

⁵⁶ See [Kungys v. United States](#), 485 U.S. 759, 779 (1988).

was made under oath; and (3) that the misrepresentation was “made with the subjective intent of obtaining immigration benefits.”⁵⁷

- One who during the statutory period has been confined to a penal institution for 180 days or more as a result of a conviction, regardless of when the offense(s) was committed.⁵⁸
- “One who at any time has been convicted of an aggravated felony” as defined by [8 U.S.C. § 1101\(a\)\(43\)](#).⁵⁹

In February 2017, the United States filed a complaint in the U.S. District Court for Northern District of Illinois, seeking to revoke the naturalization of Juan Luna, Jr.⁶⁰ In 1993, Luna and a co-conspirator murdered seven individuals in Palatine, Illinois, in what became known as the Brown’s Chicken massacre, which went unsolved for nearly a decade. Luna concealed his role in the then-unsolved crime throughout his naturalization proceedings. Luna was convicted of seven counts of first-degree murder.⁶¹

- “One who at any time has engaged in conduct . . . relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings[, as described in [8 U.S.C. § 1182\(a\)\(3\)\(E\)](#),] or [engaged in conduct] relating to severe violations of religious freedom,” as defined in [8 U.S.C. § 1182\(a\)\(2\)\(G\)](#), where the applicant naturalized after December 17, 2004.⁶²

For example, in February 2017, OIL-DCS filed a complaint to revoke the 2005 naturalization of Arnolando Vasquez, a U.S. citizen from El Salvador. The government alleges that in 1998, Mr. Vasquez, as an officer in the Salvadorian army, was a member of a military unit that murdered ten civilians in San Sebastian, El Salvador, and initially attempted to cover up the executions by stating the soldiers were ambushed by the civilians. Mr. Vasquez and several soldiers from his military unit were charged and tried for the murders, and Mr. Vasquez was ultimately found not guilty of first degree homicide. However, Mr. Vasquez subsequently misrepresented his criminal history by concealing his arrest, charge, and trial for first degree murder throughout his immigration and naturalization proceedings. In addition, the government alleges that Mr. Vasquez was also statutorily barred from naturalizing pursuant to [8 U.S.C. § 1182\(a\)\(2\)\(G\)](#) for his participation in the San Sebastian killings. This denaturalization action is currently pending before the U.S. District Court for the Eastern District of Texas.⁶³

An applicant may be found to lack the required good moral character, however, even if he or she does not fit within any of the eight enumerated categories under a residual category of this section.⁶⁴ To do so, the court must find that the applicant lacks good moral character at the time of naturalization because his or her behavior did not measure up to the “standards of the average citizen in the community

⁵⁷ See *id.* at 780–81.

⁵⁸ [8 U.S.C. § 1101\(f\)\(7\)](#).

⁵⁹ [§ 1101\(f\)\(8\)](#).

⁶⁰ *United States v. Luna*, No. 1:17-cv-1472 (N.D. Ill. filed Feb. 27, 2017).

⁶¹ *People v. Luna*, 989 N.E.2d 655 (Ill. App. Ct. 2013).

⁶² [§ 1101\(f\)\(9\)](#). Assistant U.S. Attorneys who encounter a potential Nazi case should consult with OIL-DCS, which can direct them to the appropriate special prosecuting section of the Criminal Division.

⁶³ *United States v. Vasquez*, No. 4:17-cv-101 (E.D. Tex. filed Feb. 10, 2017).

⁶⁴ See [§ 1101\(f\)](#).

of residence.”⁶⁵

The relevant regulation specifies that an applicant lacks the necessary good moral character to naturalize if, during the statutory period, the applicant “[c]ommitted unlawful acts that adversely reflect upon the applicant’s moral character, or was convicted or imprisoned for such acts, even if [they] do not fall within” other prohibitions on a finding of good moral character.⁶⁶ Courts have conferred *Chevron* deference to this regulation and have relied on it to conclude that a naturalized U.S. citizen lacked good moral character at the time of naturalization and therefore illegally procured the naturalization.⁶⁷

Determinations of good moral character are not restricted to the period found in the naturalization statute, 8 U.S.C. § 1427(a), “but may take into consideration as a basis for such determination the applicant’s conduct and acts at any time prior to that period.”⁶⁸ Similar to 8 U.S.C. § 1101(f)(3), 8 C.F.R. § 316.10(b)(3)(iii) does not require that a *conviction* occur during the statutory period; it is sufficient that the offense was *committed* during that time.⁶⁹ Unlike 8 U.S.C. § 1101(f)(3), in fact, 8 C.F.R. § 316.10(b)(3)(iii) does not require a conviction (or admission) at all. When there is no conviction or admission, the government must, in its denaturalization case, engage in a “mini-trial” and establish by clear and convincing evidence that the individual committed unlawful acts during the statutory period.⁷⁰

In February 2015, the U.S. District Court for the Northern District of Texas granted the government’s motion for judgment on the pleadings, *see infra* Section VI, thereby revoking the naturalization of Sammy Chang, a naturalized U.S. citizen from South Korea. After Mr. Chang was naturalized in 2004, he admitted to recruiting and smuggling women from South Korea into the United States and to forcing these women into working for him in order to pay off their debts to him. Based on his admissions, the U.S. District Court for the Northern District of Texas convicted Mr. Chang for providing and obtaining forced labor in violation of 18 U.S.C. § 1589. Mr. Chang’s admitted and convicted conduct, which occurred prior to his naturalization, barred him from naturalizing because it adversely reflected on his good moral character.⁷¹

Third, affiliation with certain political parties or political positions can preclude naturalization. Congress has provided that membership in or affiliation with a subversive, communist, or anarchist organization (as defined in 8 U.S.C. § 1424) within the ten years immediately preceding the filing of the naturalization application and until the time the applicant is naturalized,⁷² or the five years immediately following naturalization,⁷³ evince that the applicant was not attached to the principles of the U.S. Constitution and was not well-disposed to the good order and happiness of the United States at the time of naturalization.⁷⁴ This relevant period—ten years prior to the filing of the naturalization application through five years after naturalization—is considerably longer than the statutory period for good moral character.

⁶⁵ 8 C.F.R. § 316.10(a)(2) (2017).

⁶⁶ *Id.* § 316.10(b)(3)(iii).

⁶⁷ *See* *United States v. Suarez*, 664 F.3d 655, 661 (7th Cir. 2011); *United States v. Dang*, 488 F.3d 1135, 1140–41 (9th Cir. 2007); *United States v. Jean-Baptiste*, 395 F.3d 1190, 1194 (11th Cir. 2005).

⁶⁸ 8 U.S.C. § 1427(e); 8 C.F.R. § 316.10(a)(2); *United States v. Hovsepian*, 422 F.3d 883, 886 (9th Cir. 2005); *Nagahi v. INS*, 219 F.3d 1166, 1168 (10th Cir. 2000); *Tieri v. INS*, 457 F.2d 391, 393 (2d Cir. 1972).

⁶⁹ *Suarez*, 664 F.3d at 661; *Dang*, 488 F.3d at 1141; *Jean-Baptiste*, 395 F.3d at 1194.

⁷⁰ *See Agarwal v. Napolitano*, 663 F. Supp. 2d 528, 542 n.7 (W.D. Tex. 2009).

⁷¹ *United States v. Chang*, No. 14-cv-1173 (N.D. Tex. Feb. 25, 2015), *aff’d*, 633 F. App’x 601 (5th Cir. 2016).

⁷² 8 U.S.C. § 1424(c) (2012).

⁷³ § 1451(c). Membership or affiliation with such an organization in the five years immediately following naturalization is *prima facie* evidence of lack of attachment to which the defendant may provide countervailing evidence. *Id.*

⁷⁴ § 1424.

Although Congress enacted section 1424 when the concern was granting U.S. citizenship to communists and anarchists, the statute contains language relevant today. The statute also precludes applicants from naturalizing if they are:

- [M]embers of or affiliated with any organization that advocates or teaches
- (A) the overthrow by force or violence or other unconstitutional means of the government of the United States or of all forms of law; or
- (B) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers . . . of the government of the United States or of any other organized government because of his or their official character; or
- (C) the unlawful damage, injury, or destruction of property⁷⁵

Many terrorist organizations advocate or teach acts that section 1424 precludes, many of their activities may bar naturalization.

The INA broadly defines “advocating” to include the “giving, loaning, or promising of support or of money or any other thing of value to be used for advocating any doctrine.”⁷⁶ The INA defines “affiliation” to include the “giving, loaning, or promising of support or of money or any other thing of value for any purpose to an[] organization.”⁷⁷

B. Grounds for Civil Revocation: Willful Misrepresentation or Concealment of Material Facts

In addition to and independent from the illegal procurement ground of denaturalization, the civil revocation statute provides that a naturalized U.S. citizen can be denaturalized where the applicant “procured” his or her naturalization by “concealment of a material fact or by willful misrepresentation.”⁷⁸ Denaturalization based on a material misrepresentation requires four elements: (1) “the naturalized citizen must have misrepresented or concealed some fact”; (2) “the misrepresentation or concealment was willful”; (3) “the fact must have been material”; and (4) “the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment.”⁷⁹

The government can demonstrate misrepresentation unequivocally and convincingly by pointing to the signature on the N-400 application itself, by which the applicant certifies that the contents of the application are correct.⁸⁰ An important part of this element is the inclusion of concealment. Thus, for example, an applicant who misstates his employment in order to prevent the adjudicator from finding out his real employment or business activity has engaged in a concealment.⁸¹ A misrepresentation is “willful” if it was “deliberate and voluntary.”⁸² Deliberate and voluntary requires only knowledge of the falsity of the representation and does not require an intent to deceive.⁸³

The vast majority of litigation regarding claims that an individual procured his or her

⁷⁵ § 1424(a)(4).

⁷⁶ § 1101(e)(1).

⁷⁷ § 1101(e)(2).

⁷⁸ § 1451(a).

⁷⁹ *Kungys v. United States*, 485 U.S. 759, 767 (1988).

⁸⁰ See *United States v. Hirani*, 824 F.3d 741, 748–49 (8th Cir. 2016) (citing *Injeti v. U.S. Citizenship & Immigration Servs.*, 737 F.3d 311, 318 (4th Cir. 2013)).

⁸¹ See *Costello v. United States*, 365 U.S. 265, 267–68 (1961).

⁸² See *Hirani*, 824 F.3d at 749; *United States v. Arango*, 670 F.3d 988, 995 (9th Cir. 2012) (citing *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir.1977)).

⁸³ *Hirani*, 824 F.3d at 749 (citing *Espinoza-Espinoza*, 554 F.2d at 925). *Forbes v. I.N.S.*, 48 F.3d 439, 442 (9th Cir. 1995) (citing *Espinoza-Espinoza*, 554 F.2d at 925).

naturalization by concealment of a material fact or by willful misrepresentation, relates to the element of materiality. The seminal case on this point is the Supreme Court’s decision in *Kungys v. United States*.⁸⁴ In the plurality opinion that controls on the issue of materiality, Justice Scalia rejected a “precise test,” instead adopting a “more general formulation”: whether the concealment or misrepresentation “had a natural tendency to influence the decision of [USCIS].”⁸⁵ More specifically, the test is whether the misrepresentation or concealment ha[d] a natural tendency to produce the conclusion that the applicant was qualified.”⁸⁶ Misrepresentations are material either if they are themselves relevant to an applicant’s qualifications to naturalize or if they “would predictably have disclosed other facts relevant to [an applicant’s] qualifications.”⁸⁷ Importantly, the materiality of a misrepresentation or concealment in a civil denaturalization proceeding is a question of law.⁸⁸

The test for “procurement” is whether it is “fair to infer that the citizen was actually ineligible” for naturalization.⁸⁹ This test comes from Justice Brennan’s concurring opinion in *Kungys*, which courts have deemed the controlling opinion on the issue of procurement.⁹⁰ Justice Brennan’s concurrence is short and must be read in conjunction with Justice Scalia’s plurality opinion to be properly understood.⁹¹

VI. Civil Denaturalization Motions

In many cases, OIL-DCS attorneys are able to resolve civil denaturalization actions motions by motion practice. In particular, the most common methods of resolution are motions for judgment on the pleadings, which is pre-discovery, and motions for summary judgment, which is typically used following discovery. These motions are appropriate means to resolve denaturalization actions where the material facts are undisputed and the legal elements for a denaturalization claim are met.⁹² In some cases, however, trial may be necessary, particularly where the testimony of adverse witnesses is needed.

Because civil denaturalization has no statute of limitations or laches concerns, OIL-DCS trial attorneys working with agency counsel usually complete all investigations and have all evidence in hand before filing a denaturalization complaint. In many cases, this allows the government to file all essential evidence as exhibits to the complaint, which positions the government to file a motion for judgment on the pleadings under [Federal Rule of Civil Procedure 12\(c\)](#) after the defendant answers the complaint. If the government must obtain testimony from the defendant or a third party or gather other evidence through the discovery process, a motion for summary judgment under Rule 56 may resolve the case.

Because civil denaturalization cases often arise out of criminal investigations, many rely on factual admissions or determinations made in criminal proceedings. In some cases, defendants admit the relevant facts in factual proffers filed with the plea agreement or made before the judge; in others, defendants admit facts pleaded by the government, or the court makes factual findings on the record. For

⁸⁴ 485 U.S. 759 (1988).

⁸⁵ *Id.* at 771, 772.

⁸⁶ *Id.* at 771–72.

⁸⁷ *Id.* at 774.

⁸⁸ *Id.* at 772.

⁸⁹ See *United States v. Latchin*, 554 F.3d 709, 714 (7th Cir. 2009) (citing *Kungys v. United States*, 485 U.S. 759, 784 (1988) (Brennan, J., concurring)).

⁹⁰ See *id.*

⁹¹ Compare *Kungys*, 485 U.S. at 777 (plurality opinion of Scalia, J.) (concluding that “the ‘procured by’ language . . . express[es] the notion that one who obtained his citizenship in a proceeding where he made material misrepresentations was *presumably* disqualified), with *id.* at 783 (Brennan, J., concurring) (I write separately . . . to spell out in more detail the showing I believe the government must make to raise a presumption of ineligibility.).

⁹² See, e.g., *United States v. Hirani*, 824 F.3d 741, 748 (8th Cir. 2016) (Summary judgment is warranted ‘if, viewing the evidence in the light most favorable to the naturalized citizen, there is no genuine issue of material fact as to whether clear, unequivocal, and convincing evidence supports denaturalization.’” (quoting *United States v. Arango*, 670 F.3d 988, 992 (9th Cir. 2012))).

example, if a defendant admitted in a factual proffer that he committed unlawful activity before naturalization, or he pleaded guilty to a count where the timeline of the unlawful activity was clearly defined and the unlawful activity would have precluded the defendant from establishing the requisite good moral character, the defendant is estopped from denying those facts in the civil denaturalization action.⁹³

These factual admissions in criminal proceedings may be used to prove both illegal procurement and material misrepresentation. Naturalization applicants are asked on the naturalization application—and the written answer is orally confirmed in the naturalization interview—whether the applicant knowingly committed any unlawful activity for which he had not been arrested. If the applicant answers in the negative and is later found to have committed the unlawful activity before he was naturalized, the applicant may be denaturalized under both grounds.

When a defendant fails to respond to a denaturalization complaint, OIL-DCS typically will file either a motion for judgment on the pleadings or for summary judgment. Although the issue has not been definitively determined, the Supreme Court has noted that it disfavors default judgment in denaturalization cases, opining that a court should not denaturalize a person “until the government first offers proof of its charges sufficient to satisfy the burden imposed on it, even in cases where the defendant has made default in appearance.”⁹⁴

VII. Civil Denaturalization Judgments and Consequences

The INA provides that the revocation of the order admitting the defendant to citizenship and cancellation of the certificate of naturalization shall be effective as of the original date of the order and certificate. Accordingly, in addition to requesting a declaratory judgment, denaturalization complaints also ask the court to affirmatively revoke the defendant’s naturalization, cancel his or her certificate of naturalization, and issue judgment forever restraining and enjoining defendant from claiming any rights, privileges, benefits, or advantages related to U.S. citizenship obtained as a result of the unlawful naturalization.

The government also requests that the judgment requires defendant to surrender and deliver, within ten days of the entry of judgment, the certificate of naturalization and any copies in defendant’s possession or any other known copies, as well as any other indicia of U.S. citizenship. This could include U.S. passports, voter registration cards, and other relevant documents, whether current or expired. This protects against future identity, citizenship, or passport fraud.

Upon the entry of a denaturalization judgment, the defendant’s status typically reverts to that of a lawful permanent resident as of the date of the original naturalization order.⁹⁵ If the defendant’s spouse or children obtained citizenship based on the defendant’s naturalization, the denaturalization judgment revokes the spouse’s and children’s naturalization as a matter of law.⁹⁶

When a court enters a denaturalization judgment, OIL-DCS notifies both the Department of Homeland Security and the Department of State that the defendant is no longer a citizen. This allows the

⁹³ See, e.g., [United States v. Jean-Baptiste](#), 395 F.3d 1190, 1193, 1195 (11th Cir. 2005) (affirming that denaturalization defendant was collaterally estopped from challenging his criminal conviction or his knowledge of having committed the crime).

⁹⁴ See [Klapprott v. United States](#), 335 U.S. 601, 612–13 (1949); see also [United States v. Alrasheedi](#), 953 F. Supp. 2d 112, 114–15 (D.D.C. 2013) (granting summary judgment in favor of United States in denaturalization case where defendant never appeared).

⁹⁵ Unless the defendant has recently acquired naturalization, the defendant will retain permanent resident status because of a five-year statute of limitation on rescinding an order adjusting an individual to permanent resident status. See 8 U.S.C. § 1256(a) (2012).

⁹⁶ See § 1451(d).

agencies to cancel any benefit applications submitted on behalf of relatives and to ensure the defendant does not obtain a passport or exercise any other right or privilege of citizenship.

Typically, the government does not expend resources on civil denaturalization actions unless the ultimate goal is the removal of the defendant from the United States. OIL-DCS attorneys confirm that goal before filing the complaint. In some cases, the government may negotiate terms of a settlement of a denaturalization case, but that usually will not include any promise of relief from removal because such issues are litigated in removal proceedings by the Department of Homeland Security.

VIII. Conclusion

There is no more egregious transgression of our immigration laws than the unlawful or fraudulent acquisition of its most priceless treasure—naturalization. The Attorney General’s renewed commitment to criminal immigration enforcement⁹⁷ will bring greater focus on prosecuting cases of unlawful procurement of citizenship under [18 U.S.C. § 1425](#). When such cases are declined for prosecution, prosecutors are reminded that the civil denaturalization action is an alternative lawful means, and in some cases, superior means, to enforce the immigration laws of the United States against cases of illegal procurement or fraudulent acquisition. Please contact OIL-DCS for questions or assistance with any civil or criminal denaturalization action. OIL-DCS will ensure that the Department of Justice uses all means available to meet the high priority of establishing lawfulness in our immigration system.

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⁹⁷ See Memorandum from Jefferson B. Sessions III, Att’y Gen. of U.S., U.S. Dep’t of Justice, to All Fed. Prosecutors, U.S. Dep’t of Justice (Apr. 11, 2017).

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Civil Immigration Enforcement in National Security Cases

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I. Introduction

Since its creation in 2008, the Civil Division Office of Immigration Litigation-District Court Section (OIL-DCS) has litigated and coordinated a consistently growing body of diverse civil national security cases. In 2017, based in large part on the quantity and complexity of such cases, the Civil Division established the OIL-DCS National Security and Affirmative Litigation Unit (NS/A Unit). The NS/A Unit is a team of experienced attorneys that handle or oversee OIL-DCS's immigration-related national security and affirmative litigation issues. The NS/A Unit also serves as a force-multiplier to other components and the U.S. Attorneys' Office community on issues that are germane to its practice. This Article will survey the aspects of OIL-DCS's national security practice, describe services that it regularly provides throughout the Department, and provide an example of such partnership in action with the National Security Division's Counterterrorism Section and other agencies.

II. Breadth of OIL-DCS's National Security Practice

OIL-DCS handles a diverse docket of national security-related cases. As explained more fully below, it works to prevent terrorists from obtaining United States citizenship and passports, to keep terrorist aliens in immigration detention pending removal, to revoke the United States citizenship of known or suspected terrorists, to strategically litigate national security cases, and to defend programmatic

challenges to national security checks and immigration benefits adjudications. Indeed, OIL-DCS has built a partnership with the Department of State to facilitate difficult removals.

A. Preventing Terrorists from Obtaining Citizenship and Passports

OIL-DCS aggressively defends cases brought by known or suspected terrorists who are seeking to become United States citizens. It has successfully defended against naturalization claims of members of al-Qaeda, Hamas, and al-Shabaab, among others, and is actively litigating a number of other naturalization cases involving terrorist aliens.

B. Keeping Terrorist Aliens in Detention Pending Removal

OIL-DCS works to keep terrorist aliens in detention pending removal. It has handled dozens of habeas actions brought by detained aliens who are known or suspected terrorists, including: al-Qaeda operatives who plotted to bomb San Francisco's Golden Gate and Bay Bridges; an alien who helped set up a terrorist training camp in the United States; an alien who financed and provided weapons for Hamas; an alien who conspired to join the Taliban and fight against U.S. coalition forces; an alien who was convicted of material support to terrorism in connection with the millennium plot to bomb Los Angeles International Airport; and an alien convicted of bombing a Pan Am flight and connected to terrorist plots in England, Switzerland, Brazil, and other countries.

C. Revoking the Citizenship of Known or Suspected Terrorists

OIL-DCS pursues the revocation of United States citizenship from known or suspected terrorists and human rights violators. The Immigration and Nationality Act of 1952, as amended, provides for revocation of United States citizenship where an alien illegally procured naturalization or obtained it through willful, material misrepresentations, a process commonly referred to as "denaturalization."¹ Civil denaturalization is an effective tool for disrupting terrorist activities and fundraising, which may ultimately lead to the expulsion of terrorists from the United States. Denaturalization is also a critical instrument in returning human rights violators to the countries where they perpetrated acts of persecution, genocide, or crimes against humanity, and ensuring that the United States does not afford a safe haven to individuals who engage in the commission of war crimes. Since these cases are civil, they do not have the complication of heightened disclosure requirements of a criminal prosecution. Moreover, the civil process allows for a greater level of discovery from the defendant himself or herself, including compelling his or her testimony at a deposition.

OIL-DCS is currently handling dozens of high-profile denaturalization cases involving known or suspected terrorists and human rights violators. For example, OIL-DCS recently filed a denaturalization action against a native of Pakistan who has been convicted of providing material support to al-Qaeda, having researched the destruction of the Brooklyn Bridge by cutting through suspension cables.² Other examples include denaturalization cases against an individual who pled guilty to diverting funds from a charity to support Islamic militants in Bosnia and Chechnya, and a case against an individual who ran an al-Qaeda communications hub in Santa Clara, California, throughout the mid-1990s, and was subsequently imprisoned for fifteen years for terrorism-related offenses in Egypt.

D. Engagement with Department of State to Facilitate Difficult Removals

Through close coordination with the Department of State, OIL-DCS facilitates the removal of terrorist aliens in immigration detention. OIL-DCS was instrumental in the first removal to Gaza in recent

¹ See 8 U.S.C. § 1451(a) (2012).

² See [Press Release, U.S. Dep't of Justice, Denaturalization Lawsuit Filed Against Convicted Al Qaeda Conspirator Residing in Illinois \(Mar. 20, 2017\)](#).

history. With the permission and supervision of the Department of State, OIL-DCS has also directly engaged United States diplomats to request assistance in difficult removal cases. For instance, OIL-DCS attorneys met with the United States Ambassador to Sierra Leone to request assistance in removing a known terrorist, a convicted felon, and a child molester who attempted to set up a terrorist training camp in the United States. OIL-DCS also helps coordinate the Interagency Deportations Working Group to facilitate difficult removals of high-priority aliens.

E. Defending Against Programmatic Challenges to National Security Checks and Immigration Benefits Adjudications

OIL-DCS aggressively defends against an increasing number of lawsuits that implicate the government's process for vetting immigration benefit applicants for national security concerns, and the way in which derogatory information is used in immigration proceedings. For instance, OIL-DCS is handling a growing number of programmatic challenges to the Controlled Application Review and Resolution Program, which is U.S. Citizenship and Immigration Services' process for screening immigration-benefit applicants for national security concerns. OIL-DCS is also developing novel strategies for handling dozens of cases challenging the delayed adjudication and/or denial of applications to adjust to lawful permanent resident status wherein the alien was found inadmissible because he is a member of a terrorist organization or has engaged in terrorism-related activity.

III. Partnership in Action: Effectuating the Removal of a Convicted Terrorist from the United States

As an example of its practice in action and its partnership with other Department components and agencies, OIL-DCS defended the government against a habeas petition seeking the immediate release of a convicted terrorist alien, Mohammed Rashed. In the course of arguing against Rashed's release, OIL-DCS worked closely with the Department's National Security Division, the State Department, the FBI, the Department of Homeland Security, and other agencies.

Officers arrested Rashed in Athens, Greece, by Greek authorities on May 30, 1988, based upon a United States indictment charging him in the August 1982 bombing of Pan American Flight 830, an attack that killed a Japanese teenager and injured fifteen others.³ Rashed was a member of the "15 May" organization, a group whose goals included promoting the Palestinian cause by coercion and intimidation accomplished through economic damage, personal injury to civilians, and force and violence aimed at American and Israeli interests around the world.⁴ The organization took its name from the date when the State of Israel was formed. Investigation revealed that Rashed was involved in planning, arranging for, and carrying out bombing missions to further the goals of the organization.⁴

A United States extradition request for Rashed was denied in favor of a Greek prosecution. Rashed was convicted and sentenced to fifteen years' imprisonment in Greece, but was released from custody on December 5, 1995, before serving his full sentence.⁵ He was recaptured by the FBI and paroled into the United States for prosecution in Washington, D.C., on June 3, 1998.⁶ On December 17, 2002, Rashed pled guilty to multiple charges, including the murder of Toru Ozawa, the conspiracy to bomb Pan American Flight 830, and for his role in a broader conspiracy to conduct other bombing

³ Plea Agreement, *United States v. Rashed*, No. 1:87-cr-00308-RCL-2 (D.D.C. Dec. 17, 2002), ECF No. 142; *see also United States v. Rashed*, 234 F.3d 1280, 1281 (D.C. Cir. 2000).

⁴ *See* Plea Agreement, *Rashed*, No. 1:87-cr-00308-RCL-2.

⁴ *See id.*

⁵ *Id.*

⁶ Return of Executed Warrant, *Rashed* (June 3, 1998), ECF No. 14.

operations in Europe, the Middle East, and South America.⁷ On March 24, 2006, he was sentenced to an additional seven years' imprisonment.⁸ The plea agreement provided that Rashed would not be released from prison until March 20, 2013, and that at the conclusion of his sentence, "consistent with U.S. law," he would be deported "to the country of his choice."⁹ The agreement further explained that the parties would use "their good faith efforts to ensure" that Rashed would be "deported immediately after the completion of his sentence."¹⁰

The United States was unable to immediately remove Rashed to a country of his choice at the conclusion of his criminal sentence. The removal of a Palestinian convicted of premeditated murder as well as placing and planning to place explosive devices on commercial aircraft and in other public locations in several countries posed a significant challenge to the United States. Efforts to identify countries that would agree to accept Rashed, and that were acceptable to Rashed under the terms of the plea agreement, began promptly, but proved to be a lengthy and complicated undertaking. Accordingly, Rashed filed a habeas petition on February 3, 2014, following his transfer from DHS to Bureau of Prisons custody on March 20, 2013, seeking his immediate release from immigration detention.¹¹

OIL-DCS, in consultation with the National Security Division's Counterterrorism Section and the U.S. Attorney's Office for the District of Columbia, defended Rashed's continued detention as supported by immigration regulations, while simultaneously working with others partners in the Executive Branch to effectuate Rashed's removal as soon as possible. The case presented unique challenges, highlighting the interplay between the rights of an alien detainee to be removed from the United States promptly and national security concerns that prevent release of certain detainees where the removal process may take longer to accomplish than with other criminal detainees. Of particular note, U.S. Immigration and Customs Enforcement (ICE) invoked, for the first time in any case, [8 C.F.R. § 241.14\(d\)](#) as authority for Rashed's continued detention. That provision provides for the continued detention of removable aliens due to security or terrorism concerns despite a finding that removal will not take place within the reasonably foreseeable future, and requires the Secretary of Homeland Security to certify the alien constitutes a threat to national security. Rashed's case was the first time ICE had invoked section 241.14(d).

Ultimately, OIL-DCS was successful in forestalling and preventing Rashed's release long enough for the United States to effectuate his removal. The Rashed case presents an excellent example of the type of challenging and novel litigation handled by OIL-DCS. It also reflects the team-based approach employed by OIL-DCS, in which multiple agencies and Departments work together closely to accomplish the best result for the United States and to defend the country's national security.¹²

IV. Conclusion

OIL-DCS's national security practice serves as a resource for federal prosecutors and agencies in the development of national security investigations. It harnesses the full capacity of U.S. immigration laws to remove status of those who pose the greatest threat to the nation, and serves a vital role in national security practice by creating partnerships between agencies and divisions to address national security

⁷ Minute Entry for Sentencing Proceedings, *Rashed* No. 1:87-cr-00308-RCL-2.

⁸ Minute Entry for Sentencing Proceedings, *Rashed*, (Mar. 24, 2006); *see also* Judgment of Conviction, *Rashed* (May 1, 2006), ECF No. 172.

⁹ Plea Agreement, *supra* note 4, at ¶ 11.

¹⁰ *Id.*

¹¹ *Rashed v. United States*, No. 1:15-cv-888 (W.D.N.Y. filed Feb. 3, 2014).

¹² Prosecutors are currently using this approach in several other cases, including a case concerning an alien convicted of material support to terrorism in connection with the millennium plot to bomb Los Angeles International Airport, who upon his release from criminal incarceration violated the terms of his parole by attempting to purchase weapons.

concerns productively and efficiently. In particular, the NS/A Unit has developed the practice of using civil denaturalization, an integral part of the government's arsenal of criminal, civil, regulatory, and administrative remedies to enforce immigration law, deterring immigration fraud, and most importantly, protecting the national security and public safety of the United States.

ABOUT THE AUTHOR

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OIL-DCS Availability for Assistance and Support in Denaturalization Prosecutions under 18 U.S.C. § 1425

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I. Introduction

Citizenship is the “crown jewel” of the United States immigration system, accompanied by a panoply of important rights and benefits, not the least of which is a U.S. passport.¹ While the vast majority of individuals who naturalize into U.S. citizenship do so lawfully and in attachment to the principles of the Constitution, there are some who obtain citizenship by fraud rather than comply with the strict requirements imposed by Congress. Indeed, some do so with nefarious intent, aiming to use the conferred citizenship as a weapon against the United States itself.²

Recognizing this, Congress enacted two complementary but distinct methods of remedying unlawfully obtained citizenship. First, since 1948, Congress had made it a crime to knowingly procure or

¹ See [Schneiderman v. United States](#), 320 U.S. 118, 122 (1943) (It would be difficult to exaggerate [U.S. citizenship’s] value and importance. By many it is regarded as the highest hope of civilized men.); see also [Senate Homeland Security Committee Addresses U.S. Passport Vulnerability](#), 82 No. 31 Interpreter Releases 1267, 1268 (reporting the testimony of Michael L. Johnson, Former Special Agent in Charge, Diplomatic Security Service, U.S. Department of State, that because a U.S. passport proves both identity and citizenship, it is one of the most widely accepted and utilized government-issued documents).

² See [Leada Gore](#), 26 *Terror Plots in U.S. Tied to Immigrants*, *Sen. Jeff Sessions says: ‘Screening is Very Poor’*, [AL.COM](#) (Nov. 16, 2015).

attempt to procure, contrary to law, the naturalization of any person.³ A conviction under [18 U.S.C. § 1425](#) not only carries with it the potential for jail time, but also mandates automatic revocation of the unlawfully procured citizenship.⁴ Despite the powerful nature of § 1425, prosecutions under it remain relatively rare, with only forty-six filed nationwide in 2016.⁵

The second remedy for the United States, therefore, is a civil cause of action analogous to § 1425, which allows the government to revoke citizenship that was “illegally procured” or “procured by concealment of a material fact or by willful misrepresentation.”⁶ Such civil suits are brought primarily by the Office of Immigration Litigation-District Court Section (OIL-DCS). OIL-DCS, and in particular its National Security and Affirmative Litigation Unit, have litigated, and are litigating, hundreds of civil denaturalization actions, developing a concentrated expertise in the area.

This Article first addresses the importance of prosecutions under § 1425 and the strategic value in bringing such cases. Then, this Article will explore the ways in which AUSAs can maximize their efficiency and efficacy in evaluating and prosecuting cases under § 1425 by tapping the resources and related expertise available at OIL-DCS throughout the lifecycle of the criminal matter. Accordingly, while it is possible that there might initially be collateral proceedings as the government determines whether a case should be prosecuted under § 1425 or through civil denaturalization, or where non- § 1425 charges are filed and a civil denaturalization case is concurrently filed, this Article focuses solely on the most common scenarios that a prosecutor may face and the ways in which the Department’s collective resources can be leveraged in § 1425 prosecutions to “secure the full range of the government’s remedies.”⁷

II. The Importance of Prosecutions Under § 1425—Why Prosecutors Should Consider Bringing Such Cases

As mentioned above, becoming a naturalized United States citizen is the ultimate immigration benefit. Not only does it come with many important rights, such as voting, applying for federal employment, and running for public office, it also allows an individual to obtain a United States passport—invaluable when it comes to international travel and entry into the United States.⁸ Moreover, with naturalization comes valuable immigration benefits for family members. For example, a naturalized citizen can bring immediate foreign-born relatives to the United States without any delay.⁹ Unlimited visas are available for spouses, unmarried children under the age of twenty-one, and parents.¹⁰ Given

³ See [18 U.S.C. § 1425\(a\) \(2012\)](#). Section 1425(a) has existed in its present form since 1948. Since as far back as at least 1870, however, Congress has criminalized frauds and abuses in citizenship cases, enacting a comprehensive (and overlapping) set of false statement offenses to “purify the process of naturalization.” [CONG. GLOBE, 41st Cong., 2d Sess. 5121 \(1870\)](#) (statement of Sen. Conkling); cf. *id.* at 4838 (statement of Sen. Vickers) (observing that criminal provisions were “as broad and comprehensive as [they] well can be” and “seem[] to provide for every imaginable case”); [Act of July 14, 1870, 41st Cong., 2d Sess., 16 Stat. 254](#).

⁴ See [8 U.S.C. § 1451\(e\)](#).

⁵ This statistic was provided by the Executive Office for United States Attorneys and is derived from the United States Attorneys’ Case Management System.

⁶ See [§ 1451\(a\)](#).

⁷ [Memorandum from Eric Holder, Att’y Gen. of U.S., U.S. Dep’t of Justice, to All U.S. Att’ys, U.S. Dep’t of Justice \(Jan. 30, 2012\)](#). Although we have noted throughout this article a few of the professional responsibility issues that arise in connection with parallel criminal and civil denaturalization proceedings, we encourage AUSAs to consult with their Professional Responsibility Officers or the Professional Responsibility Advisory Office for specific guidance.

⁸ [A Guide to Naturalization, What Are the Benefits and Responsibilities of Citizenship?](#), U.S. CITIZENSHIP & IMMIGR. SERVICES (last visited May 12, 2017).

⁹ *Id.*

¹⁰ *Id.*

these immersive benefits, the temptation for someone to engage in dishonesty or fraud is significant, particularly where that individual might not be eligible for citizenship absent fraud. At the same time, the potential harm to the United States and its citizens at the hands of individuals who may seek to utilize such benefits to facilitate nefarious plans is tremendous.¹¹

Once the government discovers naturalization fraud, it is imperative to address it, cutting off the ill-gotten benefits, preventing future harms, and deterring future individuals from engaging in similar fraud. Section 1425(a) criminalizes the knowing procurement or attempt to procure, contrary to law, the naturalization of *any* person.¹² The individual who commits the fraud, or anyone who assisted that person in the fraud, is criminally liable for heavy fines and imprisonment. Indeed, the maximum sentence is twenty-five years if the fraud was for the purpose of engaging in international terrorism, twenty years for drug trafficking, and ten or fifteen years for other offenses.¹³ By considering prosecuting § 1425 violations, federal prosecutors fulfill their obligation to exercise reasoned prosecutorial authority and determine the range of sanctions or other measures that may be imposed as a result of criminal conduct.¹⁴ Even if a lesser charge may also be appropriate for a given case, pursuing a § 1425 charge most likely constitutes the more serious readily provable offense and indicates the ultimate intentions of revoking citizenship and removing the person from the country.¹⁵ Making it known that a United States Attorney's Office will pursue § 1425 prosecutions will ideally have a deterrent effect on anyone who might seek citizenship through fraud in that district. At the very least, attorneys who represent immigrants seeking citizenship should be keenly aware of the consequences and advise their clients against fraud.

Moreover, one of the unique remedies available by bringing a § 1425 charge is the applicability of the naturalization revocation provision in [8 U.S.C. § 1451\(e\)](#). In other words, the court *must* denaturalize an individual convicted under § 1425.¹⁶ Thus, a § 1425 conviction streamlines and conserves government resources because it obviates the need for separate civil denaturalization proceedings. Accordingly, while charges related to naturalization fraud might also be available under other criminal statutes (such as those proscribing false statements,¹⁷ false statements in immigration proceedings,¹⁸ and visa fraud¹⁹), it is worthwhile to consider whether § 1425 applies to a set of facts so that the fraud may be punished fully and fairly, and denaturalization may follow.

¹¹ See Timothy M. Belsan, et al., *Civil Immigration Enforcement in National Security Cases*, U.S. ATTORNEYS' BULL., July 2017, at 18.

¹² See generally [Maslenjak v. United States](#), No. 16-309, 2017 WL 2674154 (U.S. June 22, 2017). This recent Supreme Court decision concluded that § 1425(a) requires the government to prove that a false statement in the naturalization process "caused" the naturalization to be granted. *Id.* at *5. The Court explained that the government can prove this by showing either (1) that the false statement itself was disqualifying, or (2) that the false statement would have triggered an investigation that "predictably" would have led to a disqualifying fact. *Id.* at *8–9.

¹³ See [8 U.S.C. § 1425](#) (2012). For a webinar on § 1425 sentencing, please contact the Executive Office of United States Attorneys.

¹⁴ See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.001 (2017).

¹⁵ [Schneiderman v. United States](#), 320 U.S. 118, 121 (1943) (holding that taking away a person's citizenship is more severe than the imposition of a fine or other penalty).

¹⁶ [Title 8 U.S.C. § 1451\(e\)](#) provides: "When a person shall be convicted under section 1425 of title 18 of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

¹⁷ [18 U.S.C. § 1001](#) (2012).

¹⁸ [§ 1015](#).

¹⁹ [§ 1546](#).

III. How OIL-DCS Provides Support for Naturalization Fraud Prosecutions

A. Case Evaluation and Determination

One of the earliest opportunities to maximize efficiency in any potential § 1425 prosecution is during case intake and evaluation. The ability to quickly and accurately determine whether a case is a viable candidate for prosecution will help to avoid hours spent looking into a matter that your office may not want or be able to prosecute. Moreover, it is important not only to consider whether a case presents a viable prosecution opportunity, but also whether the most fitting remedy and course in any given case would be through a criminal or civil path.²⁰ Some of the key considerations when evaluating a case for a potential § 1425 charge are:

- *Timing*: Is it within the ten-year statute of limitations?
- *Venue*: Was the naturalization unlawfully procured in your district?
- *Constitutional issues*: Is the target present in the district or can he or she be extradited? Are any necessary witnesses willing to participate or within the compulsory process of the Court in order to comply with the Confrontation Clause?
- *Discovery issues*: Is there any classified information or evidence that may present discovery-related issues? Would the case benefit from the ability to demand discovery from and depose the target?

If a case is not a good candidate for prosecution under § 1425 for one of the foregoing reasons, it could be worth pursuing civilly.²¹ For example: there is no statute of limitations in civil denaturalization;²² venue in a civil case is based on the residence of the defendant;²³ a civil denaturalization action can be brought even when the defendant is outside the United States and does not appear;²⁴ and there is no right to confront the witnesses in civil proceedings.²⁵ Attorneys at the National Security and Affirmative Litigation Unit of OIL-DCS are available to help work through this analysis and to assist AUSAs as they try to determine the best path for any particular case.

B. Leveraging Pre-Existing Relationships with Immigration-Related Agencies

Successfully prosecuting naturalization fraud cases often requires significant coordination among the Department of Justice and the Department of Homeland Security and its sub-agencies, including

²⁰ See [U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.250 \(2017\)](#).

²¹ See Anthony D. Bianco, et al., *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, U.S. ATTORNEYS' BULL., July 2017, at 4.

²² See [Costello v. United States](#), 365 U.S. 265, 283 (1961); see also [United States v. Mandycz](#), 447 F.3d 951, 964 (6th Cir. 2006) (holding that laches does not apply in a civil denaturalization).

²³ See [8 U.S.C. § 1451\(a\)](#) (providing that venue in civil denaturalization case lies "in the judicial district in which the naturalization citizen may reside at the time of bringing suit).

²⁴ See *id.* (If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.); see, e.g., [United States v. al Dahab](#), No. 15-cv-514, (D.D.C. Aug. 27, 2015) (order granting the government's request to serve the complaint and summons via email and Facebook where defendant was residing in Egypt and the government's efforts to complete service by other means were thwarted).

²⁵ See, e.g., [Beyah v. United States](#), 589 F. Supp. 834, 835 n.1 (N.D. Ga. 1984) (noting that in civil cases, no Sixth Amendment right of confrontation is implicated); [Fisher Bros. v. Goldberg Plumbing Supply Co.](#), 630 F. Supp. 493, 497 n.7 (E.D. Pa. 1985) (There is no constitutional right to confront witnesses in a civil case so the same standard would not apply here as in a criminal case.).

Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and potentially U.S. Customs and Border Protection (CBP), as well as involving the Federal Bureau of Investigation (FBI), the State Department's Diplomatic Security Service, or other agencies. These agencies all play a role either in adjudicating naturalization applications or in investigating cases of fraud, material misrepresentations and omissions, and unlawful procurement of naturalization.

Moreover, throughout a § 1425 prosecution an AUSA may need to contact agencies to request a certified copy of the individual's immigration—or Alien—file (commonly called an “A-File”); to identify key information within the A-File (discussed further below); to find and contact witnesses, including potentially former government employees; to discuss plea agreements with client agencies; and perhaps to obtain authorizations from high-level officials. Ideally, every prosecutor will have a close relationship with an agent who can assist them and facilitate these processes. But what if that agent leaves, is unavailable, or is unresponsive? What if that agent does not have an immigration background? What if the naturalization fraud is uncovered during a non-immigration-related investigation?

If you run into such issues, OIL-DCS is uniquely positioned to assist. OIL-DCS has long-standing contacts and working relationships with attorneys and agents at the field level nationwide, as well as at each of the respective agency headquarters. As a result, a single call to OIL-DCS can save valuable prosecutor time resources by resulting in the quick identification of the best points of contact for a specific matter, and, where helpful, OIL-DCS can facilitate calls and meetings with the relevant agencies quickly and efficiently. OIL-DCS can assist with substantive issue-spotting and identifying a person in its office or within an agency that has subject-matter expertise.

C. Navigating the A-File & Common Documents

The A-File contains the bulk of an individual's immigration-related records, including forms, applications, petitions, attachments and supporting materials, photographs, reports of investigations, statements, reports, correspondence, and memoranda.²⁶ Although USCIS is the custodian of the A-File under the Federal Records Act, USCIS, ICE, and CBP all contribute information and documents to the A-File and use it to carry out their respective duties.²⁷ As a result, A-Files vary widely in size and contents.²⁸ A-Files may contain a few pages or hundreds of pages, depending on the immigration history of the individual; and there may be multiple A-Files for an individual who naturalized by utilizing an alternate identity.²⁹ Finally, occasionally, a temporary A-File (commonly called a T-File) is created, and there may be separately maintained files for an individual if there are related classified documents. In the context of a naturalization fraud case, you will need to identify the following key documents that will always be relevant to your case:

- Naturalization Application (Form N-400)
- Notice of Oath Ceremony (Form N-445)
- Naturalization Certificate

You may also want to locate the Application to Register Permanent Residence or Adjust Status (Form I-485) or the Petition for Alien Relative (Form I-130). These documents require the applicant to provide information that may be material to their naturalization applications. They also require the applicant to sign-in many cases under penalty of perjury—by certifying that the information contained therein is true.

²⁶ Privacy Act; Alien File (A-File) and Central Index System (CIS) Systems of Records, 72 Fed. Reg. 1755-02 (Jan. 16, 2007), 2007 WL 86868 (F.R.).

²⁷ *Id.*

²⁸ *A-Files Image Gallery, Alien Registration Files (A Files)*, U.S. CITIZENSHIP & IMMIGR. SERVICES (last updated Feb. 9, 2016).

²⁹ *A-Files Numbered below 8 Million, A-Files' Research Value*, U.S. CITIZENSHIP & IMMIGR. SERVICES (last updated Feb. 9, 2016).

Not only are these documents potentially rich with information about an individual, but if an applicant for naturalization has provided false information, or made material misrepresentations or omissions, the forms are likely to contain (or be missing) that information.

Naturalization applicants are generally required to participate in a naturalization interview, during which an immigration officer collects further information and oral testimony regarding the naturalization application.³⁰ Historically, the standard practice is for the officer to review the naturalization application and, using red ink, mark whether the applicant has confirmed, changed, or provided new information relating to the questions on the application.³¹

When it comes to obtaining and reviewing documents, OIL-DCS can help streamline and expedite the process. Indeed, OIL-DCS can help you not only obtain the certified A-File, but also quickly analyze the documents within the A-File, locating and identifying key information and the most relevant witnesses and adjudicators. While parsing the A-File can be time-consuming and difficult, OIL-DCS attorneys are familiar with immigration records and are available and willing to assist AUSAs in navigating agency files.

D. Types of Fraud

Another area in which OIL-DCS attorneys provide assistance is in identifying and understanding the many different types of fraud that occur throughout the immigration and naturalization process, and which of those can form the factual basis for a § 1425 prosecution. Examples of more basic fraud include purchasing and using false documents, obtaining documents from a foreign country containing false information, falsifying the names of family members, being deceitful about criminal or immigration history, or engaging in marriage fraud for the purpose of securing lawful permanent residence and later citizenship. But a prosecutor may run across more complex fraud as well. For example, OIL-DCS has handled cases involving individuals who have committed fraud in a foreign country to secure documents under a false identity, large-scale fraudulent “families” where the “parents” and “children” are unrelated, and subsequent “children” attempts to obtain visas.

Should you find yourself trying to understand the nature of the fraud or wondering whether it is a singular act or part of a larger scheme, OIL-DCS is available to discuss the matter and help connect any missing dots to other similar cases that may exist nationwide.

E. Plea-Related Issues

Ideally a plea offer should be made to the most serious, readily provable offense—which, as noted above, is often naturalization fraud under § 1425. If issues arise during the prosecution or preparation for trial, however, a plea agreement to a lesser offense may be necessary. Because all relevant charges should be considered and included in the indictment, it is likely that a § 1425 violation will be

³⁰ See 8 U.S.C. § 1446(a)–(d).

³¹ Courts have consistently recognized and relied on the standard practice among immigration officers to mark the N-400 during naturalization interviews by placing red check marks and annotations next to only those questions that are orally verified with the naturalization applicant. See, e.g., *Bernal v. INS*, 154 F.3d 1020, 1022 (9th Cir. 1998) (finding false testimony under oath where “the INS officer recorded Mr. Bernal’s pertinent answers on the interview form and annotated the form in red ink). USCIS’s procedures manual requires this practice:

Officers must check off or circle in RED ink all N-400 questions which are asked and answered during the interview. In order to clearly identify the applicant’s responses, the check or circle marks must be made next to the N-400 answers. All additions, deletions, changes, and annotations made by the officer, must be in RED ink and numbered and noted in RED ink within the attestation section on the last page of the N-400 before the applicant signs.

U.S. CITIZENSHIP & IMMIGRATION SERVS., NATURALIZATION QUALITY PROCEDURES MANUAL 18 (2003) (emphasis removed).

accompanied by counts under [18 U.S.C. §§ 1001, 1015, and 1546](#). This would easily allow for a plea agreement that provides for the dismissal of the § 1425 charge if necessary without the need for a Criminal Information. In that situation, adding language to the plea agreement's immigration paragraph may be worth considering. Potential language could be as follows: "The defendant understands and agrees that the government is not precluded from seeking to denaturalize him [or her] by a civil action." This heads off any later claim by the defendant that the United States bargained away its ability to bring a civil denaturalization case.³²

Moreover, in those districts in which the court expects the government to file a factual statement with the plea agreement, the prosecutor should consider making reference to naturalization fraud. This factual basis could be extremely useful later in a civil denaturalization proceeding, particularly if the court asked during the Rule 11 proceeding whether the defendant had any objections to the factual basis.³³ The defendant's answer in the negative, or silence on that question, would most likely constitute an admission for purposes of establishing that fact in a subsequent civil denaturalization proceeding. Even if the court does not require a written factual basis, a statement provided orally in the Rule 11 hearing is still useful

³² Including such language also may avoid or undermine any subsequent allegations that an AUSA had engaged in professional misconduct by omitting the fact that the United States may seek civil denaturalization notwithstanding the defendant's plea. See [MODEL RULES OF PROF'L CONDUCT r. 4.1\(a\) & cmt. 1 \(AM. BAR ASS'N 1983\)](#) (In the course of representing a client a lawyer shall not knowingly . . . make a false statement of fact or law to a third person. . . . Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.); [MODEL RULES OF PROF'L CONDUCT r. 8.4\(c\) \(AM. BAR ASS'N 1983\)](#) (It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.).

³³ Where a good-faith basis exists to seek an admission regarding naturalization fraud from the defendant in a criminal case—*i.e.*, to inform the court of the totality and seriousness of the defendant's conduct—an AUSA may do so, even where such an admission would benefit the United States in a subsequent civil denaturalization proceeding. See [MODEL RULES OF PROF'L CONDUCT r. 4.4\(a\) \(AM. BAR ASS'N 1983\)](#) (In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.); [MODEL RULES OF PROF'L CONDUCT r. 8.4\(d\) \(AM. BAR ASS'N 1983\)](#) (It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.); see also [MODEL RULES OF PROF'L CONDUCT r. 3.1 \(AM. BAR ASS'N 1983\)](#) (A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.); cf. [United States v. Kordel, 397 U.S. 1, 11–12 \(1970\)](#) (rejecting the argument that the government had violated the defendants' due process rights or departed from proper standards in the administration of justice by using the defendants' interrogatory responses from a parallel civil enforcement action in connection with the criminal prosecution, where the government had not "brought a civil action solely to obtain evidence for its criminal prosecution"); [United States v. Posada Carilles, 541 F.3d 344, 358 \(5th Cir. 2008\)](#) (rejecting the district court's conclusion that the defendant's naturalization interview was "a pretext for a criminal investigation," where "nothing in the record suggest[ed] that the naturalization interview was anything other than a bona fide examination conducted in accordance with the applicable regulations). As the American Bar Association has opined:

The Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process.

[ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 92-363 \(1992\).](#)

because the transcript can be utilized in the civil proceeding.³⁴

OIL-DCS is available to help AUSAs assess the impact of a particular course of action on any subsequent civil denaturalization case. In particular, OIL-DCS attorneys can help ensure that the factual statement that the defendant is signing, or which the defendant will be asked to consider in court during the plea colloquy, contains the specific facts necessary to bind the defendant in later civil denaturalization proceedings, ensuring success at that stage.

F. Post-Judgment Options

Even after a case has been investigated, charged, and tried, OIL-DCS may still provide valuable assistance to the United States Attorney's Office. If you have obtained a conviction, you may face an appeal on a number of legal issues that require significant and substantive briefing. Briefing on such topics may already exist, and OIL-DCS can provide it to you. In the course of their nationwide practice, and given the more briefing-heavy nature of civil litigation, OIL-DCS attorneys have addressed a variety of legal issues related to naturalization and revocation of naturalization, such as materiality or lack of good moral character based upon the provision of false testimony—issues of law where there is significant overlap between the criminal and civil proceedings. Thus, an AUSA may be able to obtain sample language (perhaps even circuit-specific) addressing the questions on appeal, saving substantial amounts of time. OIL-DCS can also provide assistance with regard to substantive issue spotting, identifying circuit case law, and contact information for experts in the field.

If, however, the prosecution took an unexpected turn and the defendant in your case has been acquitted, OIL-DCS *may* still be able to bring the case as a civil denaturalization under the lesser evidentiary standard of 8 U.S.C. § 1451.³⁵ OIL-DCS can also take advantage of the evidence, statements, and testimony generated during the criminal investigation and trial³⁶ without violating double jeopardy³⁷

³⁴ Department attorneys may share information between criminal and civil enforcement proceedings as long as the law, including Rule 6(e) of the Federal Rules of Criminal Procedure and any other applicable court rules or orders, does not prohibit the sharing. The Supreme Court has reasoned:

[C]ooperation between the branch of the Department of Justice dealing with criminal law enforcement and the branch dealing with the immigration laws would be less effective if evidence lawfully seized by the one could not be used by the other. Only to the extent that it would be to the public interest to deter and prevent such cooperation, would an exclusionary rule in a case like the present be desirable. Surely no consideration of civil liberties commends discouragement of such cooperation between these two branches when undertaken in good faith.

Abel v. United States, 361 U.S. 217, 240 (1960); *see also* MODEL RULES OF PROF'L CONDUCT r. 3.4(c) (AM. BAR ASS'N 1983) (A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.); MODEL RULES OF PROF'L CONDUCT r. 4.4(a) (In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third] person.); MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 1983).

³⁵ Although a post-acquittal civil denaturalization action may be permissible, whether OIL-DCS *will* bring a civil denaturalization case is subject to numerous equitable and legal factors that are beyond the scope of this article. Nevertheless, if you believe any case warrants consideration for a civil denaturalization action, please reach out to OIL-DCS at denaturalization@usdoj.gov.

³⁶ *See supra* note 34; *see also* *United States v. Procter & Gamble Co.*, 356 U.S. 677, 684 (1958) (The fact that a criminal case failed does not mean that the evidence obtained could not be used in a civil case.).

³⁷ *See* *United States v. Bogacki*, 925 F. Supp. 2d 1288, 1291 (M.D. Fla. 2012) ([A] civil denaturalization action brought under a civil statute, 8 U.S.C. § 1451(a), . . . does not implicate the doctrine of double jeopardy.).

or res judicata.³⁸ Thus, a civil case can provide another avenue to achieve a practically similar result. If you wish to recommend a case for civil denaturalization, please reach out to OIL-DCS at denaturalization@usdoj.gov or the appropriate individuals at your local USAO.

IV. Conclusion

Prosecutions under § 1425 are important to the national security of the United States and to protect the integrity of the naturalization process and to enforce the rule of law. When considering whether to charge an individual under § 1425 or during the ensuing litigation and any appeal, attorneys at the National Security and Affirmative Litigation Unit of OIL-DCS are available as an important resource for prosecutors. Ultimately, the U.S. Attorney's Offices and OIL-DCS can partner together to ensure the best possible outcome for the United States and "secure the full range of the government's remedies."

If you want to discuss any of the foregoing matters with an OIL-DCS attorney or have any questions regarding the ways in which OIL-DCS can be of assistance or concerning civil denaturalization, please contact any of the authors or email denaturalization@usdoj.gov.

ABOUT THE AUTHORS

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³⁸ See *Sourino v. United States*, 86 F.2d 309, 311 (5th Cir. 1936) (The fact that naturalization may be revoked as an incident to conviction of fraudulent or illegal procurement thereof does not give the required identity to the two proceedings or to the things previously sought to be obtained by them; nor does it appear that any issue here in controversy was adjudicated in the criminal prosecution where the sole issue was the bar of the statute of limitations.).

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Foreign Civil Discovery and Immigration Enforcement Actions

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I. Introduction

The need for transnational evidence gathering is prevalent in civil immigration enforcement litigation because courts may be called upon to resolve questions of foreign law or, most commonly, witnesses and documents necessary to address citizenship claims and requests for affirmative relief are located overseas. For example, federal court cross-border evidence gathering is regularly encountered in denaturalization proceedings under [8 U.S.C. § 1451\(a\)](#), affirmative citizenship claims brought under [8 U.S.C. § 1503\(a\)](#), and challenges to administrative denials of naturalization applications under [8 U.S.C. § 1421\(c\)](#). Nevertheless, this list is not exhaustive, and the need for evidence abroad may arise in other contexts, such as criminal reentry cases under [8 U.S.C. § 1326](#). Because immigration law and enforcement-related issues are often civil in nature rather than criminal, litigators seeking evidence abroad may not be able to use familiar bilateral and multi-lateral judicial assistance agreements. Accordingly, international evidence gathering poses difficult and complex challenges at both the procedural and substantive levels.

This Article addresses these issues by providing a practical overview of cross-border discovery questions that commonly arise in civil cases before federal courts.¹ In considering the subject, it is important to emphasize that the United States' approach to the taking of evidence differs significantly from that of other countries. The generous, party-driven approach to discovery in the United States is informed by the common law and is often criticized as excessive and burdensome compared to civil systems that make up the majority of the world's legal systems. Many legal systems, in fact, view evidence-gathering as an exclusive judicial function and party-driven discovery—as it exists in the United States—could result in a violation of national sovereignty. Accordingly, due to marked differences in evidence-gathering from country-to-country, it is imperative for civil litigators to possess a working knowledge of the various mechanisms available, as well as an understanding of when to utilize a given

¹ This Article does not address obtaining evidence abroad for criminal proceedings pending in the United States. This type of evidence-gathering is largely governed by country-specific bilateral agreements. Additionally, this Article does not address evidence requests from foreign jurisdictions for documents or witnesses in the United States. For issues arising in this context, please contact the Department of Justice, Civil Division, Office of Foreign Litigation/Office of International Judicial Assistance, for assistance. Helpful information is available here: [OJIA Resources](#), DOJ.GOV (last visited May 12, 2017); [Office of Int'l Judicial Assistance](#), DEP'T OF JUSTICE (last updated Apr. 11, 2017).

approach or combination of approaches.²

In general, there are three means by which the United States government may obtain evidence abroad for use in civil litigation: (1) pursuant to the Federal Rules of Civil Procedure; (2) via mechanisms provided by international conventions or treaties, such as the Hague Convention; and (3) by letters rogatory. The mechanism employed depends on several factors, including whether there is an evidence gathering treaty in place dictating procedures in a target country, the facts of the case, the nature of the request, and the legal environment of the relevant country. Also important is whether the evidence is requested from a party or a non-party to the litigation. This article discusses each tool in turn and provides practice tips for effective use.³

II. Foreign Evidence Gathering Under the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure provide many well-known tools for obtaining evidence abroad. Presumably, because federal judges are most familiar with these tools, the Rules are often regarded as the “default” means to obtain evidence abroad for litigation pending in the United States.⁴ The fallacy of this approach, however, is that utilization of the Rules to gather evidence abroad is entirely limited by the law of the country where the evidence is located. Obstacles unique to cross-border discovery include data protection laws and blocking statutes, competing sovereignty interests, and foreign privileges or immunities in the target country. Critically, limitations imposed by a country’s law are not subject to waiver by the parties, nor can foreign law be avoided by conducting otherwise prohibited discovery in a United States embassy or consulate. If a country proscribes evidence-gathering procedures in conflict with established domestic procedures, resort to the Rules violates national sovereignty, leaving counsel vulnerable to sanctions and criminal penalties. Accordingly, although federal judges may prefer use of the Rules, civil litigators must research the target country carefully and be certain evidence-gathering in the manner sought is permitted by foreign law.

A. Obtaining Documents

Rule 34 permits a request for a party present in the United States to produce documents located abroad. The adequacy of this measure, however, largely depends on the issue of control.⁵ Fortunately, control is not an arcane concept; physical possession and legal ownership are not dispositive. Neither strict legal ownership nor physical possession is required for a party to have “control” over documents

² A party, for example, may simultaneously seek discovery under the Federal Rules of Civil Procedure and by letters rogatory without prejudice to the party’s right to seek discovery under the Rules. See [Dubai Islamic Bank v. Citibank N.A.](#), No. 99 Civ.1930(RMB)(TH), 2002 WL 1159699, at *2–3 (S.D.N.Y. May 31, 2002). Further, the Hague Evidence Convention (Hague Convention) expressly states it does not preclude methods of obtaining evidence pursuant to local law; thus, parallel requests may be permissible in countries that are party to the Convention. See [Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters](#) art. 27, Oct. 7, 1972, 23 U.S.T. 2555, T.I.A.S. 7444.

³ The OIL-DCS Foreign Discovery and Service of Process Coordinator regularly provides guidance regarding litigation planning for effective foreign discovery and service practice in domestic district court litigation and may be consulted by email at yamileth.g.davila@usdoj.gov.

⁴ See [Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court](#), 482 U.S. 522, 529, 538, 541 (1987) (holding that the Hague Convention does not provide the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory); [Int’l Soc’y for Krishna Consciousness, Inc. v. Lee](#), 105 F.R.D. 435, 445 (S.D.N.Y. 1984) ([T]he federal courts have repeatedly acknowledged their own authority to compel a party to provide relevant discovery pursuant to the normal procedures outlined in the federal rules, both civil and criminal, regardless of where the information is actually located.).

⁵ [FED. R. CIV. P. 34\(a\)\(1\)](#); [Shcherbakovskiy v. Seitz](#), No. 03 CV 1220(RPP), 2010 WL 3155169, at *3 n.7 (S.D.N.Y. July 30, 2010); see also 71 Am. Jur. Trials 1 § 16 (1999).

located abroad. Rather, the requesting party need only show that the responding party has the practical ability to obtain the documents overseas.⁶ Similarly, Rule 45 permits service of a subpoena for a third party present in the United States to produce documents located abroad.⁷ Where the non-party is properly subject to the court's subpoena power, Rule 45 requires the non-party to "produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served."⁸

A practical limitation to the use of Rules 34 and 45, however, is that many civil law countries emphatically prohibit the pretrial production of documents.⁹ In the legal tradition of these countries, obtaining documents pretrial is limited by blocking statutes or other applicable laws that seek to counter broad and burdensome U.S.-style discovery. Nevertheless, when a foreign country's laws prohibit production of documents sought by a party, United States courts have sometimes required the responding party to make a good faith effort to secure permission to disclose from the foreign government. Failing such a good faith effort—and even in cases where good faith efforts are merely unsuccessful—an adverse inference against the non-disclosing party has been applied to mitigate prejudice to the requesting party's case.¹⁰ Judges faced with an objection on the basis of foreign law apply the multifactor test promulgated in the Restatement (Third) of Foreign Relations Law § 442(1)(c), considering: (1) the importance to the investigation or litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the country where the information is located. Against this backdrop, civil litigators should be prepared to meet the multifactor test to obtain inferences against a party that fails to comply with disclosure of documents located abroad due to foreign law.

B. Obtaining Testimony

Where foreign law permits voluntary depositions, Rules 28(b) and 29 allow for such by stipulation, notice, or commission. Because stipulation of counsel concerning a deposition does not cure violation of foreign law, however, civil litigators should be cautious in determining not only whether a for example, must be attended by a person authorized to administer oaths under local law, usually a

⁶ See *First Nat'l City Bank of N.Y. v. IRS*, 271 F.2d 616, 618 (2d Cir. 1959) (holding that a party with power to cause records to be sent for any purpose, "surely has sufficient control to cause them to be sent on when desired for a governmental purpose properly implemented by a subpoena).

⁷ See *FED. R. CIV. P. 45*.

⁸ *FED. R. CIV. P. 45*, 1980 amend., subd. (a).

⁹ Countries that explicitly prohibit production of documents for the purpose of pretrial discovery, as known in common law states, include Argentina, China, Italy, and Spain. See *HAGUE CONFERENCE ON PRIVATE INT'L LAW, Table Reflecting Applicability of Articles 15, 16, 17, 18, and 23 of the Hague Evidence Convention* (2014). In fact, twenty-seven contracting countries to the Hague Convention have a full exclusion prohibiting pre-trial discovery of documents while eighteen countries have a qualified exclusion. See *id.*

¹⁰ See *Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 195–96 (E.D.N.Y. 2010) (considering Arab Bank's compliance with discovery obligations in light of foreign bank secrecy laws, which Arab Bank argued prohibited the production of certain documents, and concluding that an adverse inference instruction can be a proper sanction under *FED. R. CIV. P. 37(b)*, even when the non-producing party has not been found to have engaged in bad faith or willful conduct); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 53–54 (E.D.N.Y. 2010) (same); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979) (We do not seek to force any defendant to violate foreign law. But we do seek to make each defendant feel the full measure of each sovereign's conflicting commands . . .).

United States consular official.¹¹

Finally, the Walsh Act¹² permits subpoenas for the appearance for a deposition in the United States of an individual who is a United States citizen or resident located abroad or for the production of documents from a citizen or resident located abroad. A subpoena for documents under the Walsh Act is appropriate where the requested documents are “necessary in the interest of justice” and “it is not possible to obtain . . . the production of the documents . . . in any other manner.”¹³ Foreign law, however, limits use of this device as serving and enforcing the subpoena abroad must comply with foreign evidence-gathering laws and procedures.

III. Evidence-Gathering Pursuant to the Hague Convention

In the United States, there are a limited number of treaties and laws that address the taking of evidence abroad. The most significant are the Hague Convention, a multilateral treaty which the United States ratified in 1972, detailing procedures for the taking of evidence among signatory countries, and 28 U.S.C. §§ 1781–1783.¹⁴ The Hague Convention offers a framework addressing the taking of evidence and depositions across national boundaries, setting minimum standards with which contracting countries agree to comply. The Hague Convention provides for the gathering of evidence through two main channels: (1) a Letter of Request seeking judicial assistance to be executed by a contracting country’s Central Authority; or (2) by a diplomatic officer, consular agent, or appointed commissioner for the direct taking of evidence in the country, without compulsion. Resort to the Hague Convention is often the only means of obtaining discovery from third parties located abroad in signatory countries.

Each country-party to the Hague Convention has the opportunity to make reservations and declarations regarding applicability. Importantly, some countries have invoked an absolute bar to the production of pretrial documents pursuant to Article 23, and some have qualified reservations.¹⁵ Accordingly, the Hague Convention works differently from country to country. For example, some countries grant counsel the opportunity to pose live questions at deposition, while others require written questions posed by a judge. Also, some countries provide for verbatim transcripts of testimony, while others permit only an abstract of testimony as summarized by a judicial official. Likewise, some countries provide for methods of compulsion as they exist under local law, while others decline to compel participation at all. Given significant differences in application of the same treaty from country to country—and even within the same country over time—utilization of the Hague Convention presents a maze of concerns. Fortunately, the Federal Rules of Civil Procedure accommodate these differences by providing that evidence obtained abroad pursuant to a Hague Convention Letter of Request should not be excluded because it does not comport with United States evidentiary standards.¹⁶ Rather, the district court must admit the evidence and determine its probative value, weight, and effect.¹⁷ Accordingly, questions

¹¹ See 71 Am. Jur. Trials 1 §§ 22–27 (1999); see also *Menovcik v. BASF Corp.*, No. 09–12096, 2010 WL 4867408, at *4–5 (E.D. Mich. Nov. 23, 2010) (indicating a requirement that the deponent and the person who administers the oath be in the same place).

¹² 28 U.S.C. § 1783 (2012).

¹³ See *Estate of Yaron Ungar v. Palestinian Auth.*, 412 F. Supp. 2d 328, 333–334 (S.D.N.Y. 2006) (employing a more lenient standard); 28 U.S.C. § 1783(a).

¹⁴ See *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, *supra* note 2.

¹⁵ Of the fifty-nine contracting states, only fifteen have not made a full or qualified exclusion under Article 23. See *HAGUE CONFERENCE ON PRIVATE INT’L LAW*, *supra* note 9.

¹⁶ FED. R. CIV. P. 28(b)(4) (Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.).

¹⁷ Restatement (Third) of Foreign Relations Law § 473(1) (1987).

of admissibility should not discourage counsel from employing the Hague Convention.¹⁸

A. Letter of Request

The Letter of Request is the standard form for obtaining evidence under the Hague Convention. Counsel should draft a Letter of Request using the model form.¹⁹ The Letter of Request should specify any special method of taking evidence requested. In order to avoid refusal in countries prohibiting pretrial discovery under Article 23, the Letter of Request should be specific and directed at evidence for use at trial. Letters of Request should be submitted in, or accompanied by, a certified translation into the language specified by the target country, if a translation is required. Note that Article 4 of the Hague Convention requires translation certification by a diplomatic officer, consular agent, or sworn translator, but also includes “any other person so authorized in either State,” which provides leeway.

A Letter of Request may be issued only upon motion to the district court. Accordingly, counsel must draft a motion seeking an order from the district court directing issuance of the Letter of Request for foreign discovery under the Hague Convention. Be sure to attach the request and translations as exhibits to the motion. It may also be helpful to attach a declaration of counsel explaining the facts leading to the necessity for foreign judicial assistance in your case (e.g., an uncooperative witness). Also, if possible, obtain the other party’s consent prior to filing.

After filing, the district court may hold a hearing on the motion, especially if an opposition is filed. If there is opposition, the motion’s proponent has the burden of demonstrating the necessity for Hague Convention procedures. The contesting party, however, must show good reason for denying the request.²⁰ Travel costs and the weight of the evidence sought are generally not good reasons for denying the request. Once the district court grants discovery under the Hague Convention and affixes its seal to the Letter of Request, counsel transmits the request to the appropriate Central Authority for processing abroad.

B. Discovery by Consular Officer or Commissioner

Often referred to as Chapter II discovery, voluntary depositions by diplomatic officer, consular agent, or appointed commissioner pursuant to Articles 15 to 17 of the Hague Convention are available where permitted by the target country. Although the Hague Convention does not specify a procedure for depositions by a consular officer or commissioner, the suggested method is to use the notice provision of [Federal Rule of Civil Procedure 28\(b\)\(1\)](#) or the procedure to appoint a commissioner under Rule 28(b)(2).²¹ The parties, however, must abide by any conditions set by the country.²²

IV. Diplomatic Channels for Taking of Evidence Abroad

Letters rogatory transmitted via diplomatic channels is the customary means of obtaining judicial

¹⁸ The Hague Conference on Private International Law website on the Hague Convention is a good place to begin an evaluation of the applicability in your case. See [Evidence Section, HAGUE CONVENTION ON PRIVATE INT’L LAW](#) (last visited May 12, 2017).

¹⁹ *Model for Letters of Request Recommend for Use in Applying the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, HAGUE CONFERENCE ON PRIVATE INT’L LAW (last visited May 12, 2017).

²⁰ 71 Am. Jur. Trials 1 §§ 8, 33 (1999); see *Pronova Biopharma Norge AS v. Teva Pharm. USA, Inc.*, Nos. 09-286-SLR-MPT, 09-304-SLR-MPT, 09-305-SLR-MPT, 2010 WL 1685998 (D. Del. 2010).

²¹ 71 Am. Jur. Trials 1 § 37 (1999).

²² For Hague Convention contracting states, please see the Central Authority Practical Information pages for limitations and procedures imposed when using Articles 15–17. See *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, HAGUE CONFERENCE ON PRIVATE INT’L LAW (last visited May 12, 2017); HAGUE CONFERENCE ON PRIVATE INT’L LAW, *supra* note 9.

assistance from overseas in the absence of a treaty or a country specific agreement. Because letters rogatory require transmission through diplomatic channels, the Department of State is the appropriate agency for forwarding these requests.²³ Letters rogatory addressed to courts of another country are essentially the same as Letters of Request submitted pursuant to the Hague Convention, but execution of letters rogatory is based on principles of comity and reciprocity. Some countries not party to the Hague Convention, such as Canada and Austria, regularly execute letters rogatory. Nevertheless, although letters rogatory is the traditional mechanism for obtaining evidence abroad absent a treaty, it is also the slowest—taking several months but often up to a year to complete.

The procedure for issuance of letters rogatory is similar to that for Hague Convention Letters of Request. The request must specify the discovery sought and any special procedures requested.²⁴ Likewise, the district court issues letters rogatory upon motion. Accordingly, if possible, obtain the other party's consent before filing because a significant extension of the discovery time frame may be necessary given the slow processing of letters rogatory. Once the district court grants discovery by letters rogatory, a cover letter should be drafted to accompany the request. The cover letter should describe the nature of the request, specifically naming the foreign country, the case and docket number, and the person(s) from whom evidence is to be obtained. The cover letter should also list any special instructions and include a statement of responsibility for additional costs. Additionally, the cover letter should include the name and address of local foreign counsel (if any) and the contact information of the requesting attorney.²⁵ Thereafter, counsel transmits the letter package to the Department of State, Office of Consular Services, for transmission abroad.²⁶ After a review, the Department of State will forward the letters rogatory to the United States embassy in the receiving country, which transmits it to the ministry of foreign affairs in that country. For the final approval and implementation, the letters rogatory are forwarded to the appropriate foreign court for execution. Because evidence-gathering via diplomatic channels involves many steps resulting in significant delays, early planning is essential.

V. Practice Considerations

Regardless of the mechanism employed, international discovery takes careful planning. Civil litigators should weigh the importance of the information sought against the expected delays in obtaining evidence abroad before embarking on cross-border discovery. Thus, as soon as possible, counsel should identify whether international discovery might be necessary in their case and familiarize themselves with the foreign law governing evidence gathering in the target country. If counsel decides to pursue foreign discovery, during the Rule 26(f) conference or as soon thereafter as the need for evidence abroad becomes apparent, the parties should discuss to what extent they can collaborate and attempt to resolve consensually any cross-border discovery issues that may arise. Counsel should also use the Rule 16(a) scheduling conference to their best advantage by flagging the potential for foreign discovery to the court and working together to develop a cooperative protocol and suggested approach at the threshold of litigation. Specifically, consider submitting a proposed Rule 16 order governing the timeframe and apparatus for conducting foreign discovery and resolving any disputes. Finally, as the case progresses, counsel should notice the court of significant updates, like the taking of depositions overseas. Careful planning and diligence will go a long way in persuading the court to adopt counsel's approach to foreign evidence gathering and foster cooperation throughout the process.

²³ 28 U.S.C. § 1781 (2012).

²⁴ See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Preparation of Letters Rogatory*, TRAVEL.STATE.GOV (last visited May 12, 2017).

²⁵ If consultation with foreign counsel is needed at any point in the evidence gathering process or when considering taking depositions abroad, please contact the Department of Justice's Office of Foreign Litigation for assistance.

²⁶ 71 Am. Jur. Trials 1 § 42 (1999).

VI. Conclusion

Foreign evidence gathering is dynamic and complex. Cross-border discovery touches on sensitive considerations involving the interplay of domestic law, diplomatic prerogatives, policy, treaty obligations, and foreign law. These considerations require mindful balancing of the interests involved and a precise understanding of the facts, circumstances, and applicable law in the particular case. Early engagement between the parties, the court, and the target country is critical to ensure effective, expeditious results.

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Constitutional Aspects of Civil Immigration Enforcement

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I. Introduction

The United States Constitution affects many aspects of contemporary immigration practice in ways favorable both to the government and to aliens. On the one hand, the Supreme Court has held since the late nineteenth century that the political branches enjoy an unusually broad authority to regulate immigration law. On the other hand, the Court has recognized that the Bill of Rights offers some individual rights to certain aliens against unfettered governmental action. This tension has generated substantial litigation in the federal courts.

This Article serves as a practical resource for Assistant U.S. Attorneys by identifying the constitutional issues aliens commonly raise in federal court and what the government's responsive positions in litigation have been. This Article first examines the Constitution from the government's perspective, examining its plenary power to legislate and enforce immigration law. Second, it examines the Suspension Clause and the scope of alien detainees' rights to challenge their detention pending removal. Finally, this Article explores the Fifth Amendment's Due Process Clause and arguments commonly raised by aliens under that provision.

This Article serves as an issue-spotting primer. It does not focus on pending litigation. Accordingly, it does not comment on litigation that is pending as of June 26, 2017, such as challenges

[Executive Order 13,769](#) and [Executive Order 13,780](#),¹ *Jennings v. Rodriguez*,² or *J.E.F.M. v. Lynch*.³

II. Plenary Power

The backdrop to constitutional immigration law is the political branches' broad authority over immigration. Congress and, by delegation, the Executive branch have very broad authority to regulate immigration to the United States, often under deferential judicial review. Such authority is doctrinal in nature and referred to as the "plenary power doctrine" or simply "plenary power."

This plenary power flows from two springs. First, every sovereign country has the inherent authority to regulate immigration.⁴ Second, several parts of the Constitution, read in conjunction, support Congress's plenary power to control immigration policy. The Constitution grants Congress the authority to: establish uniform laws relating to naturalization,⁵ regulate commerce with foreign countries,⁶ declare war,⁷ approve treaties,⁸ maintain armies and navies,⁹ and make laws that are "necessary and proper" to execute these enumerated powers.¹⁰ These provisions together commit to the federal government "the entire control of international relations, in peace as well as in war."¹¹

The primary immigration statute is the Immigration and Nationality Act (INA), which Congress passed in 1952 and has repeatedly amended. The INA delegates much of Congress's plenary authority to the Executive branch.¹² For example, the INA, as amended, generally gives the Department of Justice or Department of Homeland Security (DHS)¹³ the authority to, e.g.:

¹ See *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir.) (en banc), *pet. for cert. granted*, Nos. 16-1436, 16-1540, 2017 WL 2722580 (June 26, 2017).

² 804 F.3d 1060 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (2016), *oral argument held* (Nov. 30, 2016), *reargument ordered* (June 26, 2017) (considering whether the Due Process Clause requires the government to give a bond hearing to certain types of aliens who have been detained more than six months).

³ 837 F.3d 1026 (9th Cir. 2016), *pet. for reh'g and for reh'g en banc filed* (Dec. 5, 2016) (considering a claim that indigent minor immigrants without counsel have a right to government-appointed counsel in removal proceedings).

⁴ *The Chinese Exclusion Case, Chae Chan Ping v. United States*, 130 U.S. 581, 603–04 (1889) (Jurisdiction over its own territory to that extent is an incident of every independent nation.); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (calling these principles "ancient").

⁵ U.S. Const. art. I, § 8, cl. 4.

⁶ *Id.* cl. 3.

⁷ *Id.* cl. 11.

⁸ *Id.* art. II, § 2, cl. 2.

⁹ *Id.* art. I, § 8, cls. 12–13.

¹⁰ *Id.* cl. 18.

¹¹ *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); see *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens." (citations omitted)).

¹² *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950) (When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an executive power. Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate [these functions].).

¹³ The INA explicitly delegates many functions to the "Attorney General." That phrasing is anachronistic. Congress transferred many of the Attorney General's functions—e.g., the authority to naturalize or initiate deportation proceedings—to the newly created Department of Homeland Security in 2003. *E.g.*, 6 U.S.C. § 251 (2012 & Supp. III 2015); § 271(b). In so doing, Congress did not update every reference to the Attorney General in the INA. Rather, Congress enacted a blanket provision under which every affected reference to the Attorney General "shall be deemed to refer to the Secretary . . . of the Department to which such function is so transferred." § 557. Therefore, although the INA continues to refer to the Attorney General, the Secretary of Homeland Security now enjoys the sole authority to execute many of those functions.

- Admit aliens;¹⁴
- Waive various grounds of inadmissibility;¹⁵
- Grant lawful permanent residence;¹⁶
- Grant voluntary departure;¹⁷
- Cancel the removal of an inadmissible or removable alien;¹⁸
- Grant asylum;¹⁹
- Release certain detained aliens on bail;²⁰ and
- Establish records of lawful permanent residents.²¹

The judiciary has sanctioned this use of the plenary power in ways that would look odd if applied to U.S. citizens. “[I]n the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.”²² Because the plenary power is a fundament of sovereignty, it permits only narrow judicial review.²³ Initially cited to uphold laws excluding aliens from entering the United States,²⁴ plenary power has also justified the deportation²⁵ and detention of arriving aliens.²⁶ In each of those cases, the Court declined to examine the merits of the exclusion, deportation, or detention laws at issue.²⁷

However, the Supreme Court has regularly enforced a constitutional limit to the plenary power doctrine.²⁸ Chiefly, the plenary power does not abrogate procedural due process rights.²⁹ The extent of those procedural due process rights depends on the type of aliens at issue. Although an alien applying for admission to the United States has “no constitutional rights regarding his application, . . . once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”³⁰ Lawful permanent residents, therefore, may be due more process than whatever process Congress established by statute.³¹ However, the constitutional due process

¹⁴ 8 U.S.C. § 1225(b)(2)(A) (2012).

¹⁵ § 1182(g)–(h).

¹⁶ § 1255(a).

¹⁷ § 1229c(a).

¹⁸ § 1229b.

¹⁹ § 1158(b)(1)(A).

²⁰ § 1226(a).

²¹ § 1259.

²² *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (internal quotation marks omitted).

²³ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (Courts have long recognized the power to expel or exclude aliens . . . exercised by the government’s political departments [as] largely immune from judicial control.).

²⁴ *The Chinese Exclusion Case*, *Chae Chan Ping v. United States*, 130 U.S. 581, 603–04 (1889).

²⁵ *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) *abrogated in part by* *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

²⁶ *Mezei*, 345 U.S. at 215–16.

²⁷ *Chinese Exclusion Case*, 130 U.S. at 604–06; *Fong Yue Ting*, 149 U.S. at 714; *Mezei*, 345 U.S. at 216 (Whatever our individual estimate of that policy and the fears on which it rests, respondent’s right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.).

²⁸ *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (Congress has ‘plenary power’ to create to immigration law, . . . [b]ut that power is subject to important constitutional limitations.).

²⁹ *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

³⁰ *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), *superseded on other grounds by statutes*, 8 U.S.C. § 1182(a) (2012 & Supp. III 2015), § 1227(a).

³¹ *Landon*, 459 U.S. at 33–34.

inquiry is always flexible and analyzed on a case-by-case basis.

The trend of the Supreme Court has been to avoid limiting the plenary power as such, instead focusing on individual constitutional rights. In *Landon v. Plasencia*, the Supreme Court acknowledged the plenary power, but under the Due Process Clause was willing to examine the procedures used in a lawful permanent resident's exclusion proceedings.³² Similarly, in *Demore v. Kim*, the Court considered whether the Due Process Clause sanctioned the detention of criminal aliens pending a final order of removal.³³ The Court held that even under the Due Process Clause, the detention of a lawful permanent resident during deportation (now removal) proceedings is a constitutionally valid aspect of the process.³⁴

One current manifestation of the plenary power doctrine is consular non-reviewability. Consular non-reviewability, also known as consular absolutism, limits judicial review over the decisions of Department of State consular officers.³⁵ The scope of consular non-reviewability was explained by *Kleindienst v. Mandel*, which held that when the rights of a U.S. citizen were implicated by the denial of a visa, a court could inquire as to whether the consulate had offered a "facially legitimate and bona fide reason" for the denial.³⁶ The Court has not made this requirement onerous. In *Mandel*, it was enough for the government to deny a visa because the applicant violated the conditions of his previous visas.³⁷

The Supreme Court's latest treatment of the issue, *Kerry v. Din*, a plurality opinion, did not clarify the scope of consular non-reviewability.³⁸ The plaintiff in *Din* was a U.S. citizen whose husband, an Afghani national, was denied an immigrant visa.³⁹ The Court upheld the denial, but the Justices did not agree on a rationale. Chief Justice Roberts, Justice Scalia, and Justice Thomas held that the wife had no due process interest in her husband's issuance of a visa.⁴⁰ Justices Kennedy and Alito held that even if the wife had a due process right that enabled her to challenge the visa denial, the explanation given by the Department of State—the citation of a statutory provision prohibiting the issuance of visas to persons who engage in terrorist activities—was sufficient.⁴¹ This opinion left open the possibility that an alien could rebut a "facially legitimate and bona fide reason" with an "affirmative showing of bad faith on the part of the consular officer," but found that Din had not properly made such a showing.⁴² Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented, arguing that not only did the wife have a substantive due process interest in the consideration of her husband's visa application, but also the explanation from State was inadequate.⁴³

Because no single rationale prevailed, *Din*'s import is not immediately clear. A majority of the Court—six Justices—perpetuated *Mandel*'s willingness to defer to the reasoning behind a consular immigration decision. That deference has been preserved by the Seventh and Ninth Circuits, for example, which have held that Justice Kennedy's opinion represents the holding of the Court as the narrowest

³² *Id.* at 34–37 (The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.).

³³ 538 U.S. 510, 522–23 (2003).

³⁴ *Id.*

³⁵ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950); *Kerry v. Din*, 135 S. Ct. 2128 (2015).

³⁶ *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972).

³⁷ *Id.* at 758.

³⁸ 135 S. Ct. 2128 (2015).

³⁹ *Id.* at 2131.

⁴⁰ *Id.* at 2138 (plurality opinion of Scalia, J.) (Neither Din's right to live with her spouse nor her right to live within this country is implicated here.).

⁴¹ *Id.* at 2139 (Kennedy, J., concurring).

⁴² *Id.* at 2141.

⁴³ *Id.* at 2142 (Breyer, J., dissenting).

position adopted by five Justices.⁴⁴ These courts have thus assumed *arguendo* that U.S. citizens have a due process right to challenge the consular denial of a family member's visa, and issued opinions finding that the consular officers at issue had supported their denials with "facially legitimate and bona fide reasons."⁴⁵

III. Suspension Clause

The INA imposes the mandatory or permissive detention of aliens by DHS during the pendency and period following their removal proceedings. Aliens commonly challenge one of two aspects of their detention. The first type of detention challenge, discussed here, arises under the Suspension Clause. Legal challenges on the length of detention and on Immigration and Customs Enforcement's efforts to secure removal are discussed below in Part IV.A.

An immigration judge's finding that aliens are removable under the INA is subject to constitutional scrutiny via a petition for a writ of habeas corpus. Under the Suspension Clause, "some judicial intervention in deportation cases is unquestionably required by the Constitution."⁴⁶ Immigration habeas claims fall under the general habeas statute, 28 U.S.C. § 2241(c).

A habeas challenge contains two steps. Unless Congress has formally suspended the writ of habeas corpus, a court considering a habeas challenge to removal must first determine whether the petitioner is entitled to the Suspension Clause's protections.⁴⁷ The Supreme Court has broadly held that the writ of habeas corpus is "available to nonenemy aliens as well as to citizens."⁴⁸ The Court later clarified that the writ's availability is flexible and hinges on considerations such as: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."⁴⁹ On this framework, the Court in *Boumediene v. Bush* found the writ extended to aliens detained at the U.S. Naval Station in Guantanamo Bay, Cuba.⁵⁰

If a detainee may seek the writ, then a court must next determine whether the Executive has offered either the writ or "adequate substitute procedures for habeas corpus."⁵¹ Much of the immigration habeas litigation over the last fifteen years has centered on this second step, and specifically on whether the INA's modification of habeas jurisdiction deprives detainees of adequate procedural protections. This is because Congress streamlined immigration habeas jurisdiction in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA).⁵² That law prevents courts from reviewing certain immigration matters, including the Secretary of Homeland Security's decisions to commence removal proceedings, denials of discretionary relief, and final orders of removal issued against an alien who has committed certain criminal offenses.⁵³ IIRIRA designates a petition for review in the courts of appeals as

⁴⁴ *Hazama v. Tillerson*, 851 F.3d 706, 708–09 (7th Cir. 2017); *Cardenas v. United States*, 826 F.3d 1164, 1171–72 (9th Cir. 2016).

⁴⁵ *Hazama*, 851 F.3d at 709–10 (consular officer fairly found the alien was a gang associate and was thus inadmissible for intending to engage in "unlawful activity"); *Cardenas*, 826 F.3d at 1172–73 (consular officer fairly found that the alien had thrown rocks at Israeli soldiers in Palestine and was thus inadmissible for engaging in terrorist activities).

⁴⁶ *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (internal quotation marks omitted) *superseded on other grounds by statute*, 8 U.S.C. § 1252(a)(5), (b)(9) (2012); U.S. Const. art. I, § 9, cl. 2.

⁴⁷ *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

⁴⁸ *St. Cyr*, 533 U.S. at 301.

⁴⁹ *Boumediene*, 553 U.S. at 766.

⁵⁰ *Id.* at 739.

⁵¹ *Id.* at 771.

⁵² Pub. L. No. 104-208, 110 Stat. 3009–3546.

⁵³ See 8 U.S.C. § 1252(a)(2), (5).

the *exclusive* means for aliens to challenge most other types of final orders of removal.⁵⁴ The Supreme Court held in 2001 that notwithstanding IIRIRA, aliens could still seek the writ under § 2241.⁵⁵ The Court indicated a preference of constitutional avoidance: “[A] clear statement of congressional intent” is required to repeal habeas jurisdiction.⁵⁶ The decision warned, “A construction of [IIRIRA] that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions” under the Suspension Clause.⁵⁷

Congress further restricted judicial review in the REAL ID Act of 2005, which explicitly eliminated all federal habeas jurisdiction over orders of removal except for “review of constitutional claims or questions of law.”⁵⁸ The battle over whether the REAL ID Act violates the Suspension Clause is largely over. Courts of appeals have held that the REAL ID Act does divest the federal courts of habeas jurisdiction of a removal order. Nevertheless, as required by *Boumediene*, the REAL ID Act offers an “adequate substitute” to the writ by preserving the right to challenge questions of law in federal court.⁵⁹

A more recent trend has been to litigate *Boumediene*’s first step: whether the detainee is barred from invoking the Suspension Clause on account of the detainee’s individual circumstances. Recently, the Third Circuit in *Castro v. U.S. Department of Homeland Security* held that the writ is not available to aliens apprehended near the border shortly after unlawfully entering the United States.⁶⁰ The petitioners in *Castro* were apprehended within six hours of unlawfully entering the United States, and within four miles of the border.⁶¹ DHS placed the aliens in expedited removal, which carries limited judicial review over a few issues involving the citizenship and status of the detainee, such as whether the petitioner is a refugee, asylee, or lawful permanent resident.⁶² Expedited removal is available to DHS for aliens who enter the United States without inspection and are encountered within fourteen days of entry and within 100 air miles of the land border.⁶³ The *Castro* petitioners sued, claiming that the expedited-removal scheme constituted an unlawful suspension of their habeas rights.⁶⁴ The court held that federal courts indeed lack jurisdiction to review expedited removal claims beyond what is statutorily allowed.⁶⁵

In response to the petitioners’ claim that the lack of judicial review infringed their habeas rights, the *Castro* court concluded that the petitioners did not have habeas rights and so stopped its Suspension Clause analysis at *Boumediene* Step One. The court’s lengthy analysis demonstrates the case-dependent nature of *Boumediene* Step One challenges. Surveying the Supreme Court’s Suspension Clause jurisprudence, the Third Circuit found that the factors suggested by *Boumediene* “provide little guidance” in this context.⁶⁶

⁵⁴ § 1252(a)(1), (5), (b).

⁵⁵ *INS v. St. Cyr*, 533 U.S. 289, 308 (2001).

⁵⁶ *Id.* at 298.

⁵⁷ *Id.* at 300.

⁵⁸ § 1252(a)(2)(D), (5).

⁵⁹ *E.g.*, *Muka v. Baker*, 559 F.3d 480, 485 (6th Cir. 2009); *Iasu v. Smith*, 511 F.3d 881, 888–89 (7th Cir. 2007) (citing *Wang v. Dep’t of Homeland Sec.*, 484 F.3d 615, 617 (2d Cir. 2007); citing also *Chen v. Gonzales*, 435 F.3d 788, 790 (7th Cir. 2006); *Kolkevich v. Att’y Gen. of U.S.*, 501 F.3d 323, 332 (3d Cir. 2007)) ([T]here is no question that the current regime, in which aliens may petition for review in a court of appeals but may not file habeas, is constitutional.” (citing *Swain v. Pressley*, 430 U.S. 372, 381–82 (1977)); *Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007) (citing *Swain*, 430 U.S. at 381–82; citing also *St. Cyr*, 533 U.S. at 314 n.38); *Enwonwu v. Gonzales*, 438 F.3d 22, 33 (1st Cir. 2006) (quoting *St. Cyr*, 533 U.S. at 314 n.38); *Puri v. Gonzales*, 464 F.3d 1038, 1041–42 (9th Cir. 2006).

⁶⁰ *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 427 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017).

⁶¹ *Id.* at 835 F.3d at 427.

⁶² *Id.* at 427–28 (citing 8 U.S.C. § 1225(b), (e) (2012)).

⁶³ *Id.* at 835 F.3d at 425 (citing Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-01 (Aug. 11, 2004)).

⁶⁴ *Id.* at 835 F.3d at 428–29.

⁶⁵ *Id.* at 434.

⁶⁶ *Id.* at 434–39, 445 & n.25.

The *Castro* opinion instead relied on the Supreme Court’s plenary power cases, including *Landon v. Plasencia*, which held that “an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.”⁶⁷ The Third Circuit found that the petitioners, as non-admitted, “recent clandestine entrants,” were essentially seeking initial admission to the United States.⁶⁸ Applying *Landon*, the court concluded that the petitioners could not invoke the Suspension Clause to “force judicial review beyond what Congress has already granted them.”⁶⁹

The opinion took care to distinguish the petitioners at issue from other types of aliens whom the Supreme Court has found to hold constitutional rights.⁷⁰ What took the *Castro* petitioners out of the Suspension Clause’s protection was the fact that they were seeking initial entry to the country and were apprehended immediately after crossing the border.⁷¹ Their physical presence in the United States was not enough to entitle them to Suspension Clause rights.⁷² This conclusion has also been expressed as dicta in several Supreme Court cases.⁷³

Because the Supreme Court denied the *Castro* aliens’ petition for a writ of certiorari, this precise issue remains an open question outside of the Third Circuit.⁷⁴ But *Castro* also hinted at where the next cases might arise. Although “entitlement to constitutional protections [does not turn] entirely on an alien’s position relative to such a rigid conception as a line on a map,” the opinion noted that “physical presence is a factor courts should consider” that may be dispositive in a future case involving “an alien whose presence in the United States goes meaningfully beyond that of Petitioners here.”⁷⁵ Thus, the fact that an alien may be apprehended further from, or longer after, his or her unlawful entry may suggest that they have developed deeper ties to the United States and so be able to invoke the Suspension Clause.⁷⁶

Furthermore, Judge Hardiman’s *Castro* concurrence suggested that the plenary power cases do not resolve the issue and called *Landon* inapposite.⁷⁷ The concurrence would have resolved the case under *Boumediene*’s second step—whether the petitioners had access to a habeas mechanism that adequately permitted them to test denial of admission, as opposed to the denial of release from indefinite detention at issue in *Boumediene*.⁷⁸ It found that § 1252(e) was adequate for that purpose.⁷⁹ If this concurrence is any guide, future habeas cases filed by recent unlawful entrants may be decided not on the scope of *Landon*, but on the multifactor test of *Boumediene*. Given the inapposite facts of *Boumediene* highlighted by the concurrence, it could be argued that that case’s framework should not even apply to immigration habeas petitions challenging removal rather than detention.

⁶⁷ *Id.* at 445 (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), *superseded on other grounds by statutes*, 8 U.S.C. § 1182(a) (2012 & Supp. III 2015), § 1227(a)).

⁶⁸ *Id.* at 835 F.3d at 445–46.

⁶⁹ *Id.* at 446.

⁷⁰ *Id.* at 447.

⁷¹ *Id.* at 447–48 (citing, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 358 (1886)) (noting Supreme Court cases withholding constitutional rights from a former resident alien who was seeking readmission after an extended absence, and from an arriving alien allowed into the country on parole pending a determination on admission).

⁷² *Id.* at 447 (citing, e.g., *Mathews v. Diaz*, 426 U.S. 67, 77 (1976)) (noting Supreme Court cases recognizing the constitutional rights of long-time resident aliens, lawfully admitted resident aliens, undocumented resident aliens).

⁷³ *Id.* at 448 (citing, e.g., *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903)).

⁷⁴ See *Castro*, No. 16-812, 2017 WL 1366739 (Apr. 17, 2017).

⁷⁵ *Castro*, 835 F.3d at 448 & n.30.

⁷⁶ See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), *superseded on other grounds by statutes*, 8 U.S.C. § 1182(a) (2012 & Supp. III 2015), § 1227(a); *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903).

⁷⁷ *Castro*, 835 F.3d at 450 (Hardiman, J., concurring).

⁷⁸ *Id.* at 450–51.

⁷⁹ *Id.*

IV. Fifth Amendment Due Process

A. Procedural Due Process

The Constitution's guarantee of procedural due process, together with whatever process Congress has legislated, may impose a significant limit on plenary power. Virtually every aspect of immigration law offers a procedure for the alien to follow. There are, to take a few examples, elaborate statutory procedures to obtain a non-immigrant visa, to obtain an immigrant visa, to apply as a refugee, to naturalize, to challenge removal, and to challenge detention pending removal. This provides aliens with many statutory opportunities to challenge adjudications and detention on procedural due process grounds.

The Fifth Amendment forbids the government from “depriv[ing]” any “person” of “life, liberty, or property, without due process of law.”⁸⁰ Aliens within the United States qualify as “persons” within the meaning of the Due Process Clause.⁸¹

The amount of process due to an alien varies; “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.”⁸² Because this Clause requires the government to follow fair procedures before depriving a person of these rights, the remedy for a violation is additional or substitute *procedures*, not necessarily ultimate relief.⁸³

Recent cases have addressed aliens’ right to bond redeterminations pending removal proceedings. The issue in these cases is not whether the alien is removable or should be released, but whether an immigration judge must hold an individualized bond hearing. These aliens may vindicate their due process rights to an individualized bond hearing through a writ of habeas corpus.

Aliens have due process rights in removal proceedings.⁸⁴ However, the Supreme Court has emphasized that the Due Process Clause “nowhere den[ies] the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions.”⁸⁵ The question is how much process is due to aliens in these circumstances.⁸⁶

Immigration and Customs Enforcement exercises its detention discretion through four different subsections of the INA. First, aliens seeking initial entry to the United States who are inadmissible “shall be detained for [removal proceedings].”⁸⁷ Second, criminal or terrorist aliens “shall” be taken into custody.⁸⁸ Third, aliens who do not fall under § 1226(c) but are nonetheless removable “may be arrested and detained pending a decision on whether the alien is to be removed.”⁸⁹ DHS may either continue to detain the alien or release the alien on bond or conditions after a bond determination.⁹⁰ Fourth, after an alien has received a final order of removal, the Secretary of Homeland Security “shall remove the alien

⁸⁰ U.S. Const. amend. V.

⁸¹ *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (so holding as to lawful permanent residents), *superseded on other grounds by statutes*, 8 U.S.C. § 1182(a) (2012 & Supp. III 2015), § 1227(a); *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886).

⁸² *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *Landon*, 459 U.S. at 34 (The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances.).

⁸³ See *Mathews*, 424 U.S. at 343–47.

⁸⁴ *Demore v. Kim*, 538 U.S. 510, 523 (2003).

⁸⁵ *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).

⁸⁶ *Id.* at 696.

⁸⁷ 8 U.S.C. § 1225(b)(2)(A) (2012).

⁸⁸ § 1226(c)(1) (2012).

⁸⁹ § 1226(a).

⁹⁰ § 1226(a)(1)–(2).

from the United States within a period of 90 days.”⁹¹ DHS may detain aliens during that period.⁹²

The first group of aliens—applicants for admission—hold the least due process rights.⁹³ “[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality.”⁹⁴ Accordingly, Congress may authorize the detention of aliens at the border, even for prolonged periods of time, without depriving aliens “of any statutory or constitutional right.”⁹⁵ The Supreme Court affirmed that power in 1953 in *Shaughnessy v. United States ex rel. Mezei*, where a lawful permanent resident was found inadmissible upon his return to the United States from a nineteen-month trip abroad to the Eastern Bloc.⁹⁶ Because no other country would admit the alien, he remained in custody on Ellis Island indefinitely.⁹⁷ The alien filed a habeas petition after he had been in custody for over a year and a half, but the Supreme Court upheld the detention: “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”⁹⁸ “[T]he procedure authorized by Congress” in *Mezei* afforded aliens less due process than does the current § 1225(b)(2)(A).

The second and third groups of aliens subject to detention are those within the country against whom DHS has initiated removal proceedings.⁹⁹ As with applicants for admission, the government may “constitutionally detain deportable aliens during the limited period necessary for their removal proceedings” without a bond hearing.¹⁰⁰ The Supreme Court has not established a fixed point at which detention pending removal proceedings becomes unconstitutionally lengthy. In *Demore v. Kim*, for example, the Court upheld the 197-day detention of a legal permanent resident pending removal proceedings who was subject to further detention after the Court’s decision and whose removal hearing had not yet occurred because he sought a continuance and could later appeal. Indeed, the availability of additional constitutional rights afford aliens procedural opportunities to extend the course of litigation and thereby extend the period of their detention.

The Court noted the average time it took immigration officials to remove aliens was four months.¹⁰¹ This accorded with the length of time the petitioner in *Demore* had been detained, six months, considering that part of that time was consumed by a continuance he had requested.¹⁰² With that understanding, the Court found his detention constitutional.¹⁰³ Justice Kennedy concurred and emphasized that a court should examine whether the government was responsible for any “unreasonable delay . . . in pursuing and completing deportation proceedings.”¹⁰⁴ The government has since learned that the four-month figure discussed by *Demore* is inaccurate, and that it typically takes the immigration

⁹¹ § 1231(a)(1)(A) (2012).

⁹² *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

⁹³ *Id.* at 693.

⁹⁴ *Leng May Ma v. Barber*, 357 U.S. 185, 187, 188 (1958) (applying the so-called “entry fiction” to hold that an applicant for admission paroled into the United States had not “entered” the country notwithstanding his physical presence) superseded on other grounds by statutes, 8 U.S.C. § 1182(a) (2012 & Supp. III 2015), § 1227(a); *accord Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.), *superseded on other grounds by statutes*, 8 U.S.C. § 1182(a) (2012 & Supp. III 2015), § 1227(a).

⁹⁵ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 214 (1953).

⁹⁶ *Id.* at 208.

⁹⁷ *Id.* at 209.

⁹⁸ *Id.* at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

⁹⁹ 8 U.S.C. § 1226 (2012).

¹⁰⁰ *Demore v. Kim*, 538 U.S. 510, 526 (2003).

¹⁰¹ *Id.* at 529.

¹⁰² *Id.* at 530–31.

¹⁰³ *Id.* at 531.

¹⁰⁴ *Id.* at 532–33 (Kennedy, J., concurring).

courts nine months to resolve an appealed detention case.¹⁰⁵ This statistic should not undermine *Demore*, given its general acknowledgement that pre-removal detention is constitutional and the flexible nature of its inquiry, which sanctioned the alien's detention even though it was longer than the average length of pre-removal detention as was then understood.

Federal circuit courts examining these sorts of challenges have diverged in interpreting *Demore* to find when a § 1226(a) or (c) becomes unconstitutionally lengthy. Some circuits, such as the Second, have adopted a rigid six-month rule.¹⁰⁶ The Ninth has also been rigid in its construction of § 1226(a).¹⁰⁷ Other circuits have seized on Justice Kennedy's concurrence and read *Demore* as establishing a flexible, multifactor test.¹⁰⁸

The fourth group of aliens are those who are detained after having received a final order of removal. Although the statute limits detention to ninety days, the Supreme Court concluded that six months was constitutionally a "presumptively reasonable" time during which detention after entry of a final order of removal continued to serve the particular immigration purpose at issue: to effectuate the final order that the alien be removed.¹⁰⁹ Even then, there is no rigid six-month rule or requirement of a bond hearing. The alien can continue to be detained beyond that point, without a bond hearing, if he or she fails to provide "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future."¹¹⁰ Thus, *Zadvydas* allows, in most cases, for detention without an individual hearing for more than six months after entry of a removal order.¹¹¹

At the time this Article was drafted, the Supreme Court was considering a case questioning the constitutionality of prolonged detention under 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) without an individualized bond hearing.¹¹²

Other procedural due process issues in immigration that will not receive extended treatment in this Article include the right to hire counsel in expedited removal proceedings, which the Ninth Circuit has held aliens do not have.¹¹³ (In ordinary removal proceedings, aliens have a statutory right to counsel at their own expense.¹¹⁴)

B. The Equal Protection Component of the Fifth Amendment Due Process Clause

The equal protection guarantee has generated several high-profile Supreme Court cases in recent

¹⁰⁵ Letter from Ian Heath Gershengorn, Acting Solicitor Gen., U.S. Dep't of Justice, to Hon. Scott S. Harris, Clerk, Supreme Court (Aug. 6, 2016), *Demore v. Kim*, 538 U.S. 510 (2003).

¹⁰⁶ E.g., *Lora v. Shanahan*, 804 F.3d 601, 615–16 (2d Cir. 2015), cert. denied, 136 S. Ct. 2494 (2016).

¹⁰⁷ See *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013) ([T]he canon of constitutional avoidance requires us to construe the government's statutory mandatory detention authority under Section 1226(c) and Section 1225(b) as limited to a six-month period, subject to a finding of flight risk or dangerousness.).

¹⁰⁸ E.g., *Sopo v. Att'y Gen. of U.S.*, 825 F.3d 1199, 1215–19 (11th Cir. 2016) (listing five non-exhaustive factors for consideration); *Reid v. Donelan*, 819 F.3d 486, 495–98 (1st Cir. 2016) (addressing issues of apparent first impression for the court and concluding that § 1226(c) is subject to an implicit reasonableness limitation); *Chavez-Alvarez v. Warden, York Cty. Prison*, 783 F.3d 469, 473–75 (3d Cir. 2015) (calling for a "highly fact-specific" inquiry, balancing the alien's personal liberty with the government's need to "fulfill the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community).

¹⁰⁹ *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See *Jennings v. Rodriguez*, No. 15-1204, oral argument held (Nov. 30, 2016), reargument ordered (June 26, 2017).

¹¹³ *United States v. Peralta-Sanchez*, 847 F.3d 1124, 1134–39 (9th Cir. 2017).

¹¹⁴ 8 U.S.C. § 1229a(b)(4)(A) (2012).

years in subject-matter ranging from same-sex marriage,¹¹⁵ to affirmative action,¹¹⁶ to voting rights.¹¹⁷ Because of immigration exceptionalism, however, these cases do not reliably predict the outcome of immigration challenges brought under the equal protection guarantee. This Part briefly examines three types of equal protection challenges to immigration law: those based on nationality, sex, and religion.

The Constitution explicitly guarantees all “person[s]” the “equal protection of the laws” in the Fourteenth Amendment’s Equal Protection Clause.¹¹⁸ Though the Fourteenth Amendment applies only to the states, the Fifth Amendment’s Due Process Clause incorporates the equal protection guarantee; hence, aliens are generally due equal protection from the federal government.¹¹⁹

Several provisions of the INA draw distinctions based upon nationality, sex, and religion. For example, the Nicaraguan Adjustment and Central American Relief Act (NACARA) reserves certain immigration benefits for nationals of Cuba, Nicaragua, and other countries.¹²⁰ The Departments of State and Homeland Security operate the Visa Waiver Program, which “allows persons from designated countries to visit the United States for up to ninety days without obtaining a visa” for the purposes of “stimulat[ing] tourism and reduc[ing] visa processing.”¹²¹ This list inherently distinguishes on the basis of country of origin, and it fluctuates from time to time.¹²²

Various portions of the INA evince congressional policy preferences on the basis of gender as well. Congress has conferred U.S. citizenship at birth on certain individuals born outside the United States.¹²³ The exact rules depend on the statute in effect when the child was born. Under the current statutes as written, a child born abroad out of wedlock to a U.S. citizen mother and an alien father derives citizenship from the mother if she was continuously present in the United States for a year before the child’s birth.¹²⁴ But if a child is born abroad out of wedlock to a U.S. citizen father and an alien mother, then the child derives U.S. citizenship only if the father, among other requirements: was continuously present in the United States for five years before birth; legitimates the child; and establishes, by clear and convincing evidence, “a blood relationship” with the child.¹²⁵ In 2017, the Supreme Court invalidated the one-year physical-presence requirement available to unwed U.S. citizen-mothers, holding that the five-year requirement imposed on unwed U.S.-citizen fathers must apply to all unwed U.S.-citizen parents, regardless of gender.¹²⁶

In other aspects of immigration enforcement, however, the INA forbids discrimination. With some exceptions, “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”¹²⁷

In practice, the scrutiny a discriminatory law receives in court depends on what distinctions the law makes. First, laws that discriminate on the basis of nationality receive varying levels of scrutiny. If a

¹¹⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015).

¹¹⁶ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2207–08 (2016).

¹¹⁷ *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017).

¹¹⁸ *See* U.S. Const. amend. XIV, § 1; *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

¹¹⁹ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

¹²⁰ Pub. L. No. 105-100, § 202, 111 Stat. 2160, 2193 (1997), *codified at* 8 U.S.C. § 1255 note (2000).

¹²¹ *Lang v. Napolitano*, 596 F.3d 426, 427 (8th Cir. 2010); *see* 8 U.S.C. § 1187 (2012 & Supp. III 2015).

¹²² *See, e.g., Termination of the Designation of Argentina as a Participant Under the Visa Waiver Program*, 67 Fed. Reg. 7943-01 (Feb. 21, 2002).

¹²³ 8 U.S.C. § 1401(c)–(h) (2012); § 1409.

¹²⁴ § 1409(c).

¹²⁵ § 1401(g); § 1409(a); *see also* *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2012) (considering an equal protection challenge to a statute imposing more stringent naturalization requirements for children of unwed U.S.-citizen fathers than for children of unwed U.S.-citizen mothers).

¹²⁶ *Morales-Santana*, 137 S. Ct. at 1686 (construing 8 U.S.C. §§ 1401(g), 1409(a), (c)).

¹²⁷ 8 U.S.C. § 1152(a)(1)(A) (2012).

state law discriminates on the basis of alienage or affects a fundamental right, the state must “demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.”¹²⁸ An exception exists for undocumented aliens, which are not a “suspect class”: a state that treats undocumented aliens differently is subject to heightened or intermediate review.¹²⁹ That means the law “must serve important governmental objectives and must be substantially related to achievement of those objectives.”¹³⁰

But if the *Federal Government* is the sovereign distinguishing among nationalities, then its action faces only rational-basis review.¹³¹ Federal laws receive much more deferential treatment than state laws, given that “the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the federal government.”¹³² And nationality-based distinctions are essential to the federal government’s power over that relationship. “[T]he very concept of ‘alien’ is a nationality-based classification.”¹³³ “Given the importance to immigration law of, *inter alia*, national citizenship, passports, treaties, and relations between nations,” the use of “classifications on the basis of nationality are frequently unavoidable in immigration matters.”¹³⁴

Under rational-basis review, the alien bears the burden of “attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”¹³⁵ The government, by contrast, “has no obligation to produce evidence to sustain the rationality of a statutory classification.”¹³⁶ The government need not have actually relied on the proffered justification when making its decision.¹³⁷ Thus, a court must uphold such a law “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”¹³⁸

This case law sets a high standard for aliens challenging laws that distinguish on the basis of nationality. For example, courts of appeals have upheld NACARA against claims that it was unconstitutional.¹³⁹ One court found virtue in the law’s creation of “extremely identifiable groups.”¹⁴⁰ Another noted, “Although the NACARA exemptions clearly do not cover all aliens who will face hostile conditions in their homelands, this fact does not make these exemptions irrational.”¹⁴¹

A good example of the degree of deference that is due in such cases comes from the Second Circuit, which considered an equal protection challenge to a Department of Justice program requiring “alien males from certain designated countries who were over the age of 16 and who had not qualified for permanent residence to appear for registration and fingerprinting and to present immigration related documents.”¹⁴² The court found a rational reason for targeting nationals of certain countries: national security.¹⁴³ Given the September 11, 2001, terrorist attacks, which “were facilitated by the lax

¹²⁸ *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding unconstitutional state laws that conditioned welfare benefits on the recipient’s citizenship or length of residency in the United States).

¹²⁹ *Plyler*, 457 U.S. at 223.

¹³⁰ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹³¹ *Mathews v. Diaz*, 426 U.S. 67, 81–83 (1976) (upholding a federal law requiring aliens to be lawful permanent residents for five years to receive certain Medicare benefits).

¹³² *Id.* at 81.

¹³³ *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008).

¹³⁴ *Id.*

¹³⁵ *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993) (internal citation omitted).

¹³⁶ *Id.*

¹³⁷ *U.S.R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

¹³⁸ *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

¹³⁹ *E.g., Appiah v. INS*, 202 F.3d 704, 710 (4th Cir. 2000).

¹⁴⁰ *Pinho v. INS*, 249 F.3d 183, 190 (3d Cir. 2001).

¹⁴¹ *Ashki v. INS*, 233 F.3d 913, 920 (6th Cir. 2000).

¹⁴² *Rajah v. Mukasey*, 544 F.3d 427, 433 (2d Cir. 2008).

¹⁴³ *Id.* at 438.

enforcement of immigration laws,” the program was fairly “designed to monitor more closely aliens from certain countries selected on the basis of national security criteria.”¹⁴⁴ Whether the program was effective or wise was “irrelevant because an *ex ante* rather than *ex post* assessment of the Program is required under the rational basis test.”¹⁴⁵ The court therefore upheld the program.¹⁴⁶

A second kind of immigration equal protection case challenge involves sex-based distinctions, which draw closer judicial scrutiny. In equal protection jurisprudence, sex is a “suspect class.”¹⁴⁷ Thus, a law discriminating on the basis of sex “must serve important governmental objectives and must be substantially related to achievement of those objectives.”¹⁴⁸

The Supreme Court has not squarely decided whether this intermediate scrutiny extends to immigration cases. In 2001, the Court upheld 8 U.S.C. § 1409(a), which imposes a higher legitimation requirement for individuals born out of wedlock seeking derivative citizenship from a U.S.-citizen father than it does for such individuals seeking derivative citizenship from a U.S.-citizen mother.¹⁴⁹ The Court found the legitimation requirement to be a sex-based classification.¹⁵⁰ The Court avoided deciding whether rational-basis review applied, given the immigration context, or whether intermediate scrutiny applied per usual with equal protection claims of sex discrimination because the legitimation requirement satisfied the higher standard.¹⁵¹

However, in 2017 the Supreme Court set aside a different part of the naturalization statute on equal protection grounds.¹⁵² In *Sessions v. Morales-Santana*, the Court considered the INA’s derivative citizenship provisions that apply to an alien whose parents are not married when one of them is a U.S. citizen and one of them is not.¹⁵³ If the U.S.-citizen parent is a woman, she must be physically present in the United States for one year before the alien’s birth.¹⁵⁴ However, if the U.S.-citizen parent was a man, then he had to be present in the United States for five years before the alien’s birth, two of which must be after the father turned fourteen.¹⁵⁵ The Court held this distinction to be gender-based, and so applied heightened scrutiny.¹⁵⁶ Finding the government’s justifications were not “important governmental objectives,” the Court concluded that the differential physical-presence scheme was unconstitutional.¹⁵⁷ Government attorneys confronting gender-based equal-protection challenges should carefully study *Morales-Santana* and consult with the Office of Immigration Litigation.

Third, aliens claiming religious discrimination may also try to use the Fifth Amendment’s equal protection guarantee. The Supreme Court has classified religion as an “inherently suspect distinction.”¹⁵⁸ This view may be bolstered by the First Amendment’s protection of the free exercise of religion.¹⁵⁹

¹⁴⁴ *Id.* at 438–39.

¹⁴⁵ *Id.* at 439.

¹⁴⁶ *Id.* (collecting appellate cases in accord).

¹⁴⁷ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁴⁸ *Id.*

¹⁴⁹ *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

¹⁵⁰ *Id.* at 60.

¹⁵¹ *Id.* at 61.

¹⁵² *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2012).

¹⁵³ *Id.* at 1686–87 (citing 8 U.S.C. § 1409(a), (c)).

¹⁵⁴ *Id.* at 1687. Although these are the current requirements under the INA, *Morales-Santana* considered the 1958 version of that statute. The variation between the former and current versions of the statute were not relevant to the Court’s holding.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1690.

¹⁵⁷ *Id.* at 1690–1693.

¹⁵⁸ *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

¹⁵⁹ U.S. Const. amend. I; see *Plyler v. Doe*, 457 U.S. 202, 216–17 n.15 (1982) (In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein.).

However, the Court’s references to religion as an inherently suspect distinction have come in cases confronting laws that advantaged one religious sect over another, as opposed to laws that advantaged non-religious groups over religious groups.¹⁶⁰ If the right to practice a religion with the same freedom as other religions’ adherents is a fundamental right, then the federal government must satisfy strict scrutiny and “demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.”¹⁶¹ In contrast, the Supreme Court has applied rational-basis review to laws differentiating between non-religious groups and religious groups.¹⁶²

Although this is a more difficult standard to satisfy, OIL-DCS regularly defends against and prevails in federal litigation of religious discrimination under the equal protection guarantee as well as litigation brought under the Free Exercise Clause and Establishment Clause of the First Amendment. For example, beneficiaries of religious-worker visa petitions have challenged on Equal Protection and Religious Freedom Restoration Act (RFRA) grounds a DHS regulation that imposes a requirement that those visa petitions be approved before the beneficiaries may apply for adjustment of status, though the Ninth Circuit decided the case on other grounds.¹⁶³ At least one district court has rejected a RFRA immigration challenge, one brought by a minister who was ineligible to remain in the United States, not because he was exercising his religion, but because his non-immigrant visa had expired.¹⁶⁴

V. Conclusion

This article does not address all possible constitutional claims that a federal government attorney practicing immigration law might see.¹⁶⁵ Pending and future cases involving constitutional aspects of immigration law enforcement will referee the tug-of-war between the government’s plenary power and the individual constitutional rights that aliens may hold. Awareness of the cases on each side is essential

¹⁶⁰ *E.g.*, [Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos](#), 483 U.S. 327, 338–39 (1987) ([L]aws discriminating *among* religions are subject to strict scrutiny . . .).

¹⁶¹ *Plyler*, 457 U.S. at 216–17.

¹⁶² *Amos*, 483 U.S. at 329–34.

¹⁶³ [Ruiz-Diaz v. United States](#), 618 F.3d 1055, 1062 (9th Cir. 2010).

¹⁶⁴ *Soc’y of the Divine Word Chi. Province v. Napolitano*, No. 2:09-cv-2944-GAF (C.D. Cal. Oct. 2, 2009), *appeal dismissed*, No. 09-56790 (9th Cir. Jan. 28, 2011).

¹⁶⁵ *See, e.g.*, [United States v. Verdugo-Urquidez](#), 494 U.S. 259, 271 (1990) (aliens outside the United States do not have Fourth Amendment rights); [Bridges v. Wixon](#), 326 U.S. 135, 148 (1945) (resident aliens have First Amendment rights); [Russian Volunteer Fleet v. United States](#), 282 U.S. 481, 491–92 (1931) (alien whose ships were confiscated by the United States has Compensation Clause rights); [Wong Wing v. United States](#), 163 U.S. 228, 238 (1896) (resident aliens have Fifth and Sixth Amendment rights).

to successfully defending federal immigration enforcement actions. If you encounter a constitutional issue in your litigation, OIL-DCS is available to provide guidance.

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Programmatic Challenges to National Security Immigration Background Checks

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I. Introduction

Both law and common sense dictate that applicants for immigration benefits be carefully screened to ensure they are eligible for and deserving of the benefits they seek, and that granting the benefits or status would not be inconsistent with national security. U.S. Citizenship and Immigration Services (USCIS), as the agency charged with adjudicating applications for immigration benefits, conducts a variety of background checks on applicants for immigration benefits. Indeed, as discussed further below, the Immigration and Nationality Act (INA) and its implementing regulations require USCIS to conduct background investigations for naturalization applicants. The Office of Immigration Litigation-District Court Section (OIL-DCS) principally defends USCIS when these vetting procedures are challenged, both by individual plaintiffs and as class actions. This Article will explain common challenges to USCIS vetting procedures and available defenses.¹

II. Terrorism-Related Inadmissibility Grounds

An applicant for admission to the United States, including an individual physically present in the United States who seeks to adjust his or her status to that of a lawful permanent resident, must be

¹ See also Timothy M. Belsan, et al., *Civil Immigration Enforcement in National Security Cases*, U.S. ATTORNEYS' BULL., July 2017, at 18.

admissible. The INA contains a number of terrorism-related grounds of inadmissibility that preclude eligibility for visas, green cards, and other immigration benefits that are considered admissions. Applicants for asylum are subject to some, but not all, of these bars to admission.² Accordingly, background checks are necessary to establish that applicants are not barred on national-security grounds from obtaining these benefits.

The terrorism-related inadmissibility grounds are found at 8 U.S.C. § 1182(a)(3)(B),³ and they include, inter alia, any alien who has engaged in, or is likely after admission to engage in, terrorist activity, incite terrorist activity, is a representative of a terrorist organization or a member of a designated terrorist organization, endorses or espouses terrorist activity, or has received military-type training from a terrorist organization.⁴ A “terrorist organization” is broadly defined to include any group of two or more people that engages in terrorist activity, while a designated terrorist organization is an organization designated as a “Foreign Terrorist Organization” by the Secretary of State under 8 U.S.C. § 1189, or otherwise designated and published in the Federal Register (such as the Terrorist Exclusion List).⁵

“Terrorist activity” is also broadly defined, and it includes any activity that is unlawful where committed or that would be unlawful in the United States or in any State, and which also includes hijacking or sabotage; kidnapping and making demands; a violent attack upon an internationally protected person; assassination; the use of any biological, chemical, or nuclear weapon or any explosive or firearm (other than for mere personal monetary gain) with intent to endanger any person or cause substantial damage to property.⁶

“Engaging in a terrorist activity” is defined to include, in addition to the commission of the act, inciting, preparing, planning, gathering information on potential targets; soliciting funds or other things of value for a terrorist organization or terrorist activity; soliciting individuals to engage in terrorist activity or to be members of designated terrorist organizations; or to afford material support for the commission of terrorist activity to an individual planning terrorist activity or to a terrorist organization.⁷ “Material support” includes, but is not limited to, providing a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons, explosives, or training.⁸

The breadth of these statutory provisions cannot be overstated. For example, any two individuals, whether organized or not, who unlawfully use a firearm (other than for mere personal monetary gain) with the intent to endanger any person have engaged in “terrorist activity.” Furthermore, an individual who provides material support to such a person has himself engaged in terrorist activity. Courts have likewise interpreted “material support” broadly to include provision of modest amounts of food or other goods, even under duress.⁹

The broad sweep of these provisions is balanced by a grant of discretion to either the Secretary of State or the Secretary of Homeland Security, in consultation with each other and the Attorney General, to exempt individuals, categories of individuals, or types of conduct from inadmissibility under these

² 8 U.S.C. § 1158(b)(2)(A) (2012).

³ These terrorism-related inadmissibility grounds (TRIG) were added to the law as part of the [Real ID Act of 2005](#), Pub. L. 109-13, § 103, 119 Stat. 302, 306 (May 11, 2005).

⁴ 8 U.S.C. § 1182(a)(3)(B)(i) (2012).

⁵ § 1182(a)(3)(B)(vi).

⁶ § 1182(a)(3)(B)(iii).

⁷ § 1182(a)(3)(B)(iv).

⁸ § 1182(a)(3)(B)(iv)(VI).

⁹ See *Viegas v. Holder*, 699 F.3d 798, 799–800, 803 (4th Cir. 2012) (paying monthly dues equivalent to fifty cents for four years, and hanging posters); *Barahona v. Holder*, 691 F.3d 349, 353 (4th Cir. 2012) (permitting use of kitchen); *Haile v. Holder*, 658 F.3d 1122, 1124, 1129 (9th Cir. 2011) (organizing, provisioning, and acting as courier); *Singh-Kaur v. Holder*, 385 F.3d 293, 300–01 (3d Cir. 2004) (providing food and setting up tents).

provisions.¹⁰ Since 2016, the Secretaries have exercised this authority thirteen times to exempt specific groups, and eight times with respect to particular types of conduct.¹¹ In addition, a number of people have received individual exemptions.

In cases where USCIS judges the applicant to be inadmissible on terrorism-related grounds, and there is no currently applicable exemption, but USCIS believes the Secretary might foreseeably, in the future, exercise discretion under [8 U.S.C. § 1182\(d\)\(3\)\(B\)\(i\)](#) to exempt either the individual applicant or the disqualifying activity categorically, USCIS may place the application on “TRIG-hold¹²,” rather than deny it. Such applications may remain pending on TRIG-hold for many years. During that time, the alien remains in his or her prior status, e.g., asylee, and usually has authority to work in the United States in that status. In some number of cases, applicants will sue USCIS under the Administrative Procedure Act (APA)¹³ to try to force USCIS to render a decision.

When sued under the APA to force a decision, the first step is always to see if USCIS is prepared to make a decision. If USCIS prefers to litigate, then the government often argues, in the first instance, that USCIS does not have a “clear non-discretionary duty” to adjudicate naturalization applications within any given time frame. That argument is successful in some district courts and not in others. As one district court observed, “[i]t is fair to say that one can find a district court decision to support alternative views” on whether USCIS has a clear non-discretionary duty to adjudicate naturalization applications within a “reasonable time.”¹⁴ Alternatively, the government generally argues the six factors for analyzing the reasonableness of a delayed adjudication set out by the D.C. Circuit in *Telecommunications Research & Action Center v. Federal Communications Commission* (TRAC).¹⁵ As well, some districts courts have categorically found delays of four years or less not to be unreasonable.¹⁶ In such districts, the government may be able to bring a motion to dismiss for failure to state a claim upon which relief can be granted.¹⁷

The terrorism-related grounds of inadmissibility have changed somewhat over time as Congress has amended the law. As a result, on occasion a person who was granted asylum, or was admitted as a refugee, will apply to adjust his or her status to permanent resident and be denied on a terrorism-related ground of inadmissibility. Sometimes, such applicants then sue the government, arguing USCIS is collaterally estopped by the prior grant of asylum or refugee admission decision from denying adjustment of status on the ground the applicant is inadmissible and therefore ineligible. In those case, it is frequently USCIS’s position that changes in [8 U.S.C. § 1182](#) have materially changed the admissibility analysis such that while the person might not have been inadmissible at the time he or she was granted asylum or admitted as a refugee, subsequent changes in the law have made the applicant inadmissible (an applicant for adjustment of status must be admissible at the time of adjustment to be eligible to adjust). In such cases, it is necessary to examine closely the law at the relevant points in time to determine whether the law has materially changed as it applies to the particular plaintiff, thus defeating the application of collateral estoppel. OIL-DCS has also argued, in appropriate cases, that Congress did not intend USCIS to be collaterally estopped in making adjustment-of-status decisions by prior decisions on asylum or refugee admission, but at least some courts have rejected that argument and found collateral estoppel to apply if its elements are otherwise satisfied.¹⁸

¹⁰ [§ 1182\(d\)\(3\)\(B\)\(i\)](#).

¹¹ [Terrorism-Related Inadmissibility Ground Exemptions](#), U.S. CITIZENSHIP & IMMIGRATION SERVICES (last updated Dec. 29, 2016). The Exercises of Authority are individually published in the Federal Register.

¹² “TRIG” means terrorism-related inadmissibility grounds.

¹³ [5 U.S.C. § 706\(1\)](#) (2012).

¹⁴ [Alzuraiki v. Heinauer](#), 544 F. Supp. 2d 862, 865 n.6 (D. Neb. 2008).

¹⁵ [750 F.2d 70](#), 80 (D.C. Cir. 1984).

¹⁶ [Islam v. Heinauer](#), 32 F. Supp. 3d 1063, 1071 (N.D. Cal. 2014).

¹⁷ [See](#) [FED. R. CIV. P. 12\(b\)\(6\)](#).

¹⁸ [See, e.g. Amrollah v. Napolitano](#), 710 F.3d 568, 571–72 (5th Cir. 2013); [Khan v. Johnson](#), 160 F. Supp. 3d 1199, 1209 (N.D. Cal. 2016); [Islam v. Dep’t of Homeland Sec.](#), 136 F. Supp. 3d 1088, 1092 (N.D. Cal. 2015).

There are additional national-security inadmissibility grounds that are not strictly terrorism-related. These include grounds related to espionage, sabotage, and export controls;¹⁹ adverse foreign policy consequences;²⁰ membership in a totalitarian party;²¹ participants in Nazi persecution, extra-judicial killing, torture, or genocide;²² association with terrorist organizations;²³ and recruitment or use of child soldiers.²⁴

III. FBI Background Investigations and “Name Check” Litigation

As noted at the outset, the INA and its implementing regulations require background investigations for certain applications.²⁵ In addition, the need to conduct background investigations is implicit in the discretion afforded to the adjudicator for certain types of benefits, such as adjustment of status. Background investigations consist of several components. Individuals applying for certain status-conferring immigration benefits are subject to a traditional Federal Bureau of Investigations (FBI) fingerprint (i.e., criminal history) check, a review of the Interagency Border Inspection System, and an FBI “name check.”

Reliance on FBI name checks is not unique to USCIS. Rather, the FBI provides name checks to a variety of entities “seeking background information from FBI files on individuals before bestowing a privilege—[w]hether that privilege is government employment or an appointment; a security clearance; attending at a White House function; a Green Card or naturalization; admission to the bar; or a visa.”²⁶

Applicants for naturalization are subject to an additional statutory requirement to undergo an investigation prior to naturalizing. Section 1446(a) of Title 8, U.S. Code, provides that “[b]efore a person may be naturalized, an employee of [USCIS] . . . shall conduct a personal investigation of the person applying for naturalization.” In 1997, Congress specified that this “personal investigation” must include reviewing a completed “full criminal background check.”²⁷ Following the terrorist attacks of September 11, 2001, USCIS discovered that its screening process for naturalization applicants had resulted in naturalizing a man suspected of ties to the terrorist group Hezbollah. In 2002, USCIS began to include FBI name checks as part of the process for benefit applications.

Although Congress did not further define what constitutes a “full criminal background check,” ten years later it effectively endorsed USCIS’s reliance on the FBI’s name check system when, in 2007, it appropriated \$20 million to “address backlogs of security checks associated with pending applications and petitions,” and directed the Secretary of Homeland Security and the Attorney General to submit a plan to eliminate the backlog and establish information-sharing protocols.²⁸ In the interim, however, delays caused by the backlog of name check requests, coupled with the adoption of the name check process without undergoing notice-and-comment rulemaking procedures, resulted in substantial litigation, both in individual cases alleging violations of the Mandamus Act or APA, or seeking naturalization

¹⁹ 8 U.S.C. § 1182(a)(3)(A) (2012).

²⁰ § 1182(a)(3)(C).

²¹ § 1182(a)(3)(D).

²² § 1182(a)(3)(E).

²³ § 1182(a)(3)(F).

²⁴ § 1182(a)(3)(G).

²⁵ § 1446(a) (2012).

²⁶ Foreign Travel to the United States: Testimony before the H. Comm. on Gov’t Reform (July 10, 2003) (statement of Robert J. Garrity, Jr., Assistant Dir. (Acting), Records Mgmt. Div., FBI), 2003 WL 21608243.

²⁷ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, 2448–49 (1997) (None of the funds appropriated or otherwise made available to [USCIS] shall be used to complete adjudication of an application for naturalization unless [USCIS has received confirmation from [FBI] that a full criminal background check has been completed.).

²⁸ Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2067 (Dec. 26, 2007).

hearing under [8 U.S.C. § 1447\(b\)](#), and class action litigation.²⁹ However, resolution of these cases did not result in any final injunctive relief against the government, and with additional funding, the backlog of name check requests was cleared in mid-2009.³⁰ Further programmatic challenges to USCIS's name-check procedure are, therefore, not expected at this time.

IV. The Controlled Application Review and Resolution Program

A. CARRP Background and Basic Description

The Controlled Application Review and Resolution Program (CARRP) is an internal USCIS procedure for processing immigration benefit applications that raise national security concerns.³¹ USCIS instituted the CARRP review process in April 2008 by way of a policy memorandum and agency-wide officer trainings.³² Since then, USCIS has revised the process on occasion through policy memoranda.³³ USCIS closely held CARRP until 2011, when it disclosed general information about the process during discovery in a naturalization denial case.³⁴ CARRP subsequently was the subject of Freedom of Information Act (FOIA) requests and litigation. In response, USCIS produced partially redacted CARRP memoranda, training manuals, and other materials.³⁵

The CARRP pathway for vetting and adjudicating benefits applications—including applications for immigrant or non-immigrant visas, adjustment of status to lawful permanent residency, naturalization, and asylum—has four processing steps.³⁶ First, the officer screens an application for national security concerns, which arise when an individual or organization has an articulable link to terrorism, espionage, sabotage, violation of export laws, or other activity described in [8 U.S.C. § 1182\(a\)\(3\)\(A\), \(B\), or \(F\)](#), or [§ 1227\(a\)\(4\)\(A\) or \(B\)](#).³⁷ When a national security concern is identified, the officer then places the application on the CARRP adjudication track. Second, the officer conducts “internal vetting,” which is an investigation into the applicant and a preliminary assessment of the applicant’s eligibility for the benefit. Third, the officer conducts “external vetting,” which involves obtaining additional information from the law enforcement or intelligence agencies that identified the national security concern. Fourth, the officer, in coordination with supervisory review, fully evaluates the applicant’s eligibility for the benefit (assessing the evidence against the statutory eligibility facts and whether the evidence supports a favorable exercise of discretion, if appropriate) and adjudicates the application.³⁸

²⁹ See, e.g., [Mocanu v. Mueller](#), Civil Action Nos. 07-0445, 07-0971, 07-3223, 07-2718, 07-2859, 08-195, 2008 WL 372459 (E.D. Pa. Feb. 8, 2008), *order corrected*, Civil Action Nos. 07-0445, 07-3223, 07-2718, 07-2859, 2008 WL 570953 (E.D. Pa. Feb. 28, 2008); [Aslam v. Mukasey](#), 531 F. Supp. 2d 736 (E.D. Va. 2008).

³⁰ [USCIS, FBI Eliminate National Name Check Backlog](#), U.S. CITIZENSHIP & IMMIGR. SERVICES (June 22, 2009).

³¹ [Memorandum from Johnathan R. Scharfen, Deputy Dir., U.S. Citizenship & Immigration Servs., to Field Leadership, U.S. Citizenship & Immigration Servs. \(Apr. 11, 2008\)](#).

³² *Id.*

³³ See, e.g., U.S. CITIZENSHIP & IMMIGRATION SERVS., [REVISION OF RESPONSIBILITIES FOR CARRP CASES INVOLVING KNOWN OR SUSPECTED TERRORISTS](#) (July 26, 2011); U.S. CITIZENSHIP & IMMIGRATION SERVS., [ADDITIONAL GUIDANCE ON ISSUES CONCERNING THE VETTING AND ADJUDICATION OF CASES INVOLVING NATIONAL SECURITY CONCERNS](#) (Feb. 6, 2009); U.S. CITIZENSHIP & IMMIGRATION SERVS., [CLARIFICATION AND DELINEATION OF VETTING AND ADJUDICATION RESPONSIBILITIES FOR CARRP CASES IN DOMESTIC FIELD OFFICES](#) (June 5, 2009).

³⁴ [Hamdi v. USCIS](#), No. 5:10-cv-00894 (C.D. Cal. June 16, 2010).

³⁵ See, e.g., [ACLU v. USCIS](#), 133 F. Supp. 3d 234, 234, 239 (D.D.C. 2015). Some of the CARRP documents disclosed through FOIA were made available online by the American Civil Liberties Union at www.aclusocal.org/en/carrp-library.

³⁶ [Clarification and Delineation of Vetting and Adjudication Responsibilities for CARRP Cases in Domestic Field Offices](#), *supra* note 3; [Policy for Vetting and Adjudicating Cases with National Security Concerns](#), *supra* note 30.

³⁷ [Policy for Vetting and Adjudicating Cases with National Security Concerns](#), *supra* note 31, at 1, n.1.

³⁸ *Id.* at 1; U.S. CITIZENSHIP & IMMIGRATION SERVS., [CARRP OFFICER TRAINING NATIONAL SECURITY HANDOUTS](#)

B. Programmatic Challenges to CARRP

Since 2012, when USCIS released documents relating to CARRP in response to a FOIA request, numerous individual plaintiffs have challenged the program on various statutory and constitutional grounds; some of those lawsuits involved multiple plaintiffs.³⁹ At this writing, however, only one putative class action has sought to challenge CARRP.⁴⁰ As an initial matter, almost invariably, these cases arise in the context of a pending immigration benefit application, usually adjustment of status or naturalization, that has not been decided despite the passage of some period of time greater than the “average” processing time for that sort of benefit as published by USCIS.

While the precise allegations may differ somewhat in each case, the thrust of the challenges raised are generally consistent. The typical allegations are as follows: (1) CARRP violates the INA because it creates additional, extra-statutory criteria for the immigration benefit being sought;⁴¹ (2) CARRP violates the Uniform Rule of Naturalization clause of the U.S. Constitution, Art. I, § 8, cl. 4, because that clause confers the power to establish naturalization requirements solely on Congress, and by CARRP, the Executive Branch has created ultra vires criteria for naturalization not enacted by Congress; (3) under the APA,⁴² CARRP is a final agency action that (a) is arbitrary and capricious because it does not relate to an applicant’s fitness for the benefit sought, and (b) is contrary to law because it exceeds USCIS’s statutory authority to execute the law; (4) CARRP violates 5 U.S.C. § 553 because it is a substantive, or legislative, rule that USCIS is implementing without first having conducted notice-and-comment rulemaking as required by the APA; and (5) CARRP violates an applicant’s right to procedural due process under the Fifth Amendment because it deprives the applicant of a constitutionally protected property or liberty interest without first providing the applicant notice that the application will be handled under CARRP and providing the applicant an opportunity to challenge that decision. Additionally, although not always explicitly alleged as a cause of action, these cases also, at least implicitly, allege a claim under 5 U.S.C. § 706(1) that USCIS has unreasonably delayed its rendering a decision on the benefit application.

In defense, where USCIS has adjudicated the application and rendered a decision by the time the government’s answer is due, the government will first and foremost argue that the complaint should be dismissed as moot. In general, when completing the adjudication process is possible, the government is often in a stronger position if it defends a decision than to defend a sometimes lengthy delay in adjudication.

In response to the INA claim, the government often argues that the INA does not create a general private right of action to enforce its provisions, beyond those few causes of action explicitly provided by statute, such as 8 U.S.C. §§ 1421(c) and 1447(b).⁴³ In response to the Uniform Rule of Naturalization Clause claim, the government may argue the plaintiff lacks standing, as that constitutional provision confers a power on Congress rather than conferring a right or benefit on individuals. In response to the

(Apr. 2009).

³⁹ See, e.g., *Arapí v. USCIS*, No. 4:16-cv-00692 (E.D. Mo. filed May 18, 2016), in which twenty individual plaintiffs challenged CARRP in the context of delays in adjudicating their naturalization applications.

⁴⁰ *Wagafe v. Trump*, No. 2:17-cv-00094 (W.D. Wash. filed Jan. 23, 2017).

⁴¹ In the context of naturalization applicants, the relevant statutory and regulatory provisions are found at 8 U.S.C. §§ 1421–1458, and 8 C.F.R. §§ 316.2, 335.3. In the context of adjustment of status, the relevant statutory and regulatory provisions are found at 8 U.S.C. §§ 1159, 1255, and 8 C.F.R. §§ 209.1, 245.1.

⁴² 5 U.S.C. § 706 (2012).

⁴³ Title 8 U.S.C. § 1421(c) provides a naturalization applicant whose application has been finally denied a right to de novo determination of his or her eligibility for naturalization by a federal district court. Section 1447(b) provides a naturalization applicant a cause of action for determination of his or her eligibility for naturalization where the applicant has been “examined,” i.e. interviewed, by USCIS on the application but USCIS has not rendered a decision within 120 days following the examination, but gives the district court the discretion to remand the matter to USCIS with instructions to decide within a time certain rather than decide the matter itself.

APA claim that CARRP is arbitrary and capricious and not in accordance with the law, the government often argues that CARRP is a vetting *process*, not a “final agency action” subject to judicial review under [5 U.S.C. § 706](#). The government generally answers the APA notice-and-comment rulemaking claim by arguing that CARRP is not a substantive, or legislative, rule, but rather an internal policy concerning how to process benefit applications that neither adds to nor subtracts from the statutory eligibility criteria. Finally, in response to the procedural due process claim, the government could argue that the plaintiff lacks a constitutionally protected property or liberty interest in either the ultimate benefit or the speed at which USCIS adjudicates the benefit application.⁴⁴

The government’s response to the (sometimes unstated) APA claim that a decision has been unreasonably delayed⁴⁵ will necessarily vary to some degree based on the length of time the application has been pending and on other case-specific facts. In some cases, it has been possible to argue categorically that an application pending for under four years has not been unreasonably delayed, and that, therefore, the complaint fails to state a claim upon which relief can be granted.⁴⁶

⁴⁴ See [Mendez-Garcia v. Lynch](#), 840 F.3d 655, 666 (9th Cir. 2016).

⁴⁵ See [5 U.S.C. § 706\(1\)](#).

⁴⁶ See, e.g., [Islam v. Heinauer](#), 32 F. Supp. 3d 1063, 1071–72 (N.D. Cal. 2014).

Common Claim	Common Response
CARRP violates the INA	No private right of action to enforce INA provisions, beyond those causes of action explicitly provided by statute, e.g. 8 U.S.C. §§ 1421(c) and 1447(b).
CARRP violates Art. I, § 8, cl. 4, U.S. Constitution (Uniform Rule of Naturalization clause).	Plaintiff lacks standing to raise this claim.
APA Final Agency Action: CARRP is a final agency action that (a) is arbitrary and capricious because it does not relate to an applicant’s fitness for the benefit sought, and (b) is contrary to law because it exceeds USCIS’s statutory authority to execute the law.	CARRP is a vetting <i>process</i> , not a “final agency action” under 5 U.S.C. § 704 .
APA Notice & Comment Rulemaking: CARRP violates 5 U.S.C. § 553 because it is a legislative rule adopted without notice-and-comment rulemaking.	CARRP is not a legislative rule, but rather an internal policy concerning how to process benefit applications that neither adds to nor subtracts from the statutory eligibility criteria
CARRP violates applicant’s 5th Amendment right to procedural due process.	Plaintiff lacks constitutionally protected property or liberty interest in either the ultimate benefit or pace of adjudication.
APA Unreasonable Delay: USCIS has unreasonably delayed in rendering a decision on the benefit application.	Varies. In some cases, it is possible to argue categorically that an application pending for under four years has not been unreasonably delayed, and, therefore, that the complaint fails to state a claim upon which relief can be granted.

V. Conclusion

This review is necessarily cursory and limited. If confronted with a case challenging CARRP, please notify OIL-DCS as soon as possible to discuss the case. You may do so by contacting any of the authors of this article, or by email to onewcase@civ.usdoj.gov.

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Immigration Detention: Emerging Issues Concerning Arriving Aliens, Criminal and Terrorist Aliens, and Hard-to-Remove Aliens

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I. Introduction

The Supreme Court has long recognized that the government has the authority to detain any alien as a constitutionally valid part of their removal proceedings.¹ The rules governing justifications for, and limits on, the length of such detention depend on a number of considerations, most critically the alien's circumstances when entering immigration proceedings (e.g., at the border or in the interior, already admitted to the United States or seeking admission) and the stage of the alien's proceedings when testing the alien's detention.²

This article examines the detention schemes that apply to six classes of aliens. First, it discusses the mandatory detention of applicants for admission to the United States. Second, the Article explores the discretionary detention of aliens inside the country, pending conclusion of their removal proceedings.

¹ *Demore v. Kim*, 538 U.S. 510, 523 (2003); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

² See, e.g., *Demore*, 538 U.S. at 527–29; *Zadvydas v. Davis*, 533 U.S. 678, 688–94 (2001); *Landon v. Plasencia*, 459 U.S. 21, 32–34 (1982) *superseded on other grounds by statute* 8 U.S.C. § 1182(a) (2012 & Supp. III 2015); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950). For general constitutional principles related to detention, see Gretchen C. F. Shappert, et al., *Constitutional Aspects of Civil Immigration Enforcement*, U.S. ATTORNEYS' BULL., July 2017, at 42. For other issues for conditions of detention analysis, see Yamileth G. Davila & Katerina V. Ossenova, *Other Tools of Civil Immigration Enforcement*, U.S. ATTORNEYS' BULL., July 2017, at 116. For further discussion of issues regarding terrorists, see Timothy M. Belsan, et al, *Civil Immigration Enforcement in National Security Cases*, U.S. ATTORNEYS' BULL., July 2017, at 18.

Third, the Article reviews the mandatory detention of criminal and terrorist aliens inside the country, pending conclusion of their removal proceedings. Fourth, it discusses another authority for the mandatory detention of suspected terrorist aliens. Fifth, the Article examines post-removal-period detention. Finally, it discusses the detention of “special circumstances” aliens.

II. Mandatory Detention of Applicants for Admission Through Removal Proceedings—8 U.S.C. § 1225(b)

The detention of aliens previously admitted or encountered by authorities within the U.S. interior generally falls under 8 U.S.C. § 1226; in contrast, the detention of aliens arriving at or apprehended shortly after crossing the border, or who are present in the country without having been admitted, is governed by 8 U.S.C. § 1225.³ The Immigration and Nationality Act (INA) defines admission as an alien’s lawful entry into the United States after inspection and authorization by officers of the Department of Homeland Security (DHS).⁴ Section 1225 provides three separate detention provisions for three categories of aliens seeking admission:

- (1) aliens detained through credible-fear proceedings and execution of orders of expedited removal;⁵
- (2) aliens who demonstrate a credible fear of persecution or torture in their home countries and thus are detained while they pursue applications for asylum, withholding, or deferral of removal under the Convention Against Torture in removal proceedings under 8 U.S.C. § 1229a;⁶ and
- (3) all other applicants for admission who cannot show that they are “clearly and beyond a doubt entitled to be admitted” to the United States and who are thus detained for section 1229a proceedings to establish their admissibility.⁷

In each of those provisions, the explicit language of section 1225(b) provides for *mandatory* detention through receipt of a final order of removal for those aliens in section 1229a removal proceedings—at which point their detention authority switches to 8 U.S.C. § 1231. Section 1225(b) requires detention all the way through removal itself for aliens subject to a final order of expedited removal.⁸

Under DHS regulations, section 1225(b) detainees are generally not eligible for release on bond.⁹ Regulation also expressly prohibits immigration judges from “redetermining conditions of custody”—i.e., holding bond hearings—for arriving aliens in section 1229a removal proceedings, who would be those detained under section 1225(b)(1)(B)(ii) or 1225(b)(2)(A).¹⁰ The only statutory mechanism for release from section 1225(b) detention is the discretionary parole authority granted to the Secretary of Homeland Security.¹¹

For applicants who seek admission to the United States who would otherwise be detained, the INA gives the Secretary discretion to grant a temporary parole “only on a case-by-case basis for urgent

³ See 8 U.S.C. § 1225(a)(1), (b) (2012).

⁴ § 1101(a)(13)(A).

⁵ § 1225(b)(1)(B)(iii)(IV).

⁶ § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f).

⁷ 8 U.S.C. § 1225(b)(2)(A); 8 C.F.R. § 235.3(c).

⁸ 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

⁹ 8 C.F.R. § 236.1(c)(2); *Rodriguez v. Robbins*, 804 F.3d 1060, 1081 (9th Cir. 2015), cert. granted sub nom., *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (*Rodriguez II*), oral argument held (Nov. 30, 2016), reargument ordered (June 26, 2017).

¹⁰ 8 C.F.R. § 1003.19(h)(2)(i)(B).

¹¹ 8 U.S.C. § 1182(d)(5)(A).

humanitarian reasons or significant public benefit.”¹² There is a more stringent parole standard for persons subject to an order of expedited removal: such aliens may be released on parole of an alien subject to an expedited removal order only when DHS “determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.”¹³ The parole determination is typically held to be subject to the INA’s bar on judicial review of any action or decision whose authority is specified at [8 U.S.C. §§ 1151–1378](#)¹⁴ to be committed to the discretion of the DHS Secretary.¹⁵

Challenges to section 1225(b) detention generally pose some variation of the claim that Congress could not have intended non-admitted aliens lacking connections to the country be detained for an extended period without an individualized check on their detention.¹⁶ Those claims assert either that the statutory language and circumstances attending section 1225(b) detention are meaningfully indistinguishable from detention under section 1226(c) or that the canon of constitutional avoidance requires reading limitations into section 1225(b).¹⁷ Because those arguments turn on the existence and extent of the detainee’s due process rights, rebutting them requires an understanding of the constitutional principles governing the rights of non-admitted aliens at the border.¹⁸

A. Political Branches’ Plenary Power Over the Border and Non-Admitted Alien Arrivals’ Lack of Due Process Rights Regarding Admission

The political branches’ broad power over immigration is “at its zenith at the international border.”¹⁹ The power to admit or exclude aliens is a sovereign prerogative vested in the political branches, and “it is not within the province of any court, unless expressly authorized by law, to review [that] determination.”²⁰ The reason for this separation is that authority over the border is interwoven with policies regarding the conduct of foreign relations,²¹ an area where it is essential “that the Nation speak[s]

¹² *Id.* § 1182(d)(5)(A).

¹³ [8 C.F.R. § 235.3\(b\)\(2\)\(iii\)](#).

¹⁴ *See, e.g., Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 158 (3d Cir. 2004) (describing contents of “this subchapter” in section [1252\(a\)\(2\)\(B\)\(ii\)](#)).

¹⁵ [8 U.S.C. § 1252\(a\)\(2\)\(B\)\(ii\)](#); *see, e.g., Rodriguez II*, 804 F.3d at 1081 (Because parole decisions under § 1182 are purely discretionary, they cannot be appealed to IJs or courts.); *Alaka v. Att’y Gen. of U.S.*, 456 F.3d 88, 97 & n.17 (3d Cir. 2006); *Alonso-Escobar v. USCIS Field Office Dir. Miami, Fla.*, 462 F. App’x 933, 935 (11th Cir. 2012).

¹⁶ *See Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013) (*Rodriguez I*) ([T]o the extent detention under § 1225(b) is mandatory, it is implicitly time-limited. This approach fits more naturally into our case law, which has suggested that after *Demore*, brief periods of mandatory immigration detention do not raise constitutional concerns, but prolonged detention—specifically longer than six months—does.); *Damus v. Tsoukaris*, No. 16-933 (JLL), 2016 WL 4203816, at *4 (D.N.J. Aug. 8, 2016) (collecting cases holding “the distinction between removable aliens present within this country and those not yet admitted and legally at the border is insufficient to warrant a difference in treatment” with limitations on mandatory detention).

¹⁷ *See Rodriguez II*, 804 F.3d at 1082.

¹⁸ *See id.*; *e.g., Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011) (In short, when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute.); *Sopo v. Att’y Gen. of U.S.*, 825 F.3d 1199, 1218 (11th Cir. 2016) (similar reasonableness limitation); *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015) (holding that “to avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to section 1226(c) must be afforded a bail hearing before an immigration judge within six months of his or her detention).

¹⁹ *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

²⁰ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see also Kleindienst v. Mandel*, 408 U.S. 753, 765–66 & n.6 (1972) (noting that the Supreme Court’s “general reaffirmations” of the political branches’ exclusive authority to admit or exclude aliens “have been legion).

²¹ *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952).

with one voice.”²²

The Supreme Court has routinely upheld Congress’s “plenary power to make rules for the admission of aliens.”²³ Detention of aliens arriving at the border pending a determination of whether to admit them to the United States is an integral, and constitutionally permissible, aspect of the admissions determination itself, such that detention is a constitutionally permissible component to admissions proceedings.²⁴

Under the “entry fiction,” aliens arriving at the border, or who are apprehended so close to the border that they are “assimilated” to the status of border arrivals,²⁵ are legally deemed to be held at the border for constitutional purposes and, thus, are deemed to have never entered the United States, even if they are detained within the border or paroled into the interior pending a determination of admissibility.²⁶ Traditionally, such aliens were considered to have no substantive right to be free from immigration detention, even prolonged detention, and, therefore, not entitled to a bond hearing, pending resolution of their admission proceedings.²⁷

Even though such treatment might be unacceptable if applied to United States citizens²⁸ or to illegal aliens who had resided within the United States for some period of time,²⁹ courts have permitted such treatment of aliens arriving at or stopped close to the border because courts have long held a non-admitted alien “on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”³⁰ Thus, such aliens lack procedural due process rights to a more or different procedure than provided via statute or regulation regarding their admission proceedings,³¹ including procedure related to the detention concomitant to seeking admission.³²

This lack of rights of aliens positioned at the border flows from the fact that the constitutional power of the government waxes as the nexus to the border strengthens, while that of non-admitted aliens wanes. The plenary power of the political branches over admission of aliens dictates little to no role for courts to play in testing decisions relating to admission of aliens with so little connection to the

²² *Zadvydas v. Davis*, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting).

²³ See *Kleindienst*, 408 U.S. at 766 (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)).

²⁴ See, e.g., *Wong Wing v. United States*, 163 U.S. 228, 235 (1896); *Carlson v. Landon*, 342 U.S. 524, (1952); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212–15 (1953); *Reno v. Flores*, 507 U.S. 292, 306 (1993).

²⁵ See *Mezei*, 345 U.S. at 214; *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 445 (3d Cir. 2016) (*Castro II*), cert. denied, 2017 WL 1366739 (2017); *M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F. Supp. 3d 1156, 1173 (D.N.M. 2014), vacated as moot, CIV 14–769 JCH/CG, 2015 WL 7454248 (D.N.M. Sept. 23, 2015).

²⁶ *Rodriguez I*, 715 F.3d at 1140.

²⁷ See *Mezei*, 345 U.S. at 212; *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc) (*Mezei* therefore suggests that the Court found that excludable aliens simply enjoy no constitutional right to be paroled into the United States, even if the only alternative is prolonged detention. . . . Because excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows.).

²⁸ See *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976).

²⁹ See *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001).

³⁰ *Mezei*, 345 U.S. at 212 (internal quotation omitted).

³¹ E.g., *Castro II*, 835 F.3d at 449; *Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2015); see *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) superseded on other grounds by 8 U.S.C. § 1182(a) (2012 & Supp. III 2015) ([A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.).

³² See *Mezei*, 345 U.S. at 212; *Wong Wing v. United States*, 163 U.S. 228, 235 (1896); *Barrera-Echavarria*, 44 F.3d at 1450.

United States.³³ And, even if the courts had a greater role, the rights non-admitted aliens at the border could assert before them are minimal due to their constructive presence outside the United States and lack of any connections to or equities in the United States—not having joined the population in any meaningful sense—that would provide a basis for asserting greater inclusion in the constitutional community.³⁴

B. Defending Against Attempts to Impose Limitations on Section 1225(b) Detention

Although no courts have suggested Congress could constitutionally authorize permanent or indefinite detention of aliens seeking admission pursuant to section 1225(b) without any check simply by virtue of the aliens’ non-admitted or unlawful status,³⁵ several district courts and at least one circuit court have held that section 1225(b)(2)(A) detention is subject to temporal limitations.³⁶

The Ninth Circuit in *Rodriguez v. Robbins* based its decision on the fact that lawful permanent residents who have procedural due process rights were potentially included in the class of section 1225(b) detainees at issue³⁷—a circumstance that will not be present in the vast run of section 1225(b) cases, brought by individual aliens. *Rodriguez* thus suggested “the majority of prolonged detentions under § 1225(b)” would be “constitutionally permissible” because they involve non-admitted aliens subject to the entry fiction.³⁸

The majority of district courts reading a time limit into section 1225(b) detention, however, ignore that nuance and the implications of the entry fiction to hold aliens arriving at or near the border have some meaningful degree of due process rights such that they require an individualized bond determination when detention becomes prolonged. Courts so holding fall into two camps: (1) those who find no meaningful distinction between detention under section 1226(c) and 1225(b) and thus import their jurisdiction’s limitations on section 1226(c) detention (if any) in a wholesale fashion into the section 1225(b) analysis;³⁹ and (2) those who find section 1225(b) detainees have lesser due process rights. Those latter courts, while reading a reasonableness limitation into section 1225(b), give the government’s

³³ *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the government’s political departments largely immune from judicial control.); see *Castro II*, 835 F.3d at 443–44.

³⁴ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ([A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.); *Landon*, 459 U.S. at 32 ([O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.); *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (leaving on “one side the question whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed).

³⁵ See *Castro II*, 835 F.3d at 449 n.32; *Barrera-Echavarría*, 44 F.3d at 1450.

³⁶ *Rodriguez I*, 715 F.3d at 1144; *Gregorio-Chacon v. Lynch*, No. 16-2768 (SDW), 2016 WL 6208264, at *2 (D.N.J. Oct. 24, 2016); *Damus v. Tsoukaris*, No. 16-933 (JLL), 2016 WL 4203816, at *4 (D.N.J. Aug. 8, 2016); *Maldonado v. Macias*, 150 F. Supp. 3d 788, 809 (W.D. Tex. 2015); *Bautista v. Sabol*, 862 F. Supp. 2d 375, 381 (M.D. Pa. 2012); *Marquez-Diaz v. Lynch*, No. 16-26384 (S.D. Fla. Mar. 6, 2017). However, many courts interpreting section 1225(b)(2)(A) find mandatory detention under that provision lawful in all respects. See *Perez v. Aviles*, 188 F. Supp. 3d 328, 332 (S.D.N.Y. 2016); *Cardona v. Nalls-Castillo*, 177 F. Supp. 3d 815, 815–16 (S.D.N.Y. 2016); *Salim v. Tryon*, No. 13-cv-6659, 2014 WL 1664413, at *2 (W.D.N.Y. Apr. 25, 2014); *Ferreras v. Ashcroft*, 160 F. Supp. 2d 617, 626–28 (S.D.N.Y. 2001); *Viknesrajah v. Koson*, No. 09-cv-6442, 2011 WL 147901, at *5–6 (W.D.N.Y. Jan. 18, 2011).

³⁷ *Rodriguez II*, 804 F.3d at 1082 (citing *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001)).

³⁸ *Id.*

³⁹ See, e.g., *Arias v. Aviles*, No. 15-CV-9249 (RA), 2016 WL 3906738, at *10 (S.D.N.Y. July 14, 2016) (These arguments apply to § 1225(b) as forcefully as they did in *Lora* to § 1226(c).); *Bautista*, 862 F. Supp. 2d at 381 (rejecting claim that section 1225(b) detainee “is owed no due process” and applying *Diop* to find twenty-six month detention unreasonable).

interests more weight than the courts would have in a section 1226(c) analysis. Therefore, those courts have generally required a showing of comparatively longer detention before ordering a bond hearing under a Modified Reasonableness test.⁴⁰

The timing limitations on a reasonable section 1225(b) detention vary widely. Some courts impose a bright line at six months of detention,⁴¹ while other courts, applying Modified Reasonableness, have declined to order bond hearings even when detention approached one year.⁴² In addition to acknowledging the varying degrees of due process, Modified Reasonableness recognizes that the INA structured the detention provisions differently: “[U]nder § 1226, for removable aliens present in this country, detention subject to bond is the default rule and mandatory detention the exception, whereas § 1225 essentially sets high mandatory detention as the default rule with parole for humanitarian reasons the exception.”⁴³

Thus, the following arguments may be employed to defend against challenges to section 1225(b) detention: (1) the mandatory language and different structure of section 1225(b) distinguishes it from section 1226 detention; (2) section 1225(b) detainees are subject to the government’s plenary power over the border and lack the due process rights of admitted aliens that underlay the temporal limitations on detention; and (3) even if the court disagrees, any limitation imposed on section 1225(b) should reflect the government’s plenary power and the categorically minimal-to-non-existent due process rights of section 1225(b) aliens.⁴⁴ Where the alien failed to request parole under section 1182(d)(5)(A), the government may also argue the petition should be dismissed due to failure to exhaust administrative remedies.⁴⁵

Limitations on section 1225(b) detention have generally arisen in cases under section 1225(b)(2)(A).⁴⁶ Those same arguments, however, may be employed against challenges to detention under 8 U.S.C. § 1225(b)(1)(B)(ii)—that is, from aliens initially ordered expeditiously removed before establishing a credible fear of persecution or torture permitting them to pursue asylum, withholding, or Convention Against Torture relief in section 1229a removal proceedings. Indeed, the argument that Congress intended mandatory detention in this context until admissibility is determined is even stronger given these aliens’ more tenuous claim to admission⁴⁷ and their inclusion in the expedited removal regime,⁴⁸ discussed below.

⁴⁰ See, e.g., *Damus*, 2016 WL 4203816, at *4 (what is reasonable under § 1225(b)(2)(A) for an applicant for admission not entitled to the greater protections provided to an alien already present in this country may well be unreasonable for those aliens detained under § 1226(c)); *Gregorio-Chacon*, 2016 WL 6208264, at *5 (same); see also *Maldonado v. Macias*, 150 F. Supp. 3d 788, 809–10 (W.D. Tex. 2015) (declining to decide “whether to apply a bright line reasonableness limit of six months or whether reasonableness should be evaluated on a case-by-case basis” because the twenty-six month detention was six “unreasonable under either standard”).

⁴¹ See, e.g., *Rodriguez II*, 804 F.3d at 1082; *Arias*, 2016 WL 3906738, at *10; *Saleem v. Shanahan*, No. 16-CV-808 (RA), 2016 WL 4435246, at *5 (S.D.N.Y. Aug. 22, 2016).

⁴² See *Damus*, 2016 WL 4203816, at *4 (upholding slightly less than one year detention); *Gregorio-Chacon*, 2016 WL 6208264, at *5 (upholding over detention of over six months).

⁴³ *Damus*, 2016 WL 4203816, at *4.

⁴⁴ *Id.*

⁴⁵ E.g., *Okonkwo v. I.N.S.*, 69 F. App’x 57, 59 (3d Cir. 2003); *Perez-Perez v. Hanberry*, 781 F.2d 1477, 1481 (11th Cir. 1986); *Sheba v. Green*, No. CV 16-230 (SDW), 2016 WL 3648000, at *1 (D.N.J. July 7, 2016); *Bernard v. Green*, No. CV 15-6462 (JMV), 2016 WL 2889165, at *3 (D.N.J. May 17, 2016).

⁴⁶ But see *Oppong v. Hodgson*, No. CV 16-12455-RGS, 2017 WL 841276, at *2 (D. Mass. Mar. 3, 2017) (noting that some courts have placed limitations on section 1225(b) detention but declining to “decid[e] the exact nature of the [constitutional] protections afforded” section 1225(b)(1)(B)(iii)(IV) detainee and dismissing petition without prejudice to refiling if alien’s detention reaches six months).

⁴⁷ See *Clark v. Smith*, 967 F.2d 1329, 1332 (9th Cir. 1992) (An alien’s freedom from detention is only a variation on the alien’s claim of an interest in entering the country.).

⁴⁸ See generally 8 U.S.C. § 1225(b)(1) (2012).

C. Defending Challenges to Expedited Removal and Related Detention

Congress established the expedited removal (ER) system through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁴⁹ IIRIRA ended the practice of providing separate deportation proceedings for aliens who had entered and exclusion proceedings for those who had not. The new, unified removal system hinged on admission, rather than entry, in an effort to thwart the perverse incentive for aliens to surreptitiously cross the border to gain the greater procedural rights concomitant to deportation proceedings.⁵⁰ However, Congress maintained an aspect of the more summary exclusion proceedings in the form of ER, created as a response to a crisis of illegal immigration at the southern border and in recognition of the need to “expedite removal of aliens lacking a legal basis to remain in the United States” and to deter inadmissible aliens from making the dangerous journey to the United States in the beginning.⁵¹ Congress found that thousands of smuggled aliens were arriving in the United States without entry documents; thereafter, they would declare asylum and, due to the immigration court backlog and lack of detention space, would be paroled during their asylum proceedings and often take the opportunity to abscond, increasing the population of unlawfully present aliens.⁵²

Under ER, aliens who are initially determined to be inadmissible due to absent or fraudulent entry documentation⁵³ are immediately removable under an ER order unless they indicate a fear of persecution or torture in their home country or request asylum.⁵⁴ Such aliens are referred for an interview with a U.S. Citizenship and Immigration Services (USCIS) asylum officer to assess whether they have a credible fear of persecution or torture. The alien is entitled to supervisory asylum officer review and, if the alien requests it, de novo review by an immigration judge if USCIS makes a negative finding.⁵⁵ If the alien can demonstrate such a fear, the ER order is vacated, and the alien is placed in section 1229a proceedings; otherwise, the alien is removable “without further hearing or review.”⁵⁶ The alien “shall be detained” throughout credible fear proceedings and, if found not to have such fear, “until removed.”⁵⁷

The ER process is designed to proceed quickly. Asylum officer hearings normally occur within a matter of days. Review by an immigration judge typically occurs within the next twenty-four hours where possible and in no case more than a week later.⁵⁸ Further, Congress severely limited judicial review of ER orders. No direct review exists, and habeas review is available only to contest whether the petitioner (1) is in fact an alien, (2) was ordered expeditiously removed, or (3) can prove by a preponderance of the evidence that the petitioner is an LPR, was admitted as a refugee, or was granted and still retains asylum.⁵⁹ This habeas review can be used for reviewing a matter arising from or relating to an ER order, the government’s decision to invoke the ER procedures or apply them to the alien, or the procedures or

⁴⁹ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in various sections of Title 8 and Title 18 of the U.S. Code).

⁵⁰ See *Vartelas v. Holder*, 566 U.S. 257, 261–62 (2012); *Martinez v. AG*, 693 F.3d 408, 413 n.5 (3d Cir. 2010).

⁵¹ *Kucana v. Holder*, 558 U.S. 233, 249 (2010); H.R. Rep. No. 104-469, pt. 1, at 117 (1996); see S. Rep. No. 104-249 (1996).

⁵² See H.R. Rep. No. 104-469, at 117–18.

⁵³ See 8 U.S.C. § 1182(a)(6)(C), (a)(7) (2012).

⁵⁴ § 1225(b)(1)(A)(i), (iii)(II); 8 C.F.R. § 235.3(b)(4) (2017). ER may be applied to such aliens arriving at ports of entry and the sea and land borders generally, 67 Fed. Reg. 68924-01 (Nov. 13, 2002), as well as to illegal entrants apprehended within 100 miles of crossing the border who cannot show their physical presence in the United States continuously for the fourteen-day period immediately preceding their apprehension. 69 Fed. Reg. 48877, 48878-80 (Aug. 11, 2004). Statute allows DHS to designate larger pools of aliens subject to ER, up to and including aliens who have not been admitted or paroled who cannot show that they were continuously present in the United States for the two years preceding their apprehension. See 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

⁵⁵ 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. §§ 208.30, 1003.42, 1208.30.

⁵⁶ 8 U.S.C. § 1225(b)(1)(B)(ii), (iii)(I); 8 C.F.R. § 208.30(e)(5).

⁵⁷ 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

⁵⁸ See § 1225(b)(1)(B)(iii)(III).

⁵⁹ 8 U.S.C. § 1252(a)(2)(A)(i)–(iv), (e)(2).

policies adopted to implement the ER statute, section 1225(b)(1).⁶⁰ The INA expressly precludes review of whether the alien in ER “is actually inadmissible or entitled to any relief from removal.”⁶² Generalized challenges to the legality or constitutionality of section 1225(b), or any implementing regulations, may be brought in the District of Columbia within sixty days of implementation of the challenged law.⁶¹

Unsurprisingly, the limits on judicial review of ER orders have drawn numerous constitutional challenges. However, every circuit court to explicitly address the issue has held that Congress’s intent to limit review is unambiguous in the statute and that such limited review does not violate the Constitution or the INA.⁶² Specifically, courts have held, non-admitted aliens intercepted at the border or shortly after crossing it illegally lack constitutional procedural rights such that the limited review of ER orders does not implicate or violate constitutional protections.⁶³

In defending challenges to ER—whether to the merits of the removal orders themselves, or the concomitant detention through proceedings until removal—the government could argue that habeas review is limited to the bases under section 1252(e)(2), that the statutory language imposing such limited review is clear and unequivocal, and that such limited review has consistently been upheld against constitutional attack.

As for the detention component, several courts have recognized that section 1225(b)(1)(B)(iii)(IV) unambiguously provides for the mandatory detention of aliens subject to ER throughout the administrative process and until removal.⁶⁴ The argument that mandatory detention is a “secondary, temporary, and constitutionally permissible aspect of” the admission process itself is most persuasive in the ER context,⁶⁵ given the detailed congressional discussion and findings concerning the threat of border arrivals absconding while seeking asylum, the intentionally brief duration of the proceedings,⁶⁶ and the weak-to-non-existent ties of such aliens to the United States and to eligibility for admission.⁶⁷

⁶⁰ See *id.* A habeas petition addressing the three inquiries in section 1252(e)(2) is the only habeas challenge permitted—review under 28 U.S.C. § 2241 is expressly precluded. § 1252(a)(2)(A).

⁶² § 1252(e)(5).

⁶¹ *Castro II*, 835 F.3d at 427 (citing 8 U.S.C. § 1252(e)(3)(A)–(B)). The expedited removal scheme has been upheld against such a facial challenge to its constitutionality. See *AILA v. Reno*, 18 F. Supp. 2d 38, 60 (D.D.C. 1998), *aff’d*, 199 F.3d 1352 (D.C. Cir. 2000).

⁶² See *Castro II*, 835 F.3d at 450; *Shunaula v. Holder*, 732 F.3d 143, 147 (2d Cir. 2013); *Smith v. U.S. Customs & Border Prot.*, 741 F.3d 1016, 1022 (9th Cir. 2014); *Khan v. Holder*, 608 F.3d 325, 329–30 (7th Cir. 2010); *Garcia de Rincon v. Dep’t of Homeland Sec.*, 539 F.3d 1133, 1140–41 (9th Cir. 2008); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007); *Vaupel v. Ortiz*, 244 F. App’x 892, 895 (10th Cir. 2007); *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 819 (9th Cir. 2004); *Li v. Eddy*, 259 F.3d 1132, 1134–35 (9th Cir. 2001), *vacated as moot*, 324 F.3d 1109 (2003); *Brumme v. Immigration & Naturalization Serv.*, 275 F.3d 443, 448 (5th Cir. 2001); *AILA*, 199 F.3d at 1356. See also *Smith*, 741 F.3d at 1021 (obtaining review of whether border agent exceeded authority in subjecting Canadian alien to ER due to lack of entry documentation, only to have theory rejected on the merits).

⁶³ See, e.g., *Castro II*, 835 F.3d at 449; *id.* at 450–51 (Hardiman, J., concurring); *Rincon*, 539 F.3d at 1140–42.

⁶⁴ *Banton v. Morton*, 477 F. App’x 929, 933 (3d Cir. 2012); *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007); *Togbah v. Ashcroft*, 104 F. App’x 788, 792, 795–96 (3d Cir. 2004); *Singh v. Holder*, No. CIV-13-0166-PHX-PGR (MHB), 2013 U.S. Dist. LEXIS 169715, at *2 (D. Ariz. Aug. 28, 2013); *Bertrand v. Holder*, No. 10-604, 2011 WL 4356375 at *3 (D. Ariz. Aug. 16, 2011); see also *Castro v. U.S. Dep’t of Homeland Security*, 163 F. Supp. 3d 157, 162 (E.D. Pa. 2016) (*Castro I*) (noting that “[a]liens subject to expedited removal are detained by DHS throughout the administrative-review process).

⁶⁵ *Castro I*, 163 F. Supp. 3d at 173; see *Wong Wing*, 163 U.S. at 235.

⁶⁶ See H.R. Rep. No. 104-469, at 117–18 (1996).

⁶⁷ See *Castro II*, 835 F.3d 422, 445–46 (explaining that petitioners subject to ER “were each apprehended within hours of surreptitiously entering the United States, so we think it appropriate to treat them as alien[s] seeking initial admission, . . . [a]nd since the issues that Petitioners seek to challenge all stem from the Executive’s decision to

III. Discretionary Detention of Aliens in the Interior Pending Conclusion of Removal Proceedings—8 U.S.C. § 1226(a)

The presumption of detention for aliens seeking admission at the border created by the INA broadens into greater opportunities and requirements for release during proceedings when it comes to removal of aliens who were previously admitted.⁶⁸

Section 1226(a) applies broadly to all aliens already present in the United States and in removal proceedings, except “arriving aliens” or those subject to mandatory detention. On a warrant issued by the Attorney General, an alien may be arrested and either detained or released on bond of at least \$1500 or on conditional parole pending a decision on whether he or she is to be removed from the United States.⁶⁹ Parole under section 1226(a)(2)(B) is distinct from parole under section 1182(d)(5)(A) for purposes of adjustment of status.⁷⁰ DHS may at any time revoke a bond or parole and re-arrest the alien, although the setting and revocation of bond is subject to Board of Immigration Appeals (BIA) review.⁷¹ DHS may not provide the alien with work authorization unless the alien is a permanent resident of the United States or otherwise eligible.⁷²

Following an initial custody determination by DHS, the alien may seek review by an immigration judge “at any time” during removal proceedings, and either party may appeal that decision to the BIA.⁷³ At bond hearings, the alien has the burden to demonstrate that the alien is not a flight risk or danger.⁷⁴ Bond reconsideration proceedings are distinct from removal hearings and do not form part of that record.⁷⁵ A subsequent request for a bond hearing is considered “only upon a showing that the alien’s circumstances have changed materially since the prior bond redetermination.”⁷⁶ Immigration judge and BIA bond determinations are unreviewable because of the jurisdiction-stripping provision of section 1226(e), which precludes judicial review of any “discretionary judgment” or detention decision regarding an alien’s release.⁷⁷

Because aliens are afforded bond hearings, less litigation exists surrounding section 1226(a) than section 1226(c). Nevertheless, individuals may claim that they are not subject to section 1226(a) because they are U.S. citizens.⁷⁸ Section 1226(a) litigation may also involve the following: the alien’s prolonged detention; the standard and placement of the burden of proof at bond hearings; the unavailability of renewed bond hearings absent changed circumstances; the factors considered at bond hearings; and the failure to consider release on other conditions besides money bond.⁷⁹

remove them from the country, they cannot invoke the Constitution, including the Suspension Clause, in an effort to force judicial review beyond what Congress has already granted them).

⁶⁸ See *Rodriguez II*, 804 F.3d at 1082.

⁶⁹ 8 U.S.C. § 1226(a) (2012); 8 C.F.R. § 236.1 (2017).

⁷⁰ See, e.g., *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1115 (9th Cir. 2007).

⁷¹ 8 U.S.C. § 1226(b); see 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d).

⁷² 8 U.S.C. § 1226(a)(3).

⁷³ 8 C.F.R. §§ 236.1(c), (d), 1003.19, 1236.1(d)(1).

⁷⁴ *Id.* §§ 236.1(c)(8), 1236.1(c)(8); see *In re Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006) (The burden is on the alien.).

⁷⁵ 8 C.F.R. § 1003.19(d).

⁷⁶ *Id.* § 1003.19(e).

⁷⁷ 8 U.S.C. § 1226(e).

⁷⁸ See *Flores-Torres v. Mukasey*, 548 F.3d 708, 713 (9th Cir. 2008).

⁷⁹ See *infra* text accompanying note 104.

IV. Mandatory Detention of Criminal and Terrorist Aliens in the Interior Pending Conclusion of Removal Proceedings—8 U.S.C. § 1226(c)

Congress enacted section 1226(c) to limit the threat posed by criminal aliens and to ensure their attendance at removal proceedings.⁸⁰ It requires mandatory detention of certain criminal and terrorist aliens while removal proceedings are pending.⁸¹ This includes aliens covered by terrorist grounds and those removable on the following criminal grounds: a crime or crimes of moral turpitude, aggravated felonies, controlled substance offenses, firearms offenses, and “miscellaneous crimes.”⁸² DHS makes the initial determination that an individual falls within section 1226(c) under a “reason to believe” standard.⁸³ The detention begins “when the alien is released” from criminal custody.⁸⁴ Section 1226(c) allows release only for witness protection or cooperation, and then only if the alien is neither a security nor flight risk.⁸⁵

Unlike aliens who fall within section 1226(a), an alien subject to mandatory detention is not entitled to an individualized bond hearing or custody redetermination by an immigration judge.⁸⁶ The alien is entitled to request a *Joseph* hearing (named after the precedential BIA determination) before an immigration judge to challenge the DHS officer’s decision that the alien is subject to mandatory detention.⁸⁷ At the hearing, the alien may assert the following: that the alien is a U.S. citizen, not a criminal or terrorist as enumerated in section 1226(c)(1)(A)–(D); that the alien is not removable; or that the alien is entitled to relief from removal. Only if aliens successfully demonstrate that they do not meet the criteria for mandatory detention by showing that DHS “is substantially unlikely to prevail on its charge” are they entitled to a custody hearing.⁸⁸ Either party may appeal the immigration judge’s determination to the BIA.⁸⁹ If the alien succeeds at the *Joseph* hearing and the immigration judge orders the alien’s release, DHS may seek to prevent release during the pendency of the appeal by invoking an “automatic stay.”⁹⁰

Section 1226(e) precludes judicial review of a DHS “discretionary judgment” or detention decision, but it does not bar habeas review of a constitutional challenge to mandatory detention without a specific provision barring habeas review.⁹¹ Some courts have asserted habeas jurisdiction over statutory challenges to mandatory detention and over even discretionary detention decisions alleged to have violated due process or to have surpassed statutory authority.⁹²

⁸⁰ See S. Rep. No. 104-48, at 1 (1995); *Demore v. Kim*, 538 U.S. 510, 513 (2003).

⁸¹ 8 U.S.C. § 1226(c).

⁸² *Id.* § 1226(c)(1)(A)–(D). The extent to which a crime or crimes of moral turpitude render an alien subject to mandatory detention under section 1226(c) depends on whether the alien is inadmissible as an alien who has not lawfully entered the United States or deportable as an alien who has been admitted, typically as an alien who has adjusted status to lawful permanent resident. *Id.* § 1226(c)(1)(A)–(C).

⁸³ § 1357(a)(2).

⁸⁴ § 1226(c)(1).

⁸⁵ § 1226(c)(2).

⁸⁶ See § 1226(c).

⁸⁷ See 8 C.F.R. § 1003.19(h)(2)(ii); *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999).

⁸⁸ See *Joseph*, 22 I. & N. Dec. at 807–08.

⁸⁹ 8 C.F.R. § 1236.1(d)(3)(i).

⁹⁰ *Id.* § 1003.19(i)(2).

⁹¹ 8 U.S.C. § 1226(e); *Demore v. Kim*, 538 U.S. 510, 516–17 (2003).

⁹² See, e.g., *Sylvain v. Att’y Gen. of U.S.*, 714 F.3d 150, 155 (3d Cir. 2013) (section 1226(e) does not preclude judicial review); *Gonzalez v. O’Connell*, 355 F.3d 1010, 1014–15 (7th Cir. 2004) (section 1226(e) does not preclude habeas jurisdiction.); *Aguilar v. Lewis*, 50 F. Supp. 2d 539, 542–43 (E.D. Va. 1999) (interpreting section 1226(e) narrowly); *Straker v. Jones*, 986 F. Supp. 2d 345, 350 (S.D.N.Y. 2013) (section 1226(e) does not preclude judicial review). But see *Prieto-Romero v. Clark*, 534 F.3d 1053, 1067 (9th Cir. 2008) (section 1226(e) precludes review of

In addition to arguing they are not “properly included” within the mandatory detention provision, aliens often contest several aspects of their mandatory detention.⁹³ First, aliens may challenge as unconstitutional the *Joseph* hearing procedures.⁹⁴ For example, they may contest the adequacy of notice of their right to a *Joseph* hearing, the lack of a contemporaneous verbatim record of the *Joseph* hearing, and the placement of the burden of proof on the aliens to show that they are not subject to mandatory detention.⁹⁵

Second, aliens may present statutory or constitutional challenges to their prolonged detention in habeas proceedings. They may demand a bond hearing and also demand DHS bear the burden of showing the aliens’ flight risk or dangerousness by clear and convincing evidence.⁹⁶

This challenge arises even though the statute itself places no time limits on mandatory detention. In *Demore v. Kim*, the U.S. Supreme Court upheld the constitutionality of section 1226(c), finding that mandatory detention of a lawful permanent resident was reasonable and did not violate due process if set for the limited period of an alien’s removal proceedings, which the government had calculated on average was 1.5 to 4 months.⁹⁷ However, Justice Kennedy, who had joined the majority in full, wrote a separate concurring opinion recognizing that an alien subject to mandatory detention “could be entitled to an individualized determination as to his risk of flight or dangerousness if the continued detention became unreasonable or unjustified.”⁹⁸

Several courts have interpreted *Demore*’s authorization of mandatory detention under section 1226(c) as restricted to detentions of brief duration, finding that section 1226(c) must be understood as not authorizing unreasonably prolonged detention.⁹⁹ The Second and Ninth Circuits have adopted a bright-line approach, requiring bond hearings after six months for aliens detained under section 1226(c), whereas the First, Third, Sixth, and Eleventh Circuits, although finding that detention without a bond hearing is restricted to a “reasonable” time, have eschewed a bright-line rule and determined reasonableness using a case-specific balancing inquiry.¹⁰⁰ In October Term 2017, in *Jennings v. Rodriguez*, the U.S. Supreme Court may rule whether section 1226(c), as well as sections 1226(a) and 1225(b), necessitate automatic bond hearings if detention lasts for six months or more, ending this conflict among the circuits and lower courts.¹⁰¹ *Jennings* also involves several other questions surrounding prolonged detention hearings; for example, who bears the burden of proof, under what

bond amount); *see, e.g., Al-Siddiqi v. Achim*, 531 F.3d 490, 494–95 (7th Cir. 2008) (section 1226(e) does not bar jurisdiction to review constitutional questions such as whether DHS’s refusal to honor immigration judge’s bond order violates due process).

⁹³ 8 C.F.R. § 1003.19(h)(2)(ii).

⁹⁴ *See id.*; *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999).

⁹⁵ *See, e.g., Gayle v. Johnson*, 81 F. Supp. 3d 371 (D.N.J. 2015); *Gayle v. Johnson*, 4 F. Supp. 3d 692 (D.N.J. 2014), *vacated and remanded sub nom., Gayle v. Warden*, 838 F.3d 297 (3d Cir. 2016).

⁹⁶ The Second, Third, and Ninth Circuits have held that the government bears the burden of proof at prolonged detention hearings. *See Lora v. Shanahan*, 804 F.3d 601, 615–16 (2d Cir. 2015); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 235 (3d Cir. 2011); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005). The Second and Ninth Circuits have found that the government’s standard of proof to show danger and flight risk is by “clear and convincing evidence.” *See Lora*, 804 F.3d at 615–16; *Singh*, 638 F.3d at 1203.

⁹⁷ *Demore v. Kim*, 538 U.S. 510, 527–30 (2003).

⁹⁸ *Id.* at 532 (Kennedy, J., concurring).

⁹⁹ *See, e.g., Lora*, 804 F.3d at 606; *Rodriguez II*, 804 F.3d at 1079–81; *Rodriguez I*, 715 F.3d at 1138; *Reid v. Donelan*, 819 F.3d 486, 494, 502 (1st Cir. 2016); *Diop*, 656 F.3d at 231–33; *Ly v. Hansen*, 351 F.3d 263, 267–71 (6th Cir. 2003); *Sopo v. Att’y Gen. of U.S.*, 825 F.3d 1199, 1213–14 (11th Cir. 2016).

¹⁰⁰ *See, e.g., Lora*, 804 F.3d at 615–16; *Rodriguez II*, 804 F.3d at 1079–81; *Rodriguez I*, 715 F.3d at 1339–44; *Reid*, 819 F.3d at 494, 502; *Diop*, 656 F.3d at 233; *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 474 (3d Cir. 2015); *Ly*, 351 F.3d at 271–73; *Sopo*, 825 F.3d at 1215–19; *Petition for Writ of Certiorari, Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (No. 15-1204).

¹⁰¹ *Petition for Writ of Certiorari, Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (No. 15-1204).

standard, and whether the length of detention must be weighed in favor of release.¹⁰²

In circuits without settled law, and assuming that *Jennings* has not settled the issue nationwide, several arguments can rebut a claim to a bond hearing after prolonged mandatory detention. Such arguments include the following: section 1226(c) is mandatory, not optional, evidenced by the word “shall” instead of “may”; the detention is not indefinite because removal proceedings eventually end; and the factors requiring detention do not change over time in that the petitioner is still considered a criminal alien and the reasons to abscond increase as DHS prevails on its charges.

Third, the alien may challenge which detention statute applies, depending on the procedural posture of the removal case. For instance, if a court of appeals issues a stay of removal while it considers the alien’s petition for review (PFR) of the alien’s final removal order, courts are split as to whether section 1226(a), section 1226(c), or section 1231 governs this period.¹⁰³ The government’s position is that the alien is subject to section 1231 because the filing of the PFR suspends the removal period.¹⁰⁴

Fourth, the alien may assert a statutory “*Matter of Rojas*” claim, arguing that section 1226(c) does not apply if the alien was not detained immediately upon or reasonably soon after the alien’s release from prior non-immigration custody. In *Matter of Rojas*, the BIA interpreted the “when the alien is released” language in section 1226(c) to include aliens not immediately taken into custody upon release from prior non-immigration custody, including aliens taken into custody months or years later.¹⁰⁵ The Second, Third, Fourth, and Tenth Circuits have upheld the BIA’s reasoning, or at least the result, in *Rojas*.¹⁰⁶ However, the Ninth Circuit, along with three of six judges sitting en banc in the First Circuit, have rejected the *Rojas* reasoning that an alien can be held without bond pursuant to 1226(c) even if a lengthy delay exists after the alien’s release.¹⁰⁷

Finally, aliens may assert a statutory “*Matter of Kotliar/Matter of West*” claim, arguing they do not qualify for mandatory detention because they were not “released” from physical custody pursuant to a conviction for a qualifying offense. Aliens may argue section 1226(c) does not apply because the statutory term “released” presupposes a physical restraint, and their release was from a *non-physical* restraint such as court supervision, probation, parole, or supervised release.¹⁰⁸ Further, they may argue release following pre-conviction arrest does not qualify as a “release” under section 1226(c).¹⁰⁹

¹⁰² *Id.*

¹⁰³ See *Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003) (section 1226 applies); *Leslie v. Att’y Gen. of U.S.*, 678 F.3d 265 (3d Cir. 2012); *Bejjani v. I.N.S.*, 271 F.3d 670 (6th Cir. 2001), *abrogated on other grounds by* *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); see also *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008) (section 1226(a), not 1226(c) or 1231 applies); *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008) (section 1226(a) applies). *But see* *Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002) (presuming that section 1231 applies, but without discussion).

¹⁰⁴ See 8 U.S.C. § 1231(a)(1)(C).

¹⁰⁵ 23 I. & N. Dec. 117, 127 (BIA 2001) (interim decision).

¹⁰⁶ See *Lora*, 804 F.3d at 610–13; *Olmos v. Holder*, 780 F.3d 1313 (10th Cir. 2015); *Sylvain*, 714 F.3d at 155; *Hosh v. Lucero*, 680 F.3d 375, 379–80 (4th Cir. 2012).

¹⁰⁷ See *Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc), *aff’g* by an equally divided court *Castaneda v. Souza*, 952 F. Supp. 2d 307 (D. Mass. 2013); *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016); *Khoury v. Asher*, 667 F. App’x 966 (9th Cir. 2016).

¹⁰⁸ See *In re West*, 22 I. & N. Dec. 1405 (BIA 2000) (mandatory detention does not apply to an alien sentenced to probation because he was not “released” from physical custody).

¹⁰⁹ *But see In re Kotliar*, 24 I. & N. Dec. 124 (BIA 2007) (mandatory detention applies to alien even though he was not charged in the NTA with the underlying crime, even though he served no jail time, and even though he was apprehended at home while on probation instead of immediately after his release from arrest).

V. Mandatory Detention of Suspected Terrorist Aliens—8 U.S.C. § 1226a

Section 1226a provides another source of detention authority, and it applies to both pre- and post-final order of removal.¹¹⁰ Enacted in 2011 as part of the USA PATRIOT ACT, section 1226a mandates detention of any alien the Attorney General reasonably believes to be involved in terrorism or other activity.¹¹¹ This detention could last for up to seven days prior to placing the alien in removal proceedings or filing criminal charges against the alien, and then it could last during those proceedings.¹¹² Detention under section 1226a requires a certification by either the Attorney General or the Deputy Attorney General. This certification must be reviewed every six months.¹¹³ It allows for prolonged detention, subject to six-month review, “only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.”¹¹⁴ An alien may seek habeas review of their certification as a terrorist and of their continued detention, but appeal of that review may only be before the U.S. Court of Appeals for the D.C. Circuit.¹¹⁵ The Attorney General rarely uses section 1226a authority.

VI. Post-Removal Period Detention—8 U.S.C. § 1231

Once an alien has received a final order of removal, the rationale for detention changes from ensuring that the alien is present for the proceedings and does not pose a threat to the community to ensuring that DHS is able to remove the alien.¹¹⁶

The post-removal-order statute provides that an alien should be removed within ninety days from the date the order becomes final.¹¹⁷ The alien is subject to detention during the ninety-day removal period.¹¹⁸ The post-removal-order statute governs detention of aliens during the statutory removal period and generally mandates detention of criminal and terrorist aliens during that period.

Removal is not a one-way street; the country to which the alien is being removed must agree to accept the alien. To remove an alien, the United States often must secure a travel document from the receiving country. The travel document is essentially a temporary passport that allows the alien to return to the alien’s country to accomplish the removal. Obtaining a travel document can be difficult due to a lack of a repatriation agreement or circumstances in an individual case. During fiscal year 2016, ICE removed 240,255 aliens to 186 countries.¹¹⁹ Each country has its unique requirements for proof of birth, identity, and citizenship.

Sometimes obtaining a travel document is impossible. What then? Prior to 2001, the government took the position that the removal statute permitted it to hold aliens indefinitely because the statute did not place a “limit on the length of time beyond the removal period that an alien who falls within one of the § 1231(a)(6) categories may be detained.”¹²⁰ In *Zadvydas v. Davis*, the Supreme Court addressed the post-removal-order statute in a case involving two aliens with substantial criminal records who had been

¹¹⁰ 8 U.S.C. § 1226a.

¹¹¹ *Id.* § 1226a(a).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* § 1226a(a)(6).

¹¹⁵ *Id.* § 1226a(b).

¹¹⁶ See *Demore v. Kim*, 538 U.S. 510, 513 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

¹¹⁷ 8 U.S.C. § 1231(a)(1)(A).

¹¹⁸ *Id.* § 1231(a)(2).

¹¹⁹ *Fiscal Year 2016 ICE Enforcement and Removal Operations Report*, U.S. IMMIGR. & CUSTOMS ENF’T (last visited May 12, 2017).

¹²⁰ *Zadvydas*, 533 U.S. at 689.

held in custody significantly beyond the removal period (seven and two years) and who had no country willing to accept them. The Supreme Court held that the post-removal-order statute did not authorize the detention of aliens indefinitely beyond the removal period but instead is limited to “a period reasonably necessary to bring about that alien’s removal from the United States.”¹²¹ The Court held that the test was whether the alien’s removal was “reasonably foreseeable.”¹²² If removal was not reasonably foreseeable, then continued detention would be unreasonable.¹²³

To provide for the “uniform administration in the federal courts” the Court recognized that detention for up to six months after entry of a final removal order is “presumptively reasonable.”¹²⁴ After six months, if an alien can meet the burden of providing “good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,” the government must rebut the alien’s showing in order to continue to detain the alien.¹²⁵ In cases where a significant likelihood of removal exists in the reasonably foreseeable future, the Supreme Court’s decision does not curtail the government’s authority to detain an alien under section 1231(a)(6) of the Act beyond the six-month period.¹²⁶ What counts as the “reasonably foreseeable future” in this context is a sliding scale that shrinks as the period of post removal confinement grows.¹²⁷

The *Zadvydas* decision involved only aliens admitted to the United States. In January 2005, the Supreme Court, in *Clark v. Martinez*, extended the standard announced in *Zadvydas* to inadmissible aliens, such as Mariel Cubans.¹²⁸ Aliens under final orders of removal, even if they have never been formally admitted to the United States, must be released after six months of detention if they can prove that no significant likelihood exists that they will be removed in the reasonably foreseeable future.

VII. Implementation of *Zadvydas* and Post-Removal Order Review Process

Zadvydas spawned a spate of habeas litigation across the country with detainees seeking release because they believed they could prove that their removal was not reasonably foreseeable. Most of the issues that arise in this litigation focus on whether removal is significantly likely in the reasonably foreseeable future and also focus on the cooperation (or lack thereof) of the alien in the removal process.

A. Statutory and Regulatory Scheme

The removal period begins on the latest of the following:

- (i) The date the order of removal becomes administratively final.
- (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order.
- (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.¹²⁹

The regulation under which DHS makes its detention decisions is found at [8 C.F.R. § 241.4](#). That regulation was promulgated “to comply with the constitutional concerns illuminated in *Zadvydas*” and

¹²¹ *Id.* at 689.

¹²² *Id.* at 699–700.

¹²³ *Id.*

¹²⁴ *Id.* at 701.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Clark v. Martinez*, 543 U.S. 371 (2005).

¹²⁹ 8 U.S.C. § 1231(a)(1)(B).

“provide necessary procedural safeguards to ensure the detention of an alien beyond the removal period comports with due process requirements.”¹³⁰

Regulations provide for an initial removal period of ninety days, after which the detainee receives a post-order custody review (POCR). The ninety-day POCR essentially considers three criteria: (1) flight risk—whether the alien is likely to abscond if released, based on the alien’s cooperation with the removal process and on ties to the community, such as family and employment prospects; (2) danger to community—whether the alien poses a danger to the general public, based on criminal history, recidivism, and disciplinary record while in prison or ICE custody; and (3) likelihood of obtaining travel documents—whether travel documents appear forthcoming or have already been obtained, making removal imminent.

If the alien is not released or removed, is cooperating with the removal process, and has not obtained a stay of removal from the court, the second review in the POCR process is conducted as soon as possible after 180 days have elapsed from the final order of removal. The 180-day review considers whether it is reasonable to believe that travel documents can be obtained, given the federal government’s efforts, the receiving country’s willingness to accept the alien, and other factors for consideration. The regulations require the ICE’s Headquarters Custody Determination Unit to do the following:

[C]onsider all the facts of the case including, but not limited to, the history of the alien’s efforts to comply with the order of removal, the history of [ICE]’s efforts to remove aliens to the country in question or to third countries, including the ongoing nature of [ICE]’s efforts to remove this alien and the alien’s assistance with those efforts, the reasonably foreseeable results of those efforts, and the views of the Department of State regarding the prospects for removal of aliens to the country or countries in question. Where [ICE] is continuing its efforts to remove the alien, there is no presumptive period of time within which the alien’s removal must be accomplished, but the prospects for the timeliness of removal must be reasonable under the circumstances.¹³¹

Two conditions can extend detention indefinitely, essentially stopping the POCR process during the 180-day removal period: (1) a court-granted stay of removal pending judicial review; or (2) an alien’s failure to comply with the government’s removal efforts. Aliens with a stay of removal must receive a review from ICE Detention and Removal Operations (DRO) at ninety days and annually thereafter. Aliens who fail to comply with the government’s efforts to secure their removal must receive regular warnings from ICE DRO of the consequences of their actions, but they do not need to receive a review of continued detention.¹³²

B. Significant Likelihood of Removal in the Reasonably Foreseeable Future

Most of the cases in this area consist of claims by aliens that they are not likely to be removed in the reasonably foreseeable future. No bright-line test exists for measuring the “reasonable time” limitation engrafted onto the post-order removal statute.¹³³

Aliens often rely on the mere passage of time without the procurement of their travel documents as the basis for their *Zadvydas* claims. It is clear from the case law that exceeding the six-month period is not enough.¹³⁴ Federal courts disagree, however, as to the weight they will assess to the length of the

¹³⁰ [Bonitto v. Bureau of Immigration & Customs Enf’t](#), 547 F. Supp. 2d 747, 757 (S.D. Tex. 2008).

¹³¹ 8 C.F.R. § 241.13(f) (2017).

¹³² *Id.*

¹³³ [Ly v. Hansen](#), 351 F.3d 263, 271 (6th Cir. 2003) (stating that “courts must examine the facts of each case . . . to determine whether there has been unreasonable delay in concluding removal proceedings”).

¹³⁴ [Irving v. Lynch](#), 2016 WL 231381 (W.D.N.Y. 2016).

post-order removal period.¹³⁵

Many considerations come into play in deciding whether removal meets the *Zadvydas* test. The strongest case for the alien is when the removal country refuses to accept the alien.¹³⁶ Unless there is a viable, legally recognizable alternative country of removal, such an alien must be released once the ninety-day period has expired. More typically, however, litigation in this area focuses on the subtleties of the travel document process. Factors include the existence of a repatriation agreement between the United States and the removal country, issuance of travel documents from the removal country to the United States in the past, and a lack of any indication from the removal country that it will not accept the alien.¹³⁷

C. Alien Non-Cooperation

Zadvydas habeas litigation can create a dilemma for the alien. If the alien seeks to be released from custody and to remain in the United States (at least temporarily), the alien has to cooperate fully with attempts to do exactly what the alien does not want—removal from the United States. Courts have consistently held that attempts to obstruct the removal process justify the denial of habeas relief. This includes a failure to make timely application for a travel document,¹³⁸ failure to board a return flight,¹³⁹ filing meritless and vexatious litigation,¹⁴⁰ and providing false identity and entry information to immigration authorities.¹⁴¹ These cases can be contrasted with those in which courts have not found obstruction with the process, such as when an alien recanted a prior misrepresentation,¹⁴² made truthful statements on the alien's intent to file another court action,¹⁴³ or made statements to native country officials that did not result in the denial of a travel document.¹⁴⁴

Prior to the government's suspending the removal period, the alien must have: (1) been served

¹³⁵ *Nasrallah v. Quarantillo*, No. Civ.A. 06-527 (FSH), 2006 WL 1540807, at *4 (D.N.J. May 31, 2006) (collecting cases); *Fahim v. Ashcroft*, 227 F. Supp. 2d 1359, 1366 (N.D. Ga. 2002) (recognizing that “the mere fact that the Egyptian government has taken its time in responding to the INS request for travel documents does not mean that it will not do so in the future.”).

¹³⁶ *Diouf v. Mukasey*, 542 F.3d 1222, 1233 (9th Cir. 2008) (detention becomes indefinite if, for example, the country designated in the removal order refuses to accept the alien, or if removal is barred by the laws of this country).

¹³⁷ *Mulla v. Adducci*, 178 F. Supp. 3d 573, 576–577 (E.D. Mich. 2016).

¹³⁸ 8 C.F.R. 241.4(g)(5)(i) (2017).

¹³⁹ *Linares v. Dep't of Homeland Sec.*, 598 F. App'x 885, 887 (11th Cir. 2015); *Patel v. Cole*, No. L:14-cv-00779, 2015 WL 893030, at *2 (W.D. La. Feb. 27, 2015); *Kallon v. Holder*, No. 14-651, 2014 WL 5343307, at *4 (D.N.J. Oct. 20, 2014); (denying habeas petition where, “on two separate occasions,” the alien “refused to board the plane”); *Kirabira v. Mukasey*, No. 3:08-cv-0921, 2008 WL 4945642, at *1 (N.D. Tex. Nov. 18, 2008) (denying habeas petition where, due to the alien's “disruptive behavior ... the flight crew did not permit him to board the plane”); *see also Djokic v. Holder*, No. 11-cv-14792, 2011 WL 5599409, at *2 (E.D. Mich. Nov. 17, 2011).

¹⁴⁰ *Linares*, 598 F. App'x at 887 n.2 (affirming dismissal of a habeas petition where the alien “used every litigation tool at his disposal to prevent his removal from the United States” by filing “numerous actions” across the country); *Mattete v. Loiselle*, No. 2:06CV652, 2007 WL 3223304, at *6 (E.D. Va. Oct. 26, 2007) (stating that the alien's “pursuit of every available legal avenue to remain in the United States, taken to the point of noncompliance with the removal process” supports continued detention).

¹⁴¹ *Pelich v. INS*, 329 F.3d 1057, 1059 (9th Cir. 2003); *Powell v. Ashcroft*, 194 F. Supp. 2d 209, 210 (E.D.N.Y. 2002).

¹⁴² *Clark v. Ashcroft*, No. 03-3320, 2003 WL 22351953, at *3–4 (E.D. Pa. Sept. 16, 2003).

¹⁴³ *Rajigah v. Conway*, 268 F. Supp. 2d 159, 165–66 (E.D.N.Y. 2003) (finding no bad faith failure to cooperate where alien made truthful statements to Guyanese ambassador regarding his intent to file another court action).

¹⁴⁴ *Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 51–53 (D.D.C. 2002) (deciding that alien's statements to Liberian officials that he did not wish to return to Liberia did not amount to bad faith failure to cooperate because it was not the reason for failure to issue travel documents; instead, it was their concern for his lack of ties to that country).

with a notice of what the alien is required to do; (2) been given the opportunity to comply; and (3) subsequently “failed to comply.”¹⁴⁵

VIII. Special Circumstances—8 C.F.R. § 241.14

In *Zadvydas*, the Supreme Court discussed the possibility that individuals could be held longer than the presumptively reasonable period of six months if the alien is “specially dangerous.”¹⁴⁶ The Court noted that it had upheld preventive detention with strong procedural protections and required that the “dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.”¹⁴⁷

To implement *Zadvydas*, ICE established regulations setting forth an elaborate structure to be followed to continue to detain an alien whose removal is not significantly likely to occur in the reasonably foreseeable future.¹⁴⁸ Those ICE regulations outline four categories of special circumstances that permit detention beyond 180 days even if there is no significant likelihood that travel documents can be obtained in the reasonably foreseeable future: (1) aliens with a highly contagious disease who pose a threat to public safety; (2) aliens detained on account of serious adverse foreign policy consequences of release; (3) aliens detained on account of security or terrorism concerns; and (4) aliens determined to be specially dangerous, i.e., criminals whose violent behavior is due to a mental condition, who are likely to engage in acts of violence in the future, and for whom no condition of release can ensure the safety of the public. Certifying that an alien meets one of these criteria requires substantial factual support and the concurrence of senior government officials or, for “specially dangerous” aliens, an immigration judge.¹⁴⁹

However, some courts have found the regulation invalid and limited the government’s authority to detain an alien indefinitely or for a prolonged period after an order of removal has been entered.¹⁵⁰ The Tenth Circuit has deferred to the agency’s interpretation of the regulation,¹⁵¹ but the Ninth Circuit has held that aliens cannot be detained for a prolonged period without a bond hearing to determine whether they are “a flight risk or will be a danger to the community.”¹⁵²

The terrorism aspect of this regulatory scheme is rarely used and is probably superfluous. As noted above, section 1226a includes a provision that provides for the indefinite detention, for six months

¹⁴⁵ 8 C.F.R. § 241.4(g)(5) (2017).

¹⁴⁶ 533 U.S. 678, 691 (2001).

¹⁴⁷ *Id.*

¹⁴⁸ 8 C.F.R. § 241.14.

¹⁴⁹ *Id.*

¹⁵⁰ See e.g., *Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008); *Thai v. Ashcroft*, 366 F.3d 790, 798–99 (9th Cir. 2004).

¹⁵¹ See *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008).

¹⁵² See *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011) (quoting *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 951 (9th Cir. 2008)).

at a time, of a person whose removal is not reasonably foreseeable and who has been certified by the Attorney General as a national security threat or as someone involved in terrorist activities.¹⁵³

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¹⁵³ 8 U.S.C. § 1226a(a)(6) (2012); USA PATRIOT Act § 412(a), Pub. L. No. 107-56, 115 Stat. 350–51 (2001).

Defending Agency Immigration Fraud Adjudications

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I. Introduction

*[A]n unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated.*¹

The federal government is responsible for ensuring that persons eligible for immigration benefits receive them in a timely manner while at the same time ensuring that aliens ineligible for such benefits do not obtain them through fraudulent means, in the absence of lawful entitlement. This article addresses two broad categories of immigration fraud: benefit application fraud and document fraud.²

To successfully defend such cases in federal court, it is essential to understand the nature of fraud schemes, which largely turn on misrepresentation related to underlying eligibility for an immigration benefit as well as the individual's justification for committing such unlawful acts. As Judge Kozinski keenly observed, immigration fraud is so pervasive—a “deplorable state of affairs”—because the benefit is disproportionately high relative to the low risk and repercussions of being caught.³ This article will

¹ [Angov v. Lynch](#), 788 F.3d 893, 901 (9th Cir. 2015) (Kozinski, J.), *cert. denied*, 136 S. Ct. 896 (2016).

² Fraud is “[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.” *Fraud*, BLACK’S LAW DICTIONARY (10th ed. 2014).

³ “The schizophrenic way we administer our immigration laws creates an environment where lying and forgery are difficult to disprove, richly rewarded if successful and rarely punished if unsuccessful. This toxic combination creates a moral hazard to which many . . . applicants fall prey. First, the reward: the opportunity to be lawfully admitted into the United States. Those born with U.S. citizenship cannot imagine what this is worth to the world’s poor and oppressed billions, most of whom would come here tomorrow if they could. Gaining a lawful foothold in

serve as a roadmap for identifying immigration fraud and a guide for defending agency fraud adjudications and protecting the integrity of our immigration system.

II. Fraud and Misrepresentation in Immigration Cases

Certain civil immigration cases litigated in federal district courts require the court to conduct judicial fact-finding.⁴ The three most common of these cases are reviews of agency denials of naturalization applications pursuant to [8 U.S.C. § 1421\(c\)](#), declarations of citizenship pursuant to [8 U.S.C. § 1503](#), and actions to revoke a naturalized person's U.S. citizenship pursuant to [8 U.S.C. § 1451](#).⁵ A *de novo* review by the district court is required in both section 1421(c) cases⁶ and section 1503 cases.⁷

In an action to revoke naturalization, the government's evidence must be "clear, unequivocal, , convincing and not leave the issue in doubt," after the court carefully examines that evidence.⁸ In each of these cases, the government's argument requires the opposing party be ineligible for the benefit at issue and the government present evidence to support that position. Because the opposing party's position that he or she is entitled to the benefit at issue is frequently based on fraud or a misrepresentation, the government's evidence often requires establishing fraud or the misrepresentation.

The Administrative Procedure Act (APA) governs the review of agency action where a person has suffered a "legal wrong" or has been "adversely affected or aggrieved" by agency action.⁹ While the APA does not apply to removal hearings,¹⁰ it is used to challenge a variety of immigration agency actions, particularly the adjudication decisions made on both immigrant and non-immigrant applications and petitions. The most common of these cases are agency denials of family and employment-based petitions and adjustment of status applications.

Under the APA, a court may hold unlawful and set aside an agency action only if it finds the

America is an incalculable benefit. It sets an immigrant on the path to a peaceful life in a free society, economic prosperity, citizenship and the opportunity to bring family members in due course. A prize like this is worth a great deal of expense and risk. Telling an elaborate lie, and coming up with forged documents and mendacious witnesses to back it up, is nothing at all when the stakes are so high." *Angov*, 788 F.3d at 901.

⁴ Cf. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001) (finding that absent "very unusual circumstances" courts in APA cases do not take testimony and instead reviews the agency's decision).

⁵ Whereas section 1421(c) and section 1503 cases are initiated by plaintiffs against the United States and its agencies claiming a right to an immigration benefit, denaturalization actions are affirmative cases brought by the United States to revoke citizenship that the naturalized person *did not* have a right to at the time of the grant. See Anthony D. Bianco, et al., *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, U.S. ATTORNEYS' BULL., July 2017, at 4.

⁶ Section 1421(c) provides:

A person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this Title, may seek review of such denial before the United States district court for the district in which such person resides *Such review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application.*

[8 U.S.C. § 1421\(c\)](#) (2012) (emphasis added).

⁷ See *Mathin v. Kerry*, 782 F.3d 804, 805 (7th Cir. 2015); *Hizam v. Kerry*, 747 F.3d 102, 108 (2d Cir. 2014); *Richards v. Sec'y of State*, 752 F.2d 1413, 1417 (9th Cir. 1985); *Delmore v. Brownell*, 236 F.2d 598, 601 n.1 (3d Cir. 1956); *Patel v. Rice*, 403 F. Supp. 2d 560, 562 (N.D. Tex. 2005), *aff'd*, 224 F. App'x 414 (5th Cir. 2007).

⁸ *Fedorenko v. United States*, 449 U.S. 490, 505 (1981); see also *Costello v. United States*, 365 U.S. 265, 272 (1961).

⁹ [5 U.S.C. § 702](#) (2012). The APA is a limited avenue for plaintiffs. A claim under the APA may only be for "final" agency action, and only for "which there is no other adequate remedy in a court." [§ 704](#).

¹⁰ *Ardestani v. INS*, 502 U.S. 129, 134–35 (1991); *Marcello v. Bonds*, 349 U.S. 302, 305–10 (1955).

action to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”¹¹ This standard is “exceedingly deferential.”¹² In APA review cases, the government is tasked to demonstrate that the record before the agency establishes a “rational connection between the facts found [by the agency] and the choice made.”¹³ A court may reverse agency action only if “the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise.”¹⁴ If the court can discern a “rational basis” for the agency’s “treatment of the evidence,” that is sufficient; “the ‘arbitrary and capricious’ test does not require more.”¹⁵ Administrative decisions “should be set aside in this context . . . only for substantial procedural or substantive reasons as mandated by statute . . . not simply because the court is unhappy with the result reached.”¹⁶ The upshot is that the reviewing court has “very limited discretion to reverse an agency decision.”¹⁷

The arbitrary and capricious standard affords its “greatest deference” when an agency exercises its “special competence” in the subject matter committed to its regulation.¹⁸ Notably, the Homeland Security Act of 2002¹⁹ provides that “judicial deference [is owed] to regulations, adjudications, interpretations, orders, decisions, judgments, or any other actions of the Secretary of Homeland Security or the Attorney General.”²⁰

This deferential review is necessarily based on the administrative record before the agency at the time the agency’s decision was made.²¹ When an agency’s decision is based on fraud, a common response by the government is that the evidence before the agency established a rational connection to the applicable law.

In 8 U.S.C. §§ 1421(c), 1451, and 1503 cases, the government’s case will most often require that it build a record in litigation to support its argument that the individual is not entitled to a finding of U.S. citizenship. While section 1503 and sections 1421(c) and 1451 naturalization cases all involve issues of U.S. citizenship, there are different requirements for a person claiming U.S. citizenship under 8 U.S.C. § 1503 than for a person claiming eligibility to naturalize. It is the requirements of each statute that provide an otherwise unqualified opposing party the opportunity to put forth fraudulent evidence to obtain the benefit of U.S. citizenship in contravention of the law.

¹¹ 5 U.S.C. § 706(2)(A); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng’rs*, 781 F.3d 1271, 1288 (11th Cir. 2015).

¹² *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996); *see also* 5 U.S.C. §§ 702, 704.

¹³ *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 41 (1983).

¹⁴ *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (internal quotation marks omitted).

¹⁵ *See Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 290 (1974).

¹⁶ *N. Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1538–39 (11th Cir. 1990); *see also Defs. of Wildlife v. U.S. Dep’t of Navy*, 733 F.3d 1106, 1115 (11th Cir. 2013) (The court’s role is to ensure that the agency came to a rational conclusion, ‘not to conduct its own investigation and substitute its own judgment for the administrative agency’s decision.’” (citations omitted)); *FCC v. Fox*, 556 U.S. 502, 513–14 (2009) ([A] court is not to substitute its judgment for that of the agency” and should “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” (citations omitted)); *Leal v. Sec’y, U.S. Dep’t of Health & Human Servs.*, 620 F.3d 1280 (11th Cir. 2010).

¹⁷ *Warshauer v. Solis*, 577 F.3d 1330, 1335 (11th Cir. 2009) (quotation marks omitted); *see also Skinner*, 903 F.2d at 1538–39 ([T]he arbitrary and capricious standard gives an appellate court the least latitude in finding grounds for reversal.).

¹⁸ *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965).

¹⁹ Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

²⁰ 6 U.S.C. § 522 (2002).

²¹ *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) (judicial review under the APA is based on “the administrative record already in existence, not some new record made initially in the reviewing court.).

There are only two sources of citizenship: birth in the United States and naturalization.²² When a person claims to be a U.S. citizen but an agency denies that person some benefit to which U.S. citizens are entitled (such as a U.S. passport), that person can bring an action in district court for a declaration of citizenship under [8 U.S.C. § 1503](#).²³

A person claiming U.S. citizenship under a [section 1503](#) action bears the burden of proving—by a preponderance of the evidence—that he or she is qualified for citizenship.²⁴ Acquisition of U.S. citizenship at birth—versus acquisition of U.S. citizenship by naturalization—is the most common basis for a [section 1503](#) action because it often presents issues of proof. Citizenship acquisition at birth requires proof of birth in the United States or, for persons not born in the United States, proof of acquisition of citizenship at birth as provided by Acts of Congress.²⁵ Conversely, acquisition by naturalization results in a certificate of naturalization issued by the United States that affirms the alien was “entitled to be admitted as a citizen of the United States of America.”²⁶

Depending on the basis of acquisition, acquisition at birth for persons born outside of the United States requires proof of U.S. citizenship of at least one parent as well as proof of residence or presence in the United States prior to the acquirer’s birth.²⁷ Thus, a common source of fraud or misrepresentation in section 1503 cases includes evidence of birth in the United States—either for the claimant or for his or her parent through acquisition—with a fraudulent birth certificate, or misrepresentation of the residence or presence requirement of a parent.

The INA imposes several substantive requirements that an applicant must satisfy to naturalize. Unless otherwise specified, no person may be naturalized unless the applicant meets five somewhat overlapping residency requirements under [8 U.S.C. § 1427\(a\)](#) that are often the inquiry of fraud or misrepresentation. These include the a requirement of continuous residence within the United States for

²² [Miller v. Albright](#), 523 U.S. 420, 423 (1998).

²³ Section 1503 provides as follows:

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action . . . against the head of such department or independent agency for a judgment declaring him [or her] to be a national of the United States.

[8 U.S.C. § 1503\(a\)](#) (2012).

²⁴ See [De Vargas v. Brownell](#), 251 F.2d 869, 870 (5th Cir. 1958); [Liacakos v. Kennedy](#), 195 F. Supp. 630, 631 (D.D.C. 1961); see also [Sanchez-Martinez v. INS](#), 714 F.2d 72, 74 (9th Cir. 1983).

²⁵ [Miller](#), 523 U.S. at 423–24. For example, the Immigration and Nationality Act (INA) grants U.S. citizenship at birth to a person born outside of the United States of parents both of whom as citizens and one of whom has a residence in the United States. [8 U.S.C. § 1401\(c\)](#). The INA also grants citizenship at birth to a person born outside of the United States of parents one of whom is a citizen who has been physically present in the United States for five years, two of which were after the age of fourteen, prior to the birth. [8 U.S.C. § 1401\(g\)](#).

²⁶ An alien who naturalizes under the INA will receive a certificate of naturalization upon admission to citizenship. [8 U.S.C. § 1449](#). This certificate states that the applicant “had complied in all respects with all of the applicable provisions of the naturalization laws of the United States, and was entitled to be admitted as a citizen of the United States of America.”

²⁷ Note that the requirements of acquisition of U.S. citizenship have changed multiple times through the history of U.S. immigration and nationality laws. See, e.g., Nationality Act of 1940, Pub. L. No. 76-853, § 201(g), 54 Stat. 1137, 1139 (1940) (providing for nationality at birth to persons born outside of the United States between January 13, 1941, and December 24, 1952, to one U.S. citizen parent where the U.S. citizen parent had ten years’ residence in the United States, five of which were after attaining sixteen years of age).

five years²⁸ that takes place after the applicant's lawful admission for permanent residence,²⁹ and physical presence in the United States for periods totaling at least two-and-a-half years.³⁰

Certain classes of applicants may be eligible for naturalization based on a residence requirement shorter than the general five-year period. For example, applicants who obtained lawful permanent residence by marriage to a U.S. citizen are subject to a three-year residency requirement.³¹ For those applicants who obtained lawful permanent residence by marriage to a U.S. citizen, the shortened residency requirement is contingent on the applicant "living in marital union" with the U.S. citizen spouse during the three years immediately preceding the filing of the application.³² Similarly, applicants who served in the U.S. military for one year, and are either still serving or were honorably discharged within the last six months, do not need to meet a residency requirement.³³

An applicant must also establish good moral character for the period of the required continuous residence in the United States—commonly referred to as the "statutory period."³⁴ Unless the applicant is in one of the classes specified that requires a shorter period of continuous residence, the statutory period begins on the date five years immediately preceding the filing of a Form N-400, Application for Naturalization, and it runs until citizenship is granted.³⁵

The INA identifies classes of applicants who lack good moral character. In particular, in 8 U.S.C. § 1101(f), Congress enumerated eight categories that preclude a finding of good moral character. These include the following: certain offenses committed during the statutory period for which the person was convicted, or admits committing, as defined by certain grounds of inadmissibility under the INA (to include crimes involving moral turpitude and controlled substance violations);³⁶ giving false testimony for the purpose of obtaining any benefit(s) under the INA;³⁷ having been convicted, at any time, for an aggravated felony as defined by 8 U.S.C. § 1101(a)(43);³⁸ having engaged or assisted, at any time, in Nazi persecution, genocide, torture or extrajudicial killings, or severe violations of religious freedom.³⁹

In addition to the statutory grounds, the INA provides that an applicant may be found to lack the required good moral character even if he or she does not fit within any of the eight enumerated categories.⁴⁰ Under this residual or "catch-all" category, the determination is that the applicant does not possess good moral character because his or her behavior has not measured up to the "standards of the

²⁸ 8 U.S.C. § 1427(a)(1); 8 C.F.R. § 316.2(3).

²⁹ 8 U.S.C. § 1427(a)(1); 8 C.F.R. § 316.2(3). An applicant who acquires permanent resident status illegally, through fraud, misrepresentation, or mistake, is not, and never has been, a lawful permanent resident. *In re Longstaff*, 716 F.2d 1439, 1141 (5th Cir. 1983) (The term 'lawfully' denotes compliance with substantive legal requirements, not mere procedural regularity.); *Ramos-Torres v. Holder*, 637 F.3d 544, 548 (5th Cir. 2011) (If, as a matter of law, [the alien] was not eligible to receive LPR status [when he acquired it], then he could not, and therefore did not, lawfully acquire it) (emphasis and alterations in original). Thus, eligibility requires that the applicant have *lawfully* obtained permanent resident status, not merely that he obtained his permanent resident status.

³⁰ 8 U.S.C. § 1427(a)(1); 8 C.F.R. § 316.2(4).

³¹ 8 U.S.C. § 1430; 8 C.F.R. § 319.1.

³² 8 U.S.C. § 1430; 8 C.F.R. § 319.1.

³³ 8 U.S.C. § 1439; *see also* §§ 1440 (establishing more relaxed naturalization requirements for veterans who served during periods of military hostilities), 1440-1 (establishing more relaxed naturalization requirements for petitioners who die while on active duty service and apply posthumously).

³⁴ § 1427(a)(3).

³⁵ § 1427(a)(1).

³⁶ § 1101(f)(3).

³⁷ § 1101(f)(6).

³⁸ § 1101(f)(8).

³⁹ § 1101(f)(9).

⁴⁰ § 1101(f).

average citizen in the community of residence.”⁴¹

III. Reviewing the Record for Fraud

APA cases in which the agency has denied a benefit based on fraud are usually based on evidence in the record establishing marriage fraud or employment fraud. This section details why information that was fraudulently included in an immigration petition or application is relevant to the alien’s eligibility for the benefit and, further, why an applicant or petitioner may provide fraudulent information to obtain a benefit to which they are not otherwise entitled.

A. Marriage Fraud

Under 8 U.S.C. § 1154(a), a United States citizen may file a petition for an immigrant visa on behalf of his or her alien spouse by filing a Petition for Alien Relative on USCIS Form I-130.⁴² By filing a Form I-130, the citizen spouse (the “petitioner”) requests USCIS to classify his or her spouse (the “beneficiary”) as an “immediate relative” under the INA.⁴³ If USCIS approves the petitioner’s Form I-130, the beneficiary may apply for lawful permanent residence.⁴⁴

A Form I-130 has two purposes. First, a Form I-130 provides the agency with an opportunity to verify that the petitioner met his or her burden of showing a legal and valid relationship exists between the petitioner and the beneficiary.⁴⁵ Thus, the petitioner bears the burden to show—by a preponderance of the evidence—that the claimed spousal relationship exists.⁴⁶ This requires that the petitioner establish the marriage to the beneficiary is “bona fide,” that is, the spouses intended to establish a life together at the time the marriage was celebrated and did not enter the marriage for the purpose of evading immigration laws.⁴⁷ The agency may look at relevant conduct before and after the celebration of the marriage to determine whether the parties intended to establish a life together at the time of the marriage.⁴⁸

Second, a Form I-130 provides the agency with an opportunity to verify there are no legal impediments to the beneficiary’s classification. Importantly, approval is not a forgone conclusion, as section 1154(c) unequivocally bars USCIS from conferring spousal benefits if the alien has entered into a marriage to circumvent the immigration laws.⁴⁹

Thus, marriage fraud, including seeking permanent residence through a spousal visa petition based on a “sham” marriage, has lasting consequences on an alien’s immigration case. USCIS “will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and

⁴¹ 8 C.F.R. § 316.10(a)(2).

⁴² 8 U.S.C. § 1154(a); 8 C.F.R. § 204.1(a)(1) (2016).

⁴³ 8 C.F.R. § 204.1(a)(1).

⁴⁴ 8 U.S.C. § 1255(a).

⁴⁵ See *Agyeman v. INS*, 296 F.3d 871, 879 n.2 (9th Cir. 2002); *Park v. Gonzales*, 450 F. Supp. 2d 1153, 1156 (D. Or. 2006), *aff’d sub nom.*, *Park v. Mukasey*, 514 F.3d 1384 (9th Cir. 2008).

⁴⁶ *In re Pazandeh*, 19 I. & N. Dec. 884, 887 (BIA 1989).

⁴⁷ See *Agyeman*, 296 F.3d at 879 n.2; *Soriano*, 19 I. & N. Dec. 764, 765 (BIA 1988).

⁴⁸ *In re Soriano*, 19 I. & N. Dec. at 765 (citing *Lutwak v. United States*, 344 U.S. 604 (1953)).

⁴⁹ The statute provides:

Notwithstanding the provisions of subsection (b) of this section *no petition shall be approved if* (1) *the alien* has previously been accorded, or *has sought to be accorded*, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, *or* (2) the Attorney General has determined that the *alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.*

8 U.S.C. § 1154(c) (emphasis added).

probative evidence of such an attempt or conspiracy[.]”⁵⁰

Even if the current marriage between the petitioner and the beneficiary is bona fide, the agency is statutorily required to deny a Form I-130 filed on behalf of a beneficiary who previously entered into a marriage to evade immigration laws.⁵¹ To make a marriage fraud finding, the agency must have “substantial and probative evidence” in the alien’s file that the alien previously entered into, or attempted to enter into, a marriage for the purpose of evading the immigration laws.⁵² The primary test for a bona fide marriage under immigration law is whether, at the inception of the marriage, “the bride *and* groom intended to establish a life together.”⁵³

The conduct of the spouses after the marriage is also probative of their intent at the time of marriage.⁵⁴ If the marriage is no longer viable at the time of adjudication, the marriage can only support a visa petition if the marriage was valid at its inception and there has been no legal termination.⁵⁵ A couple’s separation is relevant to establishing the subjective intent of the parties at the time of their marriage and whether the marriage was entered into in good faith.⁵⁶ Additionally, USCIS may look at all relevant evidence in determining whether the beneficiary engaged in marriage fraud, including evidence originating from the agency’s prior dealings with the beneficiary.⁵⁷ The beneficiary does not need to have been prosecuted or convicted for any past marriage fraud, attempt, or conspiracy.⁵⁸

B. Employment Fraud

While the INA provides a wide array of non-immigrant visas for business personnel,⁵⁹ the “H” visa category for temporary workers, and particularly the “H-1B” status category for high-skilled workers, often stand out as the most controversial, as well as the most likely to involve fraud.⁶⁰ The H-1B visa was originally intended to allow U.S. employers to address shortages in the U.S.’s skilled labor workforce by temporarily hiring skilled foreign workers to fill positions for which U.S. employees with the needed skills cannot be obtained.⁶¹ As a result, the H-1B program is often abused by U.S. employers who use fraudulent means to hire moderately skilled foreign workers at lower wages instead of U.S. workers.

The H-1B visa category was born out of the 1990 Immigration Act (IMMACT),⁶² legislation, which significantly focused on employment-based immigration and championed the goal of “help[ing] American businesses hire highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found.”⁶³ The number of workers that may be issued H-1B non-immigrant visas to enter into the United States, or otherwise be authorized for H-1B employment, is

⁵⁰ 8 C.F.R. § 204.2(a)(1)(ii) (2017); *see In re McKee*, 17 I. & N. Dec. 332, 333 (BIA 1980).

⁵¹ 8 U.S.C. § 1154(c); *Virk v. INS*, 295 F.3d 1055, 1057 n.4 (9th Cir. 2002); *In re Tawfik*, 20 I. & N. Dec. 166, 167 (BIA 1990).

⁵² 8 C.F.R. § 204.2(a)(1)(ii).

⁵³ *In re Laureano*, 19 I. & N. Dec. 1, 2–3 (BIA 1983) (emphasis added); *see also Lutwak v. United States*, 344 U.S. 604, 611 (1953) (test is whether “the two parties have undertaken to establish a life together and assume certain duties and obligations”) (emphasis added).

⁵⁴ *Bark v. INS*, 511 F.2d 1200, 1202 (9th Cir. 1975).

⁵⁵ *Boromand*, 17 I. & N. Dec. 450 (BIA 1980).

⁵⁶ *McKee*, 17 I. & N. Dec. 332, 334 (BIA 1980) (citing *Bark*, 511 F.2d at 1200–02).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See* 8 U.S.C. § 1101(a)(15)(E), (I), (H), (L), (O), (P), (Q), (R).

⁶⁰ OIL-DCS has a specialized Labor and Employment Team with significant litigation expertise in this field.

⁶¹ *See American Competitiveness and Workforce Improvement Act of 1998*, Pub. L. No. 105-277, § 411(a)(A), 112 Stat. 2681-641, 2681-642 (1998), (current version at 8 U.S.C. § 1184 (2006)).

⁶² Immigration Act of 1990, Pub. L. No. 101-649, § 205(a), 104 Stat. 4978, 5019–22.

⁶³ Employment-Based Immigrants, 56 Fed. Reg. 60, 897 (Nov. 29, 1991).

capped at 65,000 new workers each fiscal year, plus an additional 20,000 “cap exempt” H-1B workers for persons who have earned a master’s degree (or higher) from a U.S. institution of higher education.⁶⁴ If USCIS approves an employer’s H-1B petition, DHS admits the foreign worker in H-1B status for an initial period of up to three years.⁶⁵ USCIS may extend a non-immigrant’s H-1B status for up to three more years for a total authorized stay in H-1B status of six years.⁶⁶

Under IMMACT, the H-1B classification was defined to include persons working in “specialty occupations.” A job is in a specialty occupation if it requires theoretical and practical application of a highly specialized body of knowledge as well as attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.⁶⁷ Additionally, to meet the requirements of performing in a specialty occupation, the intended H-1B non-immigrant will need the following:

1. Full state licensure if such is required for practice in the state of employment;
2. Completion of a U.S. bachelor’s degree or higher (or its foreign equivalent) in the specific specialty related field; or,
3. Education, training, or experience in the specialty equivalent to the completion of such degree.⁶⁸

To establish that a job qualifies as a specialty occupation under USCIS regulations, one or more of the following criteria must be met: (1) A bachelor’s degree (or higher), or its equivalent, is normally the minimum entry requirement for the employment position; (2) The degree requirement is common to the industry of employment, or, in the alternative, the position is so complex or unique that it can be performed only by an individual with a degree; (3) The employer normally requires a degree, or its equivalent, for the intended position; or, (4) The nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor’s degree (or higher).⁶⁹

The application process for H-1B non-immigrant visas begins with a U.S. employer filing a Labor Condition Application (LCA) with the Department of Labor (DOL).⁷⁰ Statutorily, the LCA must include the number of workers the petitioning employer seeks to be hired, each employee’s occupational classification, the prevailing wage (and method for determining it), as well as the actual wage rate.⁷¹ Employers are required to pay H-1B visa beneficiaries either the same wage paid to other employees with similar skills and qualifications, or the “prevailing wage” for that occupation and location, whichever is higher.⁷² Finally, the LCA must contain assertions by the employer that the position’s working conditions will not have an adverse effect on similar situated U.S. workers, and that no labor dispute or lockout exists at the place of employment.⁷³

Once DOL has certified the LCA, it may be used as the foundation of an H-1B petition, which the U.S. employer (H-1B Petitioner) files on behalf of the intended non-immigrant worker (H-1B beneficiary) with USCIS through Form I-129, Petition for a Nonimmigrant Worker.⁷⁴ For the principal beneficiary to qualify in one of the H categories, Form I-129 must be filed by a “U.S. Employer” at the USCIS service

⁶⁴ See 8 U.S.C. § 1184(g)(1)(A)(vii), (g)(5)(C).

⁶⁵ *Id.* § 1184(g)(4); 8 C.F.R. § 214.2(h)(9)(iii) (2017).

⁶⁶ 8 U.S.C. § 1184(g)(4); 8 C.F.R. § 214.2(h)(9)(iii).

⁶⁷ See 8 U.S.C. § 1184(i)(1).

⁶⁸ *Id.* § 1184(i)(2).

⁶⁹ 8 C.F.R. § 214.2(h)(4)(iii)(A).

⁷⁰ 8 U.S.C. § 1182(n); 8 C.F.R. § 214.2(h)(1)(ii)(B).

⁷¹ 8 U.S.C. § 1182(n)(1)(A)(i)(I)–(II).

⁷² *Id.*

⁷³ 8 U.S.C. § 1182(n)(1)(A)(ii), (n)(1)(B); see also *Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 192 (3d Cir. 2010) (explaining LCA requirements for H-1B petitions).

⁷⁴ See 8 C.F.R. §§ 214.2(h)(4)(iii)(B), 214.2(h)(2)(i)(A) (2017).

center with jurisdiction over the place of employment.⁷⁵ Further criteria governing the H-1B non-immigrant visa includes the establishment of an “employer-employee relationship” showing that the employer has the right to control the beneficiary’s work, including the ability to hire, fire, supervise and be responsible for the overall work performed for the duration of the Beneficiary’s H-1B period.⁷⁶ Finally, a major criterion for the H-1B visa requires the employer to pay all salaries and costs related to the H-1B employment.. This includes: that the employer pay the petition-stated wage to the employee within 30 days of the employee’s entry on duty pursuant to the statutory requirements,⁷⁷ that the employer pay the costs for the petition process,⁷⁸ that the employee’s wage be 100% of the prevailing wage,⁷⁹ and that the employer not “bench” an H-1B employee due to lack of available work.⁸⁰

Accordingly, the most common incidences of H-1B fraud relate to misrepresentations of the underlying eligibility for the non-immigrant visa. Specific examples of H-1B fraud indicators may include the following⁸¹:

- The H-1B worker is not or will not be paid the wage certified on the Labor Condition Application (LCA).
- There is a wage disparity between H-1B workers and other workers performing the same or similar duties, particularly to the detriment of U.S. workers.
- The H-1B worker is not performing the duties specified in the H-1B petition, including when the duties are at a higher level than the position description.
- The H-1B worker has less experience than U.S. workers in similar positions in the same company.
- The H-1B worker is not working in the intended location as certified on the LCA.

Upon receipt of a properly filed petition,⁸² USCIS stamps each petition with the date of arrival at the Service Center. After being sorted into potential “cap” and “cap-exempt” cases, the file is assigned to an adjudicator who determines whether the Petitioner has provided the requisite evidence to demonstrate a basis for H-1B eligibility and whether eligibility is demonstrated by a preponderance of the evidence.⁸³ In the case of insufficient evidence establishing eligibility, the adjudicator may issue a Notice of Intent to Deny (NOID),⁸⁴ request additional evidence from the petitioner by means of a Request for Evidence

⁷⁵ See *id.* § 214.2(h)(2)(i). “U.S. Employer” is defined at 8 CFR § 214.2(h)(4)(ii). USCIS’s Vermont and California Service Centers adjudicate and oversee the H-1B petition process.

⁷⁶ A.F.M. 31.3(g)(15); A.F.M. 33.3(g)(15)(B)(1); see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

⁷⁷ 8 U.S.C. § 1182(n)(2)(C) (2012).

⁷⁸ 20 C.F.R. § 655.731(c)(10).

⁷⁹ 8 U.S.C. § 1182(p)(3), (n)(1)(A)(i)(II).

⁸⁰ *Id.* § 1182(n)(2)(C)(vii)(I)–(II).

⁸¹ *Combating Fraud and Abuse in the H-1B Visa Program*, U.S. CITIZENSHIP & IMMIGR. SERVICES (last accessed Apr. 13, 2017).

⁸² The regulations governing H-1B procedures specify the requisite materials needed to document eligibility for the H-1B petition. See 8 C.F.R. § 214.2(h)(2). A copy of the certified LCA must be submitted, as well as the following documentation (as applicable): degrees; evidence of experience; written contracts; education evaluations; affidavits of experts; translations; evaluations; and, licenses. See § 214.2(h)(4)(iv). Petitions that are improperly filed (e.g., submitted without the proper signatures or required fees) are rejected by the respective USCIS service center that receives the petition. Rejected petitions are returned to the petitioner with any submitted fees and will not retain a filing date. See § 103.2(a)(7).

⁸³ U.S. Citizenship & Immigration Servs., PM-602-0085, *Policy Memorandum on Requests for Evidence and Notices of Intent to Deny 2* (June 3, 2013).

⁸⁴ A NOID is also required when derogatory information is uncovered by the government that is unknown to the individual. See 8 C.F.R. § 103.2(b)(16). It is also appropriate where there is little or no evidence submitted or the

(RFE),⁸⁵ or issue a notice of an investigation for fraud and misrepresentation.⁸⁶ If the employer does not respond to the request within a set period, USCIS will deny the petition. Likewise, if the totality of the evidence does “not meet the applicable standard of proof” and there “is no possibility that additional information or explanation will cure the deficiency,” the petition should be denied.⁸⁷

Under USCIS guidelines, RFEs should not be issued if there is suspected fraud.⁸⁸ Rather, suspected fraud uncovered in the H-1B adjudications process is referred to USCIS’s Fraud Detection and National Security Division (FDNS),⁸⁹ a subcomponent of USCIS that conducts investigations into petition fraud and national security issues. FDNS reserves the right to “verify by any means determined appropriate” the supporting evidence submitted with the I-129 petition, including on-site inspections, which may include interviews with organizational officials and review of the petitioning organization’s records “relating to compliance with immigration laws and regulations”.⁹⁰ FDNS has principally relied on these site visits—conducted through the organization’s Administrative Site Visit and Verification Program (ASVVP) along with its use of the Validation Instrument for Business Enterprises (VIBE)⁹¹ to address issues of fraud, particularly in H-1B cases.⁹²

IV. Defending Fraud Cases Arising in the I-130 Petition

A. Substantial and Probative Evidence

The petitioner’s “preponderance of the evidence” standard is distinct from the “substantial and probative” evidentiary standard that USCIS has to meet to establish a “sham marriage” finding. If USCIS finds that it should deny a visa petition under section 1154(c), and substantial and probative evidence supports that finding, the burden then shifts back to the petitioner to rebut the fraud finding and show that the prior marriage was bona fide.⁹³ Evidence that the petitioner and beneficiary never shared a residence together and inconsistencies between the statements of the petitioner and beneficiary are significant and may support USCIS’s finding of marriage fraud.⁹⁴ At all times, the petitioner has the burden of proving

individual has met the threshold eligibility requirements but has not established that he or she warrants a favorable exercise of discretion. *See* PM-602-0085, *supra* note 83, at 3.

⁸⁵ If not all required initial evidence has been submitted or the petition, under the totality of the evidence submitted, does not meet the applicable standard of proof, the offer should issue an RFE. *Id.* at 2. An officer may issue a follow up RFE if the previous RFE “opens up new lines of inquiry.” *Id.* at 3. However, “officers must include in a single RFE all the additional evidence they anticipate having to request.” *Id.*

⁸⁶ *See* 66 Fed. Reg. 29, 682 (June 1, 2001).

⁸⁷ PM-602-0085, *supra* note 3.

⁸⁸ Memorandum from Fujie O. Ohata, Dir., Serv. Ctr. Operations, U.S. Citizenship & Immigration Servs., to Serv. Ctr. Dirs., U.S. Citizenship & Immigration Servs. 2 (Jan. 6, 2005).

⁸⁹ *Id.*

⁹⁰ 8 C.F.R. § 214.2(r)(16) (2017).

⁹¹ VIBE utilizes Dun & Bradstreet and other sources to validate whether an Immigrant Visa/Non-Immigrant Visa employer/organization petitioner on an I-129 exists and/or is doing (or authorized) to do business. VIBE provides USCIS officers with information about the petitioner company including: business activities, financial standing, number of employees, affiliate companies, type of office, type of legal entity, company executives, date of establishment of the business, and current physical address. If the information does not appear in Dun & Bradstreet or if it does not appear correctly, USCIS will typically issue an RFE requiring the employer to provide information validating its business.

⁹² Memorandum, FDNS, USCIS, *Revised H-1B Anti-Fraud Operational Guidance* (June 3, 2013).

⁹³ *See In re Tawfik*, 20 I. & N. Dec. 166, 167 (BIA 1990); *In re Kahy*, 19 I. & N. Dec. 803, 806–07 (BIA 1988); 8 C.F.R. § 204.2(a)(1)(ii).

⁹⁴ *See In re Phillis*, 15 I. & N. Dec. 385, 387 (BIA 1975).

the intended beneficiary is eligible for benefits.⁹⁵

A marriage-based visa petition must be denied if there is substantial and probative evidence that: (1) the beneficiary “has previously been accorded, or has sought to be accorded,” immediate relative status based on a marriage “entered into for the purpose of evading the immigration laws,” or (2) the beneficiary “has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.”⁹⁶ The government bears the burden of showing this with substantial and probative evidence.⁹⁷ However, once that showing is made, the burden shifts back to the petitioner to establish the bona fides of the marriage.⁹⁸

A decision to deny or revoke a visa petition because the beneficiary entered into a prior marriage for the primary purpose of obtaining immigration benefits can only be sustained if there is substantial and probative evidence in the alien’s file that the prior marriage was entered into for such purposes.⁹⁹ “Substantial and probative evidence” is evidence that would permit a reasonable fact-finder to conclude that a given factual claim is true.¹⁰⁰ The agency’s marriage fraud finding is supported by substantial evidence if the record shows the couple did not intend to establish a life together when they entered the marriage.¹⁰¹ However, reasonable inferences, standing alone, do not amount to substantial and probative evidence.¹⁰²

In general, when a prior marriage fraud finding is used to deny a subsequent alien relative petition, the reviewing body cannot rely solely on the prior finding but must consider, *de novo*, the evidence in the record.¹⁰³ In determining whether or not the beneficiary has previously engaged in marriage fraud, “the district director may rely on *any relevant evidence*, including evidence having its origin in prior Service proceedings involving the beneficiary, or in court proceedings involving the prior marriage.”¹⁰⁴

As explained, the agency’s decision can be set aside only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.¹⁰⁵ Moreover, the agency’s factual determination must be affirmed unless the evidence compels a contrary conclusion.¹⁰⁶ Even “[i]f the evidence is susceptible of more than one rational interpretation,” a court must uphold the agency’s findings if a reasonable mind might accept the evidence as adequate to support the findings.¹⁰⁷ While a court conducting APA judicial review may not resolve factual questions, the court can determine “whether or not as a matter of law the

⁹⁵ See *In re Brantigan*, 11 I. & N. Dec. 493 (BIA 1966) (In visa petition proceedings, the burden of proof to establish eligibility for the benefits sought rests with the petitioner.); see also 8 U.S.C. § 1361 (2012).

⁹⁶ 8 U.S.C. § 1154(c); 8 C.F.R. § 204.2(a)(1)(ii).

⁹⁷ 8 C.F.R. § 204.2(a)(1)(ii); see also *Abufayad v. Holder*, 632 F.3d 623, 631 (9th Cir. 2011).

⁹⁸ *In re Kahy*, 19 I. & N. Dec. 803, 806–07 (B.I.A. 1988) ([W]here there is evidence in the record to indicate that the beneficiary has been an active participant in a marriage fraud conspiracy, the burden shifts to the petitioner to establish that the beneficiary did not seek status based on a prior fraudulent marriage.); *Zemeka v. Holder*, 989 F. Supp. 2d 122, 131 (D.D.C. 2013) (so long as the government has produced more than a “scintilla of evidence” of suspected fraud, the burden shifts back to petitioner to rebut the evidence of fraud).

⁹⁹ See *In re Tawfik*, 20 I. & N. Dec. 166 (BIA 1990).

¹⁰⁰ See *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

¹⁰¹ *Baria v. Reno*, 180 F.3d 1111, 1113–14 (9th Cir. 1999).

¹⁰² *Tawfik*, 20 I. & N. Dec. at 168.

¹⁰³ See *Tawfik*, 20 I. & N. at 168 (holding that the agency should reach an independent conclusion of marriage fraud from the evidence originating in prior proceedings that indicate that the beneficiary had committed marriage fraud).

¹⁰⁴ *Id.* at 168 (emphasis added).

¹⁰⁵ *Family Inc. v. U.S. Citizenship & Immigration Servs.*, 469 F.3d 1313, 1315 (9th Cir. 2006) (citing 5 U.S.C. § 706(2)(A)).

¹⁰⁶ *Id.*; *Nakamoto v. Ashcroft*, 363 F.3d 874, 883 (9th Cir. 2004).

¹⁰⁷ *Bear Lake Watch, Inc. v. F.E.R.C.*, 324 F.3d 1071, 1076 (9th Cir. 2003).

evidence in the administrative record permitted the agency to make the decision it did.”¹⁰⁸

B. Due Process Notice Issues

While section 204(a) of the INA creates the right to submit an I-130 visa petition on behalf of an alien spouse, it does not establish the right to an adjudicatory hearing.¹⁰⁹ The adjudication process does, however, provide the petitioner with sufficient notice and an opportunity to respond to adverse information in the record.¹¹⁰ If USCIS discovers information related to marriage fraud, the agency is required to issue a Notice of Intent to Deny (NOID) to the applicant.¹¹¹ The NOID “will be in writing and will specify the type of evidence required, and whether initial evidence or additional evidence is required, or the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond.”¹¹² The NOID thus informs the applicant of the derogatory information at issue and affords the applicant the “opportunity to rebut the information and present information in his/her own behalf before the decision is rendered[.]”¹¹³ After receiving a response to the NOID, USCIS determines whether the I-130 petition should be approved.¹¹⁴ In the case of an adverse decision, the petitioner can appeal to the Board of Immigration Appeals.¹¹⁵

The regulation at 8 C.F.R. § 103.2(b)(16) does not require USCIS to provide a petitioner with the original evidence underlying the derogatory information on which it intends to rely, nor does it require USCIS to provide documentary evidence of the information. Instead, it need only provide information sufficient to allow the petitioners to rebut the allegations. Specifically, section 103.2(b)(16)(i), requires only that the agency advise a petitioner of derogatory information on which it intends to base its decision *and* of which the petitioner is unaware.¹¹⁶ Moreover, section 103.2(b)(16)(ii) requires only that any decision be based on information disclosed to the petitioner. Neither provision requires USCIS to advise petitioner of or disclose information that is neither derogatory nor relied upon in its decision.¹¹⁷

The U.S. Court of Appeals for the Ninth Circuit altered the status quo of the due process requirements for I-130 adjudications when it decided *Ching v. Mayorkas*,¹¹⁸ finding that a protected property interest exists in the adjudication of a petitioner’s I-130 petition and, further, that the petitioner’s Fifth Amendment procedural due process rights were violated when he was not given the opportunity to cross-examine the beneficiary’s first husband regarding sworn statements that his prior marriage to the

¹⁰⁸ *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (quoting *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985)).

¹⁰⁹ See 8 U.S.C. § 1154(a)(1)(A)(i), (a)(1)(B)(i)(I); 8 C.F.R. § 204.1(a).

¹¹⁰ See 8 C.F.R. § 103.2(b)(8)(iv) (2016).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* § 103.2(b)(16)(i), USCIS’s regulation provides that:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered[.]

8 C.F.R. § 103.2(b)(16).

¹¹⁴ 6 U.S.C. § 271(b) (2016); 8 C.F.R. §§ 204.1(d), (e), 204.2(a)(1)(ii).

¹¹⁵ 8 C.F.R. § 1204.1.

¹¹⁶ *Id.* § 103.2(b)(16).

¹¹⁷ Notably, however, in *Ghafoori v. Napolitano*, the U.S. District Court for the Northern District of California held that the agency violated 8 C.F.R. § 103.2(b)(16)(ii) “by deciding [a] Plaintiff’s I-730 petition based on an evaluation of x-rays that were not disclosed to Plaintiff.” 713 F. Supp. 2d 871 (N.D. Cal. 2010). The court remanded the matter with orders that the I-730 petition be reconsidered and a new of statutory eligibility determination be made based only on evidence disclosed to the Plaintiff.

¹¹⁸ 725 F.3d 1149 (9th Cir. 2013).

beneficiary was fraudulent.¹¹⁹

Specifically, *Ching* determined that I-130 petitioners hold a property right in the adjudication of their petition because applicants meeting the statutory requirements have a non-discretionary entitlement, not just a unilateral expectation, to the petition's approval.¹²⁰ After finding a property right, the court assessed whether additional process was due. Citing *Goldberg v. Kelly*,¹²¹ the court held that "[a]n opportunity to confront and cross examine 'is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.'"¹²²

Ching was the first case of its kind, fashioning a new constitutional protection in the context of visa adjudications of an "[evidentiary] hearing with an opportunity . . . to confront the witnesses against her."¹²³ As a result, many litigants have tried to expand the scope of *Ching* by arguing that they, too, must be afforded a right to cross-examine an adverse witness prior to USCIS's denial of an I-130 under the marriage-fraud bar. Successful defense of these complaints demands a thorough analysis of the three part balancing test articulated in *Mathews v. Eldridge*, which identifies the specific dictates required for due process:

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.¹²⁴

To be clear, due process does not require USCIS to provide an adversarial hearing or the opportunity to cross examine witnesses when adjudicating I-130 petitions.¹²⁵ The existing I-130 visa adjudication process adequately protects against the erroneous deprivation of a visa petition, and additional safeguards provide minimal probative value.¹²⁶

USCIS's current I-130 adjudication process provides safeguards identical to those in *Mathews*,¹²⁷ namely the opportunity to be notified of derogatory information to be used in a possible denial—the

¹¹⁹ *Id.* at 1159.

¹²⁰ *Id.*

¹²¹ 397 U.S. 254, 269 (1970).

¹²² 725 F.3d at 1156, 1158 (internal citations omitted).

¹²³ *Id.*

¹²⁴ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹²⁵ To succeed on a procedural due process claim, Plaintiffs must show: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process. See *Shanks v. Dressel*, 540 F.3d 1082, 1090 (9th Cir. 2008). What constitutes lack of process can vary, as due process is "flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The procedural protections need not include a formal hearing or an opportunity to cross examine witnesses. See *Buckingham v. Sec'y of U.S. Dept. of Agr.*, 603 F.3d 1073, 1082–83 (9th Cir. 2010). What matters is that a person deprived of a liberty or property interest be given an opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 984 (9th Cir. 1998).

¹²⁶ The process is analogous to the process analyzed under the second prong of *Mathews*, where the Supreme Court held that the risk of an erroneous deprivation of a property interest in disability benefits was minimized through the disability recipient's "opportunity . . . to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions." *Mathews*, 424 U.S. at 346.

¹²⁷ In determining that additional procedural safeguards were unnecessary, the *Mathews* Court held that the Social Security Administration's procedures "enable[d] the recipient to 'mold' his argument to respond to the precise issues which the decision maker regards as crucial." *Id.*

NOID, and the opportunity to sufficiently rebut the derogatory information through a Request for Evidence (RFE). Thus, the procedures USCIS uses to adjudicate visa petitions provide petitioners with notice and an opportunity to respond, the traditional hallmarks of due process.¹²⁸ Consequently, these procedures have repeatedly been held constitutionally sufficient.¹²⁹

USCIS further fulfills its duty when it considers petitioners' submitted evidence, interviews them, issues written decisions on the petition based on the evidence in the record, and provides the parties with the opportunity to inspect the evidence in the record and/or appeal the decision.¹³⁰ Implementing and creating an evidentiary hearing to challenge witness' adverse statements offers no greater effect to the veracity of a petitioner's claim than a thorough RFE response would have accomplished.¹³¹

Reviewing the government's interest under the third *Mathews* factor,¹³² any additional procedures Plaintiffs request must be balanced against the additional financial and administrative burdens such procedures would impose on the government. While the government has a substantial interest in preventing marriage fraud and avoiding erroneous grants of benefits,¹³³ those interests must be balanced with the "significant public interest in allowing those who are legitimately married to receive the benefits entitled for them."¹³⁴

Since the essence of due process is the requirement that "a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it,"¹³⁵ it is only necessary that the procedures be tailored to "the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case."¹³⁶ When the value of granting additional process is low, there is no due process violation, even when a substantial private interest is at stake.¹³⁷ Even assuming,

¹²⁸ See, e.g., *United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2013) (Due process always requires, at a minimum, notice and an opportunity to respond.).

¹²⁹ See *Avitan v. Holder*, No. C-10-03288 JCS, 2011 WL 499956, at *7 (N.D. Cal. Feb. 8, 2011); *Dhillon v. Mayorkas*, No. C 10-0723 EMC, 2010 WL 3325630, at *4 (N.D. Cal. Aug. 20, 2010) (finding that an I-130 applicant has no right to cross examine former husband who claimed his prior marriage to an alien was fraudulent); *Garcia-Lopez v. Aytes*, No. C 09-0592 RS, 2010 WL 2991720, at *4 (N.D. Cal. July 28, 2010).

¹³⁰ See 8 C.F.R. § 103.2(b)(1), (16). USCIS's existing due process procedures through the use of the NOID and RFE allow for ample opportunities to rebut any adverse or derogatory information offered by ex-spouses, etc. If USCIS fails to give proper weight to the RFE materials submitted by petitioner, such action should, at most, be considered an arbitrary and capricious decision to deny the I-130, in violation of the APA. Thus, district and appellate courts should remand adverse decisions back to the agency for further review, as opposed to fashioning a constitutional remedy through the creation of evidentiary hearings in visa adjudication processing.

¹³¹ Notably, the Ninth Circuit, when addressing the exact issue of due process requirements in a separate I-130 adjudication denial case, held that USCIS's issuance of an NOID that adequately advised plaintiffs of the issues and afforded them the opportunity to respond was all the process plaintiffs were due under the circumstances, and was "constitutionally adequate due process." *Dhillon v. Mayorkas*, 537 F. App'x 737 (9th Cir. 2013).

¹³² While the government has a substantial interest in protecting the integrity of the immigrant visa process, mandating evidentiary hearings would be a significant burden on the agency. The *Mathews* Court determined that assessing the public interest was the last factor in determining the appropriate due process requirements. Specifically, the Court looked to the "administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing . . ." *Mathews*, 424 U.S. at 347.

¹³³ *Ching v. Mayorkas*, 725 F.3d 1149, 1158 (9th Cir. 2013).

¹³⁴ *Id.* at 115859. As articulated by the Court in *Mathews*, "the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." 424 U.S. at 348. In fact, "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action . . . may be outweighed by the cost." *Id.*

¹³⁵ *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951).

¹³⁶ *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970).

¹³⁷ See *Stuart v. U.S. ex rel. Dep't of the Interior, Bureau of Indian Affairs*, 109 F.3d 1380, 1385 (9th Cir. 1997) (concluding that the third *Mathews* factor did not grant a land buyer, despite a "substantial interest" in the land he is

arguendo, that there is a high risk of erroneous deprivation of a Plaintiff's private interest, the fiscal and administrative burdens posed by any additional procedural requirements are likely to far outweigh the probative value that may result.

V. Defending Fraud in De Novo Review Cases

A. Standards and Discovery Tools

In addition to marriage and employment-based fraud, other types of fraud that may be revealed during discovery include the following: tax, bank, and identity fraud, and false testimony and misrepresentations regarding past or current criminal conduct. These types of fraud may be discovered when examining immigration applications and petitions, tax records, automotive applications, employment records and prior job applications, mortgage documents, lease agreements, bank records, insurance applications, telephone and cell phone records, utility records, social security records, birth certificates, arrest records, and DNA evidence.

Omissions and misrepresentations on an application for immigration benefits and during a naturalization interview are willful and material if they thwarted an avenue of inquiry that would have led the agency to discover the applicant's ineligibility.¹³⁸ The government "need show only that the 'misrepresentation was deliberate and voluntary,'" which may be shown by circumstantial evidence.¹³⁹ The logical conclusion is that the statement was made for the purpose of obtaining immigration benefits.¹⁴⁰

Where an applicant intentionally conceals his or her past to obtain a favorable disposition of his immigration application, the applicant is precluded from establishing the good moral character required to naturalize.¹⁴¹ The relevant inquiry is the following:

1. Did the applicant provide false testimony?
2. Is the applicant's false testimony considered to be material?
3. Did the applicant act with the subjective intent of obtaining immigration benefits?
4. Did the false testimony foreclose a line of questioning into the applicant's past that could influence the decision on his eligibility for naturalization?

When deposing an immigration officer who has granted an application where lies, fraud, or misrepresentation are later discovered, ask that officer the following questions: if you had known this

purchasing, a hearing prior to cancelling the land sale contract when "the value of such a hearing in insuring accuracy is low).

¹³⁸ *Kungys v. United States*, 485 U.S. 759, 771–72 (1988) (defining "materiality" as turning on whether the concealments or misrepresentations at issue "had a natural tendency to influence" and "was predictably capable of affecting" an official decision.); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977) (noting that intent to deceive is not required and that knowledge of the falsity of a representation is sufficient).

¹³⁹ See *Espinoza-Espinoza*, 554 F.2d at 925–26; *Hernandez-Robledo v. INS*, 777 F.2d 536, 539 (9th Cir. 1985) (specific intent to deceive is not required to show that misrepresentations were willful.)

¹⁴⁰ See *Kungys*, 485 U.S. at 807 n.3 (White, J., dissenting) ([I]t is quite clear that when misrepresentations of fact are made in process of applying for immigration and naturalization benefits, in a very real and immediate sense those misrepresentations are made 'for the purpose of obtaining' such benefits).

¹⁴¹ See *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1240 n.7 (11th Cir.2003) (Under the law of this Circuit, we may disregard an affidavit submitted solely for the purpose of opposing a motion for summary judgment when that affidavit is directly contradicted by deposition testimony.); *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984) (When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.).

fraudulent information at the time you interviewed the applicant or adjudicated his application, would you have approved the application? What would you have done? Would you have issued a Request for Evidence? Referred the case to the FDNS? Denied the application, etc.? Here, the relevant inquiry is whether, but for Plaintiff's lies, omissions, concealments, and misrepresentations, the application would have been granted.

B. Citizenship Cases: Finding Fraud in the Birth Records and Residency/Presence

Fraud or misrepresentation in [section 1503](#) cases often involves facts regarding the place of birth or periods of residence or presence in the United States. The defense of these fraud cases is complicated by the length of time since the facts at issue occurred and the possession of relevant evidence by a foreign government. Conversely, much of the relevant evidence is contained in public documents which should be easily obtained. This section will review some of the best practices for determining whether evidence presented in a [section 1503](#) case is fraudulent and how to build the evidence in support of the government's position that a person claiming U.S. citizenship has not proven, by a preponderance of the evidence, that he or she is qualified for citizenship.

First, a [section 1503](#) plaintiff will usually provide evidence of a birth in the United States either for plaintiff or for a parent, to establish acquisition of U.S. citizenship. This will often be in the form of a birth certificate stating that the birth occurred in the United States.¹⁴² As a matter of law, courts have declined to find a birth certificate alone as conclusive proof of United States citizenship, even where the law of the issuing state pronounces that a certified birth certificate is *prima facie* evidence that the person was born in the United States.¹⁴³ The closest a birth certificate comes is "almost conclusive" to evidence of a birth when it is a record made contemporaneously with the birth.¹⁴⁴ While a birth record alone is not conclusive proof of U.S. citizenship, finding a contemporaneous record of birth is an important step in proving fraud in a contested [section 1503](#) case, as there are usually competing birth certificates alleging two different places of birth. Where the birth certificate alleging birth in the United States is a delayed birth certificate, a contemporaneous record of foreign birth is "almost conclusive" evidence of birth in that country.¹⁴⁵

Thus, where the plaintiff provides a delayed birth certificate alleging birth in the United States, a search of foreign records is recommended to determine whether the plaintiff—or the parent through which he or she is claiming acquisition of citizenship—was actually born in a foreign country and contemporaneously filed a foreign record of birth. The government attorney should work with agency counsel and officers to request such certificates from the foreign government.¹⁴⁶ In addition to challenging the birth in the United States with a competing foreign birth record, the government should

¹⁴² In an acquisition of U.S. citizenship case, the proof of birth in the United States may also include a U.S. passport for the parent. However, the U.S. Department of State will usually require proof of birth in the United States from a birth certificate stating that the person was born in the United States before issuing a U.S. passport.

¹⁴³ See, e.g., [Garcia v. Kerry](#), 557 F. App'x 304, 308 (5th Cir. 2014); [Liacakos v. Kennedy](#), 195 F. Supp. 630, 632 (D.D.C. 1961); [Lopez v. U.S. Dep't of State ex rel. Clinton](#), No. 11-cv-1069, 2013 WL 121804, at *11 (D. Or. Jan. 9, 2013).

¹⁴⁴ [Liacakos](#), 195 F. Supp. at 631.

¹⁴⁵ See [Garcia v. Clinton](#), 915 F. Supp. 2d 831, 834 (S.D. Tex. 2012), *aff'd sub nom. Garcia v. Kerry*, 557 F. App'x 304 (5th Cir. 2014); [Pinto-Vidal v. Att'y Gen. of U.S.](#), 680 F. Supp. 861, 862 (S.D. Tex. 1987); [Liacakos](#), 195 F. Supp. at 631.

¹⁴⁶ Foreign documents are self-authenticating when filed with a certificate of authenticity known as an "apostille" certificate. The apostille certificate certifies "the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears." See [1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents](#), Art. 3, Oct. 5, 1961, 33 U.S.T. 883, 527 U.N.T.S. 189 (Hague Convention); see also [FED. R. CIV. P. 44\(a\)\(2\)](#); [FED. R. EVID. 902\(3\)](#).

confirm the record of United States birth with the issuing authority.¹⁴⁷ The attorney should also consider whether to depose or obtain testimony from any supporting witnesses listed on a birth certificate to confirm the facts listed. Where the birth certificate is witnessed by a midwife, the attorney should check with the issuing state to determine whether the midwife is registered and if there are any disciplinary actions¹⁴⁸ or whether the midwife has been criminally prosecuted for fraud in other birth certificate cases. Finally, it is recommended that the attorney confirm any records used to support a plaintiff's claim of birth in the United States with the record custodian. For example, certificates of baptism are often based on baptism registries which are recorded at the time of the ceremony, are official records of the church, maintained in a secure located, and which are not easily tampered. While a person may fraudulently alter or create a certificate of baptism, he or she would be less likely to fraudulently alter a church's registry to match the fraudulent certificate.

Where periods of residence or presence in the United States for a plaintiff claiming acquisition of citizenship are in issue, the sources of evidence to prove residence or presence of the U.S. citizen parent are virtually unlimited in scope. Lease contracts, tax filings, school records, department of motor vehicle licenses, identification cards, alien files (A-files),¹⁴⁹ property records, travel itineraries, border crossing encounters, and census records are examples of some of the evidence that may be used to prove or disprove residence or presence in the United States.

VI. Conclusion

In an immigration system replete with fraud, coupled with incentives to make misrepresentations to garner benefits, the government is dependent upon its adjudicators as triers of fact and their government litigators to assess and identify the evidence underlying a denial based on fraud and articulate why such a decision was correct under the law. While it may be true that “for every case where the fraud

¹⁴⁷ Obtaining a certified copy of the birth certificate directly from the state allows the government to confirm the accuracy of the facts presented on a plaintiff's copy of the birth certificate. In addition, it allows the government to confirm that the birth record is still a valid record and has not been revoked or that the state record custodian otherwise refuses to issue a certified copy of the record due to its inability to confirm the birth certificate. *See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 191.057; 25 TEX. ADMIN. CODE § 181.21* (stating that the Texas State Registrar will refuse to issue certified copies of birth records if it receives information that contradicts the information shown on the record).

¹⁴⁸ For example, the Texas Department of State Health Services posts enforcement actions for violations by midwives, to include the submission of false or misleading information, on its website. *See Texas Midwifery Board Enforcement Actions, TEX. HEALTH & HUMAN SERVICES* (last updated Mar. 27, 2017).

¹⁴⁹ A-files are the United States immigration records maintained by the U.S. Department of Homeland Security. While a U.S. citizen parent through whom a plaintiff alleges acquisition of citizenship would most likely not have an immigration file of their own, they may be included in immigration applications filed by others (such as by other children or their parent) that may provide evidence of residence or presence.

is discovered or admitted, there are doubtless scores of others where the petitioner gets away with it because our government didn't have the resources to expose the lie",¹⁵⁰ it is important that the government uphold the rule of law by utilizing its resources to uphold such denials in federal court.

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¹⁵⁰ [Angov v. Lynch](#), 788 F.3d 893, 901 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 896 (2016).

Crimmigration: the Changing Landscape of Criminal Immigration Consequences

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I. Introduction

The Immigration and Nationality Act (INA) provides a comprehensive scheme for the admission, removal, and naturalization of aliens. Within its framework, an alien's convictions and criminal conduct can render the alien inadmissible, removable, ineligible for relief and protection from removal, and ineligible to naturalize. Recent U.S. Supreme Court cases have significantly altered the analysis of the immigration consequences of a conviction. This article provides a general outline of how to determine the civil immigration consequences of criminal conduct.

Part I reviews statutes creating immigration consequences for certain crimes. Part II describes the methods for determining when a criminal conviction triggers an immigration consequence. Finally, Part III explores how to conduct a divisibility analysis and offers suggestions for grappling with jury-unanimity issues in the wake of *Mathis v. United States*.¹

¹ 136 S. Ct. 2243 (2016).

II. Statutory Background: Immigration Consequences of Crimes

A. Inadmissibility Versus Deportability

Essential to the immigration consequences of criminal conduct is the distinction between “inadmissible” and “deportable” aliens.² The difference focuses on the alien’s status, if any, in the United States. Aliens without status are deemed to be seeking admission because they have not made a lawful entry after inspection by an immigration officer.³ On the other hand, aliens who legally entered with a valid immigration document have been admitted to the United States.⁴

An alien seeking admission must establish that he or she is not inadmissible under any of the grounds listed in 8 U.S.C. § 1182⁵ or, if inadmissible, obtained a waiver and qualifies for relief or protection from removal.⁶ Inadmissibility grounds include everything from health-related grounds to criminal bars.⁷ Aliens who have not been admitted can only be removed from the United States based on the INA’s inadmissibility grounds.⁸

Likewise, an alien who has been admitted may only be ordered removed based on the INA’s removability grounds.⁹ Thus, when seeking removal, the government has the burden to prove “by clear and convincing evidence” that the alien is removable under one or more of the grounds alleged in the charging document.¹⁰ An immigration judge’s ruling that an alien is removable must be based on “reasonable, substantial, and probative evidence.”¹¹

B. When A Conviction Is, And Is Not, Required For Removal

Certain removal grounds require a criminal conviction; others require only that the alien have committed, or admit to having committed, the essential elements of a criminal offense.

As a general rule, the removability grounds for those with lawful status in the United States require a criminal conviction.¹² The INA lists offenses deemed “aggravated felonies,”¹³ and a conviction for one of these offenses renders the alien removable with little relief from removal available.¹⁴ Moreover, for a person to be removed for committing a “crime involving moral turpitude,” the INA requires that the conviction occur within five years of admission or that the alien have two convictions for

² After the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, both inadmissibility and deportability fall under the blanket term “removal.” See, e.g., Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 966 (1998) (IIRIRA realigned the vocabulary of immigration law, creating a new category of ‘removal’ proceedings that largely replaces what were formerly exclusion proceedings and deportation proceedings . . .).

³ See 8 U.S.C. § 1101(a)(13)(A) (2012).

⁴ See generally *id.*

⁵ This section describes classes of aliens ineligible for visas or admission.

⁶ See, e.g., 8 U.S.C. § 1229a(c)(2)(A) (placing burden on alien to show admissibility); 8 U.S.C. § 1229a(c)(4)(A) (placing burden on alien to show entitlement to relief from removal).

⁷ See § 1182(a) (2012 & Supp. III 2016).

⁸ See § 1182 (describing classes of “inadmissible” aliens subject to removal).

⁹ See § 1227 (describing classes of “deportable” aliens subject to removal).

¹⁰ § 1229a(c)(3)(A).

¹¹ *Id.*

¹² See, e.g., § 1227(a)(2) (listing removability grounds for aliens who committed criminal offenses).

¹³ § 1101(a)(43)(A)–(U).

¹⁴ See § 1227(a)(2)(A)(iii) (providing that an alien convicted of an aggravated felony after admission is deportable). For instance, an alien with an aggravated felony conviction is ineligible for asylum. Compare § 1158(b)(2)(A)(ii) (aliens convicted of “particularly serious crime[s]” ineligible), with § 1158(b)(2)(B) (aliens convicted of aggravated felonies are deemed to have been convicted of a particularly serious crime).

crimes involving moral turpitude.¹⁵ Other removal grounds requiring a criminal conviction include those for certain firearm offenses,¹⁶ domestic violence, child abuse,¹⁷ or other miscellaneous crimes.¹⁸

However, some inadmissibility grounds do not require a criminal conviction.¹⁹ For example, where the alien illicitly trafficked in controlled substances or listed chemicals,²⁰ or attempted to do so,²¹ the alien is inadmissible.²² This removal ground does not require a conviction.²³ Rather, an immigration officer must “know[] or ha[ve] reason to believe” that the alien completed the culpable conduct.²⁴ “[R]eason to believe” might be established by a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports.”²⁵

To sustain a removal charge based on unconvicted criminal conduct, the immigration officer need not have known of the conduct; information learned during the subsequent proceedings to determine inadmissibility may also be considered.²⁶ Further, under some circumstances, an alien’s admissions during an airport interview can establish removability.²⁷ Inadmissibility can be shown without a conviction where the agency furnishes the alien with a definition of the crime in understandable terms, and the alien admits to committing each element.²⁸

An alien can also be inadmissible, even without a conviction, if an immigration official has reason to believe the alien engaged or seeks to engage in certain money laundering offenses,²⁹ if the alien admits to committing (the essential elements of) a controlled substance offense,³⁰ knowingly encourages, induces, assists, abets, or aids in alien smuggling,³¹ or if the alien committed a crime involving moral turpitude.³²

A few other notable exceptions to the general idea that removable offenses require a conviction exist for aliens who falsely claim to be U.S. citizens, commit marriage fraud, participate in human trafficking, vote unlawfully, or are involved in terrorism-related grounds.³³ For example, falsely claiming U.S. citizenship can render an alien both removable and inadmissible, with or without a conviction.³⁴

¹⁵ See § 1227(a)(2)(A).

¹⁶ See § 1227(a)(2)(C).

¹⁷ See § 1227(a)(2)(E)(i).

¹⁸ See § 1227(a)(2)(D)(i)–(iii) (ranging from espionage, sabotage, treason and sedition, threats against the presidency, expedition against a friendly nation, to violations of the Military Selective Service Act or the Trading With the Enemy Act).

¹⁹ See generally § 1182.

²⁰ See 21 U.S.C. § 802 (2012 & Supp. III 2015).

²¹ 8 U.S.C. § 1182(a)(2)(C)(2).

²² *Id.* § 1182(a)(2)(C)(1).

²³ See *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000); see also *Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1209 (9th Cir. 2004); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 n.9 (9th Cir. 2003).

²⁴ *Alarcon-Serrano*, 220 F.3d at 1119.

²⁵ *Garces v. Att’y Gen. of U.S.*, 611 F.3d 1337, 1345–46 (11th Cir. 2010) (quoting U.S. DEP’T OF STATE, 9 FOREIGN AFFAIRS MANUAL 302.4-3(B)(3)(b) (last updated Sept. 30, 2016)).

²⁶ See *Gomez-Granillo v. Holder*, 654 F.3d 826, 832 (9th Cir. 2011).

²⁷ See, e.g., *Alimi v. Gonzales*, 489 F.3d 829, 835–37 (7th Cir. 2007) (sustaining finding of inadmissibility under 8 U.S.C. § 1182(a)(6)(E)(i)).

²⁸ See *In re G–M–*, 7 I. & N. Dec. 40, 42–43 (BIA 1955).

²⁹ See 8 U.S.C. § 1182(a)(2)(I)(i)–(ii); see also 18 U.S.C. §§ 1956, 1957 (2012 & Supp. III 2015).

³⁰ See 8 U.S.C. § 1182(a)(1)(A)(iv), (2)(A)(i)(II), (2)(C)(i)–(ii).

³¹ See § 1182(a)(6)(C)(ii)(I).

³² See § 1182(a)(2)(A)(i)(I).

³³ See § 1227(a)(3)(D)(i), (a)(1)(B), (a)(2)(F), (a)(6)(B), (a)(4)(B).

³⁴ See §§ 1227(a)(3)(D)(i), 1182(a)(6)(C)(ii)(I).

C. Other Immigration Situations Where Convictions Matter

The distinction between criminal convictions and criminal conduct affects other INA provisions, too, such as whether an alien is subject to mandatory detention throughout immigration proceedings.³⁵ Detention is mandatory for any alien who is inadmissible by reason of having committed any offense under 8 U.S.C. § 1182(a)(2) (criminal and related grounds); removable under 8 U.S.C. § 1227(a)(2)(A)(ii) (convicted of two crimes involving moral turpitude); convicted of an aggravated felony; convicted of a drug offense; and removable for being convicted of crime involving moral turpitude for which the sentence was at least one year.³⁶

Eligibility for certain forms of relief and protection from removal is also limited by criminal convictions or conduct. For example, aggravated felons are ineligible for cancellation of removal,³⁷ asylum,³⁸ and voluntary departure.³⁹ Similarly, to be eligible for adjustment of status, cancellation of removal, and naturalization, aliens must establish “good moral character.”⁴⁰ Although the INA does not exhaustively define “good moral character,” it includes examples of circumstances that prohibit a finding of good moral character.⁴¹ This list includes certain criminal acts, including aggravated felony convictions, crimes involving moral turpitude, controlled substance violations, having multiple convictions with cumulative sentences of at least five years’ imprisonment, and imprisonment for an aggregate period of 180 days during the good-moral-character periods, regardless of when the offense(s) occurred.⁴²

III. Determining Whether Immigration Consequences Apply

The menu of immigration consequences for criminal conduct would be meaningless without a method to evaluate whether those consequences attach. To make this assessment, Courts have developed a three-step process—the “categorical” approach, “divisibility,” and the “modified categorical” approach. The second step, determining whether a statute is “divisible” is relatively new, resulting from the Supreme Court’s 2013 and 2016 decisions *Descamps v. United States*⁴³ and *Mathis v. United States*.⁴⁴ Much litigation now focuses on whether an alien’s conviction statute is divisible.⁴⁵

A. The Categorical and Modified Categorical Approaches

As discussed above, the INA mandates removal or otherwise restricts immigration benefits when an alien commits or is convicted of certain crimes.⁴⁶ Where the INA requires a conviction, courts apply

³⁵ See § 1226(c) (detention of criminal aliens).

³⁶ See § 1226(c)(1) (mandatory detention).

³⁷ See § 1229b(a)–(b).

³⁸ See § 1158.

³⁹ See § 1229c.

⁴⁰ See §§ 1255(a) (adjustment of status), 1229b(b)(1)(B) (cancellation of removal), 1427(a) (naturalization).

⁴¹ See § 1101(f).

⁴² See § 1101(f)(1)–(8).

⁴³ 133 S. Ct. 2276 (2013).

⁴⁴ 136 S. Ct. 2243 (2016).

⁴⁵ See, e.g., *United States v. Lamb*, 847 F.3d 928, 932 (8th Cir. 2017) (determining that Wisconsin statute listed locational elements of divisible burglary offenses); *Swaby v. Yates*, 847 F.3d 62, 68–69 (1st Cir. 2017) (determining that Rhode Island statute created distinct crimes based on drug type and is divisible); *Larlos-Reyes v. Lamb*, 843 F.3d 146, 154 (4th Cir. 2016) (recognizing recent holding that Maryland statute lists alternative sets of elements that create multiple versions of third-degree sexual offense (citing *United States v. Alfaro*, 835 F.3d 470, 473 (4th Cir. 2016))); see also, e.g., *United States v. Grogans*, No. 11-00021, 2017 WL 946312, at *10 (W.D. Va. Mar. 9, 2017) ([T]he principle question raised is whether the disjunctive list of locations contained in [the statute] amounts to alternative elements constituting different crimes or merely multiple means of committing a single crime.).

⁴⁶ *Supra* Part II.

the *Taylor/Shepard* categorical/modified approach and look to the elements of the conviction statute, as opposed to the underlying facts of the crime, in deciding whether immigration consequences result.⁴⁷

Courts first examine the conviction statute and consider whether the minimum conduct the statute reaches is also covered by the INA (sometimes called the crime’s “generic definition”).⁴⁸ If the conviction statute is the same as or narrower than the generic definition, there is a categorical match, meaning there is no “realistic probability” that the conviction statute applies to conduct outside of the generic definition.⁴⁹ A categorical match triggers immigration consequences.⁵⁰

If, however, the conviction statute is broader than the generic definition, courts determine whether the conviction statute is divisible, that is, whether it contains “multiple, alternative elements, and so effectively creates several different crimes.”⁵¹ If the statute is divisible, courts use the modified categorical approach to determine whether the alien was convicted of a qualifying INA offense.⁵² Under the modified categorical approach, courts review a limited class of conviction documents (such as the indictment, jury instructions, plea colloquy, and plea agreement) to determine the crime of conviction.⁵³ Notably, the modified categorical approach permits courts to review certain conviction documents only; testimony about the underlying conviction is not a permissible source of evidence for this purpose.⁵⁴ Courts then compare the precise elements of the conviction statute to the generic definition to determine whether there is a match.⁵⁵

If, on the other hand, the conviction statute is not divisible, the modified categorical approach is unavailable.⁵⁶ Thus, an overbroad, non-divisible statute is categorically not an offense with immigration consequences.⁵⁷

B. The New Step: Divisibility

As noted, *Decamps* and *Mathis* introduced a new step to the *Taylor/Shepard* analysis. “A court may use the modified [categorical] approach only to determine which alternative element in a divisible statute formed the basis of the defendant’s conviction.”⁵⁸ Under *Decamps* and *Mathis*, a statute phrased in the alternative is divisible, and therefore amenable to use of the modified categorical approach, only if it defines alternative “elements,” but not if it merely defines alternative “means” of committing the offense.⁵⁹ As described by the Court, “[e]lements’ are the ‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction.’”⁶⁰ This new rule requires

⁴⁷ See generally *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013); *Shepard v. United States*, 544 U.S. 13, 19–20, 26 (2005); *Taylor v. United States*, 495 U.S. 575, 600 (1990).

⁴⁸ See *Moncrieffe*, 133 S. Ct. at 1684–85; *Taylor*, 495 U.S. at 600.

⁴⁹ See *Moncrieffe*, 133 S. Ct. at 168485; see also *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

⁵⁰ See *Moncrieffe*, 133 S. Ct. at 1684.

⁵¹ *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013); see *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

⁵² *Shepard*, 544 U.S. 13, 19–20, 26; *Taylor*, 495 U.S. at 599, 602.

⁵³ See *Shepard*, 544 U.S. at 26.

⁵⁴ See, e.g., *Cervantes v. Holder*, 772 F.3d 583, 588–89 (9th Cir. 2014) (Although judicial admissions ordinarily bind a party, an alien’s description of his crimes is not an acceptable source of evidence under the modified categorical approach.). Importantly, however, *Cervantes* left open the possibility of relying on judicial admissions to ascertain whether an alien committed acts constituting the essential elements of a crime involving moral turpitude. *Id.* at 589 n.5.

⁵⁵ See *Mathis*, 136 S. Ct. 2243; *Descamps*, 133 S. Ct. at 2284.

⁵⁶ *Descamps*, 133 S. Ct. at 2285–86.

⁵⁷ See, e.g., *Gomez-Perez v. Lynch*, 829 F.3d 323, 327–28 (5th Cir. 2016).

⁵⁸ *Descamps*, 133 S. Ct. at 2293.

⁵⁹ *Mathis*, 136 S. Ct. at 2248–49.

⁶⁰ *Id.* at 2248 (quoting *Elements*, BLACK’S LAW DICTIONARY 634 (10th ed. 2014)).

litigators to identify statutory alternatives and determine if they are elements or means. Any case law relying on the modified categorical approach before *Descamps* is suspect.

C. *Mathis*'s Litigation Consequences

Descamps and *Mathis*'s divisibility rules make it more difficult to demonstrate that a conviction has immigration consequences. Before *Descamps* and *Mathis*, courts routinely skipped over even the categorical analysis and merely turned to the conviction documents to determine whether the alien's conduct fell within the generic definition. As this is no longer permissible, litigators should be prepared to thoroughly address the categorical approach, which may require research into state materials to determine whether there is a "realistic probability" that the scope of the statute exceeds the generic definition.⁶¹

Additionally, as discussed above, many inadmissibility and moral character grounds do not require a conviction. In determining whether immigration consequences result under these grounds, courts need not use the *Taylor/Shepard/Descamps/Mathis* method. The inquiry is simply whether the alien committed the offense, or in some circumstances, whether immigration officials have reason to believe the alien did so. Litigators should be aware of these grounds and the types of bad acts that result in immigration consequences; where appropriate, these grounds should be charged in the alternative or in lieu of a ground that requires a conviction.⁶²

IV. Litigating Post-*Mathis* Divisibility

A. *Mathis*'s Discussion on Elements Versus Means

Despite the exceptions discussed above, a conviction is frequently required before immigration consequences will attach. Knowing whether a conviction causes immigration consequences has only grown more complicated under recent case law. To summarize, in *Descamps*, the Court limited the modified categorical approach to overbroad statutes where the statute's terms are written in the alternative.⁶³ *Mathis* took this analysis a step further, holding that "[t]he itemized construction gives a sentencing court no special warrant to explore the facts of an offense, rather than to determine the crime's elements and compare them with the generic definition."⁶⁴

Thus, after *Mathis*, divisibility is a two-step test. First, a statute must pass *Descamps*'s construction test: The statute must be written in discrete and finite terms, with separate, alternative terms for any act that is outside the scope of the generic definition.⁶⁵ Where the statute is overbroad but its terms are not constructed or defined in the alternative, the statute fails the divisibility test.⁶⁶ Second, *Mathis* dictates that those alternatives must be alternative *elements*, not merely alternative *means*.⁶⁷ *Mathis* promises that this is a simple distinction; citing *Black's Law Dictionary*, *Mathis* tells us that elements are the "'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a

⁶¹ See [Gonzales v. Duenas-Alvarez](#), 549 U.S. 183, 193 (2007); see also [Castillo v. Holder](#), 776 F.3d 262 (4th Cir. 2015) (examining state law to determine whether least culpable conduct of joyriding statute constituted "theft offense").

⁶² See, e.g., [Cervantes v. Holder](#), 772 F.3d 583, 588–89 & n.5 (9th Cir. 2014) (declining to consider whether alien "admitted committing acts" constituting removable offense where agency relied on "conviction").

⁶³ *Descamps*, 133 S. Ct. at 2285–86.

⁶⁴ *Mathis*, 136 S. Ct. at 2251.

⁶⁵ *Descamps*, 133 S. Ct. at 2285–86.

⁶⁶ *Id.*

⁶⁷ *Mathis*, 136 S. Ct. at 2248.

conviction.”⁶⁸ *Mathis* distinguishes “elements” from “facts,” which “by contrast, are mere real-world things.”⁶⁹

Writing for the majority, Justice Kagan opined that the “threshold inquiry— elements or means?—is easy in [*Mathis*], as it will be in many other[.]” cases.⁷⁰ *Mathis* identifies a hierarchy of sources that demonstrate whether the alternatives in the statute are true elements or merely means, beginning with decisions from the state supreme court.⁷¹ In *Mathis*, there was a controlling decision from the state supreme court precisely on point, and *Mathis* identifies such cases as the starting point for determining whether a statute contains elements or “brute facts.”⁷² In lieu of such a decision, *Mathis* indicates that the statute itself may answer the question: if statutory alternatives carry different punishments, they are elements.⁷³ *Mathis* also cites a statute which only provides “illustrative examples,” to state that such statutes will have only means of commission.⁷⁴ Notably, a statute containing only illustrative examples is not particularly instructive on *Mathis*’s jury-agreement requirement, as it fails the *Descamps* construction test. Should the statute or state law fail to provide such answers, *Mathis* continues by stating the court may rely on other state “authoritative sources of state law,” providing as an example a statute identifying what facts must be charged.⁷⁵ When all else fails, *Mathis* suggests courts take a “peek at the [record] documents,” to see how the defendant was charged, in the event this provides additional clues as to whether the fact at issue is an element, or merely a means.⁷⁶

B. Jury-Agreement Issues Make the *Mathis* Task Harder Than It Sounds

To the extent the question posed in *Mathis* was answered by a dispositive case from the state supreme court, Justice Kagan is perhaps correct that the inquiry is easy. However, suggesting the task will be easy in “many” cases greatly underestimates the challenge the *Mathis* methodology represents. In reality, as the plurality opinion noted in *Schad v. Arizona*,⁷⁷ “[t]he question whether statutory alternatives constitute independent elements of the offense . . . is a substantial question of statutory construction.”⁷⁸

The first fundamental problem with applying the approach in *Mathis* is that *Mathis* requests lower courts to limit the modified categorical approach to those facts upon which a jury must agree,⁷⁹ but the Supreme Court itself has not yet produced a comprehensible rule on jury agreement. The Supreme Court has entertained only two jury agreement cases, resulting in five decisions.⁸⁰ There is only one thing on which all the justices agree: sometimes the jury is required to agree, and sometimes it is not.⁸¹ Given the Supreme Court’s difficulty coming up with a coherent rule, it should come as no surprise that Justice Kagan’s “easy” threshold inquiry often will be far from easy.

The first Supreme Court case on this issue, *Schad*, exemplifies the problem. In *Schad*, an elderly man was found strangled to death on the side of the road.⁸² The victim had left his home eight days

⁶⁸ *Id.* at 2248.

⁶⁹ *Id.*

⁷⁰ *Id.* at 2256.

⁷¹ *Id.*

⁷² *Id.* at 2248.

⁷³ *Id.* at 2256.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2256–57.

⁷⁷ 501 U.S. 624 (1991).

⁷⁸ *Id.* at 636.

⁷⁹ *Mathis*, 136 S. Ct. at 2256.

⁸⁰ See *Richardson v. United States*, 526 U.S. 813 (1999); *Schad*, 501 U.S. 624.

⁸¹ See Peter K. Westen & Eric Ow, *Reaching Agreement on When Jurors Must Agree*, 10 NEW CRIM. L. REV. 153, 156 (2007).

⁸² *Schad*, 501 U.S. at 628.

earlier, driving his new Cadillac and towing a camper.⁸³ The defendant was intercepted in possession of the Cadillac and other of the victim's personal possessions.⁸⁴ The prosecution advanced two theories for first-degree murder: that the defendant premeditated the murder, and that he committed the murder in the course of a robbery.⁸⁵ The defendant was convicted and sentenced to death.⁸⁶ The question presented to the Court was whether the jury was required to agree on the theory of the crime—whether the defendant committed premeditated or felony murder—or whether it was sufficient that everyone on the jury agreed that defendant committed one of those two acts.⁸⁷

In deciding the case, the Court produced a plurality opinion, a concurrence, and a dissent.⁸⁸ Among the decisions, the justices agreed that there are some facts upon which the jury need not agree, but none of the decisions proposed a coherent rule to determine the difference between what Justice Kagan later termed “brute facts” and “elements.” Indeed, the plurality decision found it “impossible to lay down any single analytical model for determining when two means are so disparate as to exemplify two inherently separate offenses.”⁸⁹ The plurality proposed a rule that required the balancing of the historical application and understanding of the offense and the moral equivalence of the alternative means.⁹⁰ The dissent rejected the plurality's analysis, troubled that “while these two paths both lead to a conviction for first-degree murder, they do so by divergent routes possessing no elements in common except the fact of a murder.”⁹¹

The plurality also emphasized that whether a crime could be completed by divergent means was nevertheless a single offense and properly a question for the states' courts and legislatures; therefore, the Court should not substitute its opinion for that of a state.⁹² In *Schad*, as in *Mathis*, the state supreme court conclusively decided the question presented, concluding the statute was a single offense with alternative means of commission.⁹³ The plurality thus viewed the question not as whether premeditated murder and felony murder were means of committing a single offense, but rather whether Arizona's decision that they were a single offense was constitutional.⁹⁴ This, however, highlights a further difficulty of litigating cases in federal courts after *Mathis* where there is no definitive decision from the state Court: the federal court's task is essentially to determine what the state court would have done.

The Supreme Court again grappled with jury agreement questions a few years later in *Richardson v. United States*.⁹⁵ The defendant was charged with engaging in a continuing criminal enterprise under 21 U.S.C. § 848(a).⁹⁶ That statute punishes a person who has a “series of violations” of the federal drug laws.⁹⁷ The Court sought to address whether the jury was required to agree on which violations the defendant committed.⁹⁸ It held the jury was required to agree on each individual violation, and not merely that the defendant committed multiple violations.⁹⁹

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 627, 630.

⁸⁸ *Id.* at 627, 647 (Scalia, J., concurring); *id.* at 652 (White, J. dissenting).

⁸⁹ *Id.* at 636, 643.

⁹⁰ *Id.* at 640–45.

⁹¹ *Id.* at 653 (White, J., dissenting).

⁹² *Id.* at 636.

⁹³ *Id.* at 629.

⁹⁴ *Id.* at 637.

⁹⁵ 526 U.S. 813 (1999).

⁹⁶ *Id.* at 815.

⁹⁷ *Id.*

⁹⁸ *Id.* at 815–16.

⁹⁹ *Id.* at 816.

The Court found treating each violation as a separate element was “consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law.”¹⁰⁰ The Court also pointed to the statute’s breadth as justification for requiring unanimity, as “that breadth aggravates the dangers of unfairness.”¹⁰¹ The Court bolstered its position by referencing *Schad*’s discussion of history and tradition, noting there was no history of treating criminal violations as a means of committing a greater crime.¹⁰² Referencing recidivism laws, the Court observed that a judge could only increase a sentence based on a prior individual conviction.¹⁰³ The dissent, however, argued the law’s purpose was not to increase punishment based on discrete violations, but to punish those who organized the violations as part of an enterprise.¹⁰⁴ Accordingly, the dissent believed, the underlying violations were merely means, not elements, of the offense.¹⁰⁵

Richardson highlights factors the justices consider important in determining whether the jury is required to agree, but again, neither the majority nor dissent proposes a workable test. The justices generally agree that fairness is one concern, and that fairness is measured by how broad and divergent the competing theories of the crime are.¹⁰⁶ The justices also agree legislative intent plays a substantial role in determining when the jury has to agree,¹⁰⁷ but none of the decisions make clear how this factor should be weighted, or when it is determinative.

Perhaps more enlightening than these cases’ holdings are the three examples the justices cite as instances where it is readily apparent whether the jury is required to agree.¹⁰⁸ First, the justices all agree the jury would be required to agree to the facts where the alternatives are generally understood to be two separate crimes, such as if the statute prohibited embezzlement or murder.¹⁰⁹ Peter K. Westen describes this as “wrongdoings that, historically, have been separate offenses that are functionally and morally distinct.”¹¹⁰

Additionally, Justice Scalia’s concurrence in *Schad* stated jurors would be required to agree on alternative charges where the defendant committed the same crime but against different victims and different locations, an example cited with approval in *Richardson*.¹¹¹ These first two examples have in common the notion that the jury is required to agree on the commission of a particular crime—be it a particular brand of crime, or a crime committed at a particular time and place.

The final example from *Schad* is that the jury need not agree on the factual manner of committing a single element; the *Schad* plurality provides the example of murder by either shooting or drowning.¹¹² This is reflected in *Descamps*’s construction requirement: to use *Schad*’s example, where the statute requires intentionally causing the death of another but does not specify how the perpetrator must cause the death, the jury is not required to agree on whether the victim was shot or drowned, only that defendant did something to intentionally kill another person. Further, *Descamps* provides another example: where the burglary statute provides only for “entry,” the jury is not required to agree on whether the entry was lawful.¹¹³ As *Schad* explains, it is permissible that “different jurors may be persuaded by different pieces

¹⁰⁰ *Id.* at 819.

¹⁰¹ *Id.*

¹⁰² *Id.* at 821.

¹⁰³ *Id.* at 822.

¹⁰⁴ *Id.* at 828 (Kennedy, J., dissenting).

¹⁰⁵ *Id.*

¹⁰⁶ See Westen, *supra* note 81, at 163–65 (analyzing the decisions).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Schad*, 501 U.S. at 633.

¹¹⁰ Westen, *supra* note 81, at 163.

¹¹¹ *Schad*, 501 U.S. at 651 (Scalia, J., concurring); see *Richardson*, 526 U.S. at 820.

¹¹² *Schad*, 501 U.S. at 631 (citing *Anderson v. United States*, 170 U.S. 481 (1898)).

¹¹³ *Descamps v. United States*, 133 S. Ct. 2276, 2285–86 (2013).

of evidence, even when they agree upon the bottom line.”¹¹⁴

This is an important backdrop to *Mathis*, as relatively few state court decisions address when the jury has to agree, and, like *Richardson* and *Schad*, those cases may be of limited value beyond the particular statute addressed in that case. Consequently, much litigation will now likely focus on those statutes that survive *Descamps*’s construction requirement by identifying a finite set of alternatives, but it remains unclear whether those alternatives truly create separate crimes, requiring litigators to wade into what *Mathis* described as “authoritative sources of state law.”¹¹⁵

C. How to Find “Authoritative Sources of State Law”

Mathis provides limited guidance as to what may constitute an “authoritative source of state law,” focusing primarily on state court decisions and the contents of the statute itself.¹¹⁶ As in *Mathis*, the outcome of the case will be clear if the highest state court has ruled on the statute in question. Short of that, however, there are numerous state sources to research to help determine whether state law has provided authority relevant to the divisibility question.

As *Mathis* noted, the statute itself may resolve the issue where statutory alternatives provide different punishments, as the jury is required to agree on any alternative carrying a higher sentence.¹¹⁷ Beyond this, the statute may also have a direct statement that the statute is a “single offense.”¹¹⁸ Be aware, however, that statements that the statute is consolidated or a single offense may not be in the same provision as the crime itself, but codified elsewhere, such as in a definitional provision.¹¹⁹ Bearing in mind *Schad*’s observation that whether an alternative is a mean or an element is primarily a question of legislative intent,¹²⁰ other sources of legislative history may also include statements demonstrating legislative intent to make a provision a single crime. Any statute that is a “single offense” would not satisfy the requirement of *Mathis* and *Descamps* that the statutory alternatives describe discrete crimes.

In this vein, cases addressing whether a charge is duplicitous or duplicative may also shed light on whether the statute is divisible.¹²¹ This again goes to the notion that the statutory alternatives present a list of separate, discrete crimes. If each alternative presents a separate offense, the jury will have to agree

¹¹⁴ *Schad*, 501 U.S. at 631–32 (citing *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)).

¹¹⁵ *Mathis v. United States*, 136 S. Ct. 2243, 2256–57 (2016).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2256.

¹¹⁸ See, e.g., N.J. STAT. ANN. § 2C:20-2 (Conduct denominated theft or computer criminal activity in this chapter constitutes a single offense, but each episode or transaction may be the subject of a separate prosecution and conviction.); 18 PA. STAT. AND CONS. STAT. § 3902 (West 1973) (Conduct denominated theft in this chapter constitutes a single offense.); TEX. PENAL CODE § 31.02 (Theft as defined in Section 31.03 constitutes a single offense superseding the separate offenses previously known a theft, theft by false pretext, conversion by a bailee, theft from the person, shoplifting, acquisition of property by threat, swindling, swindling by worthless check, embezzlement, extortion, receiving or concealing embezzled property, and receiving or concealing stolen property.).

¹¹⁹ See *supra* note 118 (providing examples).

¹²⁰ 501 U.S. at 636.

¹²¹ An indictment that is duplicative seeks to impose repeated criminal liability for the same act. See *United States v. Westbrook*, 817 F.2d 529, 532–33 (9th Cir. 1987) (indictment is not duplicative if each count requires proof of a fact which the other does not). By comparison, an indictment that is duplicitous (also referred to as multiplicitous) alleges multiple offenses within a single charge, presenting notice problems. See, e.g., *United States v. King*, 200 F.3d 1207, 1212–13 (9th Cir. 1999) (A duplicitous indictment compromises a defendant’s Sixth Amendment right to know the charges against him, as well as his Fifth Amendment protection against double jeopardy.). Thus, multiplicitousness and duplicativeness are separate issues which can arise in challenges to indictments. See, e.g., *United States v. Conley*, 291 F.3d 464, 469 (7th Cir. 2002) (observing that defendant failed to challenge indictment as multiplicitous, but instead raised only separate issue of whether indictment was duplicative). Nevertheless, courts sometimes use the terms interchangeably. See, e.g., *United States v. Kakos*, 483 F.3d 441, 443–44 (6th Cir. 2007).

on the alternative. For example, consider circumstances where the police raid the defendant's premises and find several different controlled substances. Cases addressing whether each substance supports a separate charge or whether the charge merges to a single transaction may resolve whether the controlled substance schedules are divisible. If possession of each substance supports a separate charge, the jury would be required to agree on the identity of the drug for each charge in order to render a verdict. Conversely, if possession of multiple drugs support only a single charge, the identity of the drug is likely not an element.

Rules governing charging requirements may also provide insight into whether a crime is divisible.¹²² *Mathis* posits that any fact the state requires the prosecutor to identify will be an element.¹²³ However, if the charging document alone could conclusively answer the question, the Supreme Court would not have needed to decide *Mathis*. Indeed, the question whether a defendant was convicted of a predicate offense under any statute that survived *Descamps*'s construction test could have been resolved by moving to the modified categorical approach and examining how a defendant was charged. The fact that the charging document is not sufficient to resolve the question is in part because charging requirements are premised on notice issues—the defendant has the right to notice of legal and factual allegations so that he or she may prepare a defense. Whether a specific charge limits the prosecution to a single theory of the crime may vary between jurisdictions.¹²⁴ It is for this same reason that *Mathis*'s “peek” allowance at the conviction documents of record generally can only show that a statute is *not* divisible. While documents that have a disjunctive charge (burgling a building, structure, or vehicle) or an umbrella term (premises) demonstrate that the item charged in the alternative is merely a means, a charge that alleges only a single alternative (burgling a building) does not necessarily demonstrate the prosecutor is limited to a single theory of the case, or the jury is required to agree the defendant committed that particular act and no other. In jurisdictions where the prosecutor's theory of the case is limited to the charges alleged, it could be argued that the jury is required to agree the defendant committed the specific acts alleged where the charge is sufficiently narrow.

Additionally, charging practices may be indicative of factors highlighted in *Richardson* and *Schad*, namely, legislative intent, history, and common understanding of how the pieces of the crime fit together. For this reason, it may be helpful to contact local prosecutors to obtain additional information about charging practices. Many offices have resources, including template charging forms, which may provide insight into these practices. Similarly, model jury instructions may be helpful in determining how juries are typically instructed, and whether a jury would be required to agree on a statutory alternative.¹²⁵ In some instances, cases challenging specific jury instructions may provide insight into jury agreement rules, even where the case does not address whether the jury is required to agree on a specific alternative.

V. Conclusion

Despite *Mathis*'s suggestion that clear answers are readily available, litigators may need to conduct extensive inquiries into state statutory schemes and legislative intent to determine whether statutory alternatives are elements or “mere real-world things.” As this is a potentially labor-intensive exercise, it behooves offices to track the research done in specific states and regarding specific statutory schemes, particularly in regard to statutes that are routinely used to support removability charges. Additionally, this should make clear why prosecutors should use alternative inadmissibility and

¹²² *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016).

¹²³ *Id.*

¹²⁴ See, e.g., *State v. Lambert*, 236 W. Va. 80, 88, 777 S.E. 2d 649, 657 (W. Va. 2015) (holding that indictment of first degree murder on premeditation theory does not preclude state from pursuing lying-in-wait or felony murder theories). But see, e.g., *Castillo v. State*, 7 S.W. 3d 253, 258 (Tex. Ct. App. 1999) (holding that state could not promote theory based on facts not alleged in indictment).

¹²⁵ See, e.g., *Criminal Jury Instructions & Model Colloquies*, NYCOURTS.GOV, (last updated Feb. 9, 2017).

removability charges that do not rely on a conviction, where appropriate.

Determining the immigration consequences of criminal conduct can be complicated, especially when a conviction is required. Future litigation will give courts the opportunity to clarify the means/elements distinction, jury-unanimity questions, and more. Meanwhile, in addition to the practical suggestions presented here—such as checking legislative history, state charging requirements and practices, and model jury instructions—practitioners should stay tuned. Litigation and more developments in the crimmigration arena are far from over.

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Other Tools of Civil Immigration Enforcement

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I. Introduction

In a broad sense, immigration enforcement litigation touches on a variety of substantive areas of law. As a result, Department of Justice litigators must be prepared to handle a gauntlet of administrative, constitutional, and ethical questions in a single case to uphold the rule of law when defending client agency enforcement behavior. To preview contemporary topics in immigration litigation, this article provides an overview of issues concerning: (1) parole of foreign nationals for law enforcement purposes; (2) administrative records and executive privilege; (3) constitutionality of short-term detention conditions; and (4) the Executive's authority to standardize procedures for renunciation of United States citizenship. Aside from illustrating trends in immigration litigation, these topics illustrate the diversity of tools available for civil immigration enforcement.

A valuable offshoot of foreign discovery is the use of parole of foreign nationals for criminal and civil law enforcement purposes.¹ Often, litigators will find themselves faced with the need to secure the participation of a foreign witness in the United States. This possibility, subject to foreign law and treaty law considerations, may be effectuated using the Law Enforcement Significant Public Benefit Order. Although the government holds the position that a Law Enforcement Significant Public Benefit Parole Order can only be issued by the Department of Homeland Security, courts have not always agreed. Accordingly, parole of foreign nationals is an area in which Department litigators should consider consulting with the Office of Immigration Litigation-District Court Section to develop a successful and practical strategy.

Established principles of administrative records are not often subject to controversy. Nationwide defense of administrative actions, however, requires an understanding of differences in views regarding records across jurisdictions. This issue is especially nuanced when addressing the treatment of executive

¹ See, e.g., Yamileth G. Davila & Katerina V. Ossenova, *Foreign Civil Discovery and Immigration Enforcement Actions*, U.S. ATTORNEYS' BULL., July 2017, at 34.

privileges in administrative proceedings. As plaintiffs increasingly attempt to exceed the bounds of the administrative record and probe agency deliberations by alleging pretext and bad faith, litigators must identify and defend the administrative record at the outset of litigation.

Just as creative pleading has affected the care required to certify an administrative record, imaginative arguments couched in the prospect of institutional reform have affected immigration detention. For example, because of the increase in border-crossings—especially of families—over the past decade, many Border Patrol facilities originally intended for short-term processing now face backlogs and crowding. This situation has spurred inventive arguments challenging everything from room temperature and food selection, to personal hygiene in detention facilities. Central to the issues presented are views on the propriety of sleep time and sleep conditions.

Finally, while the past decade saw a rise in illegal border-crossings, the late 2000s also saw the advent of renunciation of United States citizenship from within the United States. Specifically, adherents of sovereign citizen ideology believe that federal, state, and local governments operate illegally and, because the government operates outside of its jurisdiction, they do not recognize federal, state, or local laws, policies, or regulations.² As the so-called Sovereign Citizen Movement and its views gained popularity, courts and government agencies have seen a surge in petitions and litigation of persons seeking to avoid the tax and regulatory responsibilities associated with United States citizenship. Not wishing to relinquish their ability to remain in the United States, however, sovereign citizens are increasingly attempting to relinquish citizenship and remain within the United States as stateless individuals. Additionally, because sovereign citizens often have criminal records that leave them with no practical ability to immigrate to a foreign state, their putative renunciation of United States citizenship presents a myriad of security concerns. Accordingly, issues raised in litigation include the definition of citizenship, Executive Branch authority to determine the procedures by which citizenship may be relinquished, and the sufficiency of citizenship renunciation procedures provided. The intersection of constitutional, criminal, and international law presented in these cases makes for a dynamic practice area.

II. Parole Issues in Litigation

If, in a civil or criminal proceeding, a party intends to call a witness who is a foreign citizen living abroad, the party may apply for Law Enforcement Significant Public Benefit Parole. Under [8 U.S.C. § 1182\(d\)\(3\)\(A\)](#), the Secretary of State may, after approval by the Secretary of Homeland Security, issue a document reflecting a grant of temporary parole to an alien who is applying for a nonimmigrant visa, but is known to be ineligible for such a visa. The Secretary of Homeland Security, thereafter, may, in his or her discretion, parole the alien into the country temporarily, notwithstanding the alien's admissibility to the United States, on a case-by-case basis for humanitarian reasons or because of what he or she deems is a significant public benefit.³ Such parole is distinct from admission.⁴

Notably, federal courts lack the authority to order the parole or admission of witnesses for purposes of discovery or trial. The decision to parole an alien into the United States rests solely within the discretion of the Secretary of Homeland Security.⁵ Such parole may be granted on a case-by-case basis

² Due to violent acts committed by sovereign citizens, the FBI has recognized extremist sovereign citizens as a domestic terrorist movement. DOMESTIC TERRORISM OPERATIONS UNIT AND DOMESTIC TERRORISM ANALYSIS UNIT, FEDERAL BUREAU OF INVESTIGATION, SOVEREIGN CITIZEN DANGER TO LAW ENFORCEMENT (2010).

³ See [8 U.S.C. § 1182\(a\)\(9\)\(A\)](#) (2012).

⁴ See [§ 1101\(a\)\(13\)\(B\)](#) (providing that “[a]n alien who is paroled under [8 U.S.C. Section] 1182(d)(5) ... shall not be considered to have been admitted” for purposes of 8 U.S.C. § 1182(a)(13)(A)).

⁵ *Id.*; [8 C.F.R. § 212.5\(a\)](#) (2017). Although [8 U.S.C. § 1182\(d\)\(5\)\(A\)](#) refers to the “Attorney General” as having authority to grant parole, the [Homeland Security Act of 2002](#), Pub. L. No. 107-296 § 441(2), 116 Stat. 2135, 2192 (2002), transferred this authority to the Secretary of the Department of Homeland Security. See also [6 U.S.C. § 251](#) (2012 & Supp. III 2015).

for urgent humanitarian reasons or significant public benefit.⁶ As expressed by the Supreme Court over one hundred years ago, the United States government’s power to admit and exclude aliens “without judicial intervention” is well-settled:

The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come into this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudication.⁷

The Supreme Court has repeatedly recognized that “the power to exclude aliens, and conversely, admit aliens, is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government.”⁸

AUSAs who wish to make witnesses available via Significant Public Benefit Parole should work closely with local contacts from Immigration and Customs Enforcement and follow the instructions outlined in application materials.⁹ An often unrecognized obstacle to such parole is that the sponsoring law enforcement agency is responsible for supervising and monitoring the whereabouts of the parolee while present in the United States, and must ensure the parolee’s timely departure. Given the implications on the Department of Homeland Security’s discretionary authority over parole and admissions, litigators should also consult with an Office of Immigration Litigation-District Court Section attorney when developing a strategy on using a significant public benefit parole.

III. Executive Privileges and Administrative Record Challenges

Immigration litigation is fraught with challenges arising under the Administrative Procedure Act (APA),¹⁰ the Freedom of Information Act (FOIA)¹¹ and/or the Privacy Act,¹² among others. Often, APA challenges arise in labor and employment immigration litigation, for example in the context of investment-based immigration petitions or national interest waivers for certain professions. APA challenges, however, are equally likely in visa denial and delay litigation outside of the employment context. Regardless of the nature of the complaint challenging agency action, success in APA litigation is inextricably tied to compilation of a complete and credible certified administrative record.

The APA provides for review of agency actions based on the “full administrative record that was before [the agency] at the time [it] made [its] decision.”¹³ Thus, “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”¹⁴ The record should provide a contemporaneous written explanation of the agency’s rationale at the time the decision was made, and the validity of the agency’s action must stand or fall on the propriety of that reason, judged by the appropriate standard of review.¹⁵ The standard of review for most agency

⁶ See 8 U.S.C. § 1182(d)(5)(A).

⁷ *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895); see also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (the Supreme Court has “‘long recognized [that] the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the government’s political departments largely immune from judicial control’” (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953))).

⁸ *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

⁹ See *Tool Kit for Prosecutors*, IMMIGR. & CUSTOMS ENF’T (last visited May 12, 2017).

¹⁰ 5 U.S.C. §§ 551–559.

¹¹ § 552.

¹² § 552a.

¹³ *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971).

¹⁴ *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam); see also *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985).

¹⁵ *Fla. Power & Light*, 470 U.S. at 743–44.

actions under the APA is whether an agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁶ Despite these enshrined principles governing administrative records, the issue is often complicated when dealing with governmental privileges—most commonly, the deliberative process privilege.

Courts typically hold that deliberative privileged material does not form a part of an administrative record for judicial review. Courts first recognized a hard and fast rule shortly after passage of the APA that “internal memoranda made during the decisional process . . . are never included in a [certified administrative] record.”¹⁷ A more nuanced view emerged over time, that “[agency] deliberations not part of the record are . . . immaterial as a matter of law.”¹⁸ Accordingly, “deliberative intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the record.”¹⁹ As a result, materials containing solely the policy advice, recommendations, or opinions, generated as part of the internal deliberative process for formulating the final agency decision, are not generally part of the administrative record. However, some jurisdictions consider materials subject to the deliberative-process privilege part of the administrative record, and they regard identification in a privilege log as necessary for the government to properly assert the privilege.²⁰ Accordingly, litigators should familiarize themselves with the approach in their jurisdiction and work with agency counsel to determine whether deliberative material is considered part of the record and preparation of a privilege log is required.

IV. Developments in Constitutional Challenges to Immigration Detention Conditions—A Survey of Sleep Conditions Challenges

Most immigration detention challenges focus on the authority to detain and the length of such detention.²¹ Other challenges to immigration detention relate to the conditions at detention facilities, such as healthcare, privacy and sanitary conditions. This Article will survey issues related to sleep conditions as an example of the complexity of the field. Although constitutional challenges to immigration detention conditions are not new, the murkiness of constitutional implications surrounding sleep in short-term immigration detention facilities is a new vintage, presenting a myriad of challenges. Simply put, there may be a constitutional right to a certain level of sleep in the detention context. Case law analyzing both convicted inmates and pretrial detainees suggests that certain actions that deprive inmates of sleep may rise to the level of a constitutional violation. But such a constitutional right (under the Eighth Amendment or, potentially, under the Fifth Amendment) has been narrowly construed by the courts. Indeed, a number

¹⁶ *Overton Park*, 401 U.S. at 416.

¹⁷ *Norris & Hirshberg v. SEC*, 163 F.2d 689, 693 (D.C. Cir. 1947); *Tafas v. Dudas*, 530 F. Supp. 2d 789, 794 (E.D. Va. 2008) (holding internal memoranda made during the decisional process are never included in a record).

¹⁸ *In re Subpoena Duces Tecum Serv. on Office of Comptroller of Currency*, 156 F.3d 1279, 1280 (D.C. Cir. 1998); see *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 371 (D.D.C. 2007).

¹⁹ See, e.g., *Amfac Resorts, LLC v. Dep’t of the Interior*, 143 F. Supp. 2d 7, 13 (D.D.C. 2001) ([D]eliberative intra-agency memorand[a] are ordinarily privileged and need not be included in the record); *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1549 (9th Cir. 1993) (holding “neither the internal deliberative process of the agency nor the mental processes of individual agency members” are proper components of the administrative record). But see *NRDC v. Train*, 519 F.2d 287, 287 (D.C. Cir. 1975) (finding a possible improper exclusion of Administrator’s briefing book and remanding to the agency).

²⁰ See, e.g., *Miami Nation of Indians of Ind. v. Babbitt*, 979 F. Supp. 771, 777–79 (N.D. Ind. 1996); see also *Assadi v. USCIS*, No. 12-CV-1374, 2014 WL 4804785, at *5–6 (S.D.N.Y. Sept. 26, 2014) (holding an investigative report that was part of the deliberative process is part of the record but properly withheld as privileged).

²¹ See, e.g., Gretchen C.F. Shappert, et al., *Constitutional Aspects of Civil Immigration Enforcement*, U.S. ATTORNEYS’ BULL., July 2017, at 42; Joseph A. Darrow, et al., *Immigration Detention: Emerging Issues Concerning Arriving Aliens, Criminal and Terrorist Aliens, and Hard-to-Remove Aliens*, U.S. ATTORNEYS’ BULL., July 2017, at 66.

of courts, when presented with similar facts, have found no constitutional violation.

First, multiple circuits have concluded that deprivation of sleep may rise to the level of a constitutional violation.²² For example, in *Walker v. Schult* the Second Circuit addressed a wide range of allegedly unconstitutional conditions raised by an inmate. Specifically, the inmate alleged that “for approximately twenty-eight months, he was confined in a cell with five other men, with inadequate space and ventilation, stifling heat in the summer and freezing cold in the winter, unsanitary conditions, including urine and feces splattered on the floor, insufficient cleaning supplies, a mattress too narrow for him to lie on flat, and noisy, crowded conditions that made sleep difficult and placed him at constant risk of violence and serious harm from cellmates.”²³ Based on these facts, the court concluded that “Walker has plausibly alleged cruel and unusual punishment in violation of the Eighth Amendment.”²⁴ Similarly, in *Harper v. Showers*, the Fifth Circuit evaluated a complaint that a detainee was housed in “filthy, unsanitary cells” and subjected to frequent searches for the purpose of harassing him.²⁵ Based on those facts, the Court concluded that “[i]n light of these allegations, we cannot say that Harper’s claim of cruel and unusual punishment is indisputably meritless. The court abused its discretion, therefore, in dismissing it as frivolous.”²⁶ Thus, both the *Walker* and *Harper* courts allowed a claim based in part on deprivation of sleep to proceed.

The *Walker* and *Harper* courts do not suggest, however, that the constitutional implications surrounding the right to sleep are necessarily broad. Instead, the rationale in both *Walker* and *Harper* allows cases to proceed at the outset of litigation because the allegations in a complaint, if ultimately proven true, *might* establish a constitutional violation. Other cases suggest that the constitutional rights surrounding sleep are necessarily narrow and highly fact-intensive. In this connection, plaintiffs in recent litigation over short-term immigration detention conditions cite *Lareau v. Manson* for the general proposition that use of floor mattresses “is unconstitutional ‘without regard to the number of days a prisoner is so confined.’”²⁷ This conclusion is far from universally held and was explicitly criticized by the Third Circuit in a 2008 decision. In *Hubbard v. Taylor*, the Third Circuit stated:

This finding—in which the Second Circuit effectively held floor mattresses to be *per se* unconstitutional—is in considerable tension with *Lareau*’s own statement that the punishment inquiry “is one of degree and must be considered in light of the particular circumstances of each case and the particular facility in question.”²⁸

Under *Hubbard*, any analysis of a “right” to sleep must take into account the particular circumstances of an individual case and the particular type of facility at issue.

When considering plaintiff allegations in the context of litigation over short-term immigration detention conditions and the particular types of short-term facilities at issue, some case law favors the position that there is no constitutional deprivation when it comes to sleep. Recently, plaintiffs have focused on the following factors, which they claim give rise to a constitutional violation: general overcrowding (inadequate space, unsanitary sleeping spaces near toilets, etc.), lack of bedding/mattresses, constant illumination, and noise caused by overcrowding. However, the government can successfully rebut these claims with two relevant points: (1) detentions are for a short duration only, and (2) the

²² See, e.g., *Walker v. Schult*, 717 F.3d 119, 126–27 (2d Cir. 2013) ([S]leep is critical to human existence, and conditions that prevent sleep have been held to violate the Eighth Amendment.); *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999) ([S]leep undoubtedly counts as one of life’s basic needs. Conditions designed to prevent sleep, then, might violate the Eighth Amendment.).

²³ *Walker*, 717 F.3d at 126.

²⁴ *Id.*

²⁵ *Harper*, 174 F.3d at 720.

²⁶ *Id.*

²⁷ 651 F.2d 96, 105 (2d Cir. 1981).

²⁸ *Hubbard v. Taylor*, 538 F.3d 229, 235 (3d Cir. 2008) (quoting *Lareau*, 651 F.2d at 103).

conditions, most notably illumination, are reasonably related to the normal purpose and function of detention facilities.

Specifically, one decision from the Ninth Circuit includes facts that are somewhat similar to allegations recently made in the context of Border Patrol detention facilities. In *Chappell v. Mandeville*, a prisoner alleged he was unconstitutionally placed on a “contraband watch.”²⁹ The watch lasted from April 30, 2002, until May 6, 2002, and during that time, the prisoner was placed in various restraints in a constantly illuminated and closely monitored cell so he could perform bowel movements, which were then searched for contraband.³⁰ The plaintiff was ultimately released after he had three bowel movements that did not reveal any contraband. The plaintiff raised an Eighth Amendment claim, and the Ninth Circuit concluded that the individuals sued were entitled to qualified immunity.³¹ Turning first to the issue of continuous lighting, the court noted the case law was highly fact-specific, focusing on factors such as: (1) whether the lights caused sleep deprivation; (2) the brightness and intensity of the lights; (3) whether a legitimate penological justification existed; and (4) whether prison officials were trying to keep the prisoner awake.³² The court also noted, significantly, that “[a] large majority of the courts . . . concluded that there was no Eighth Amendment violation” when analyzing continuous lighting issues.³³ The court held there was no clearly established violation in that case, citing the short duration (approximately seven days), the fact that the inmate did not specifically claim he was deprived sleep, and the legitimate penological interests³⁴ at hand.³⁵ Similarly, the court reached the same conclusion with respect to mattress deprivation, noting courts finding a clearly establish violation typically required “additional egregious facts supporting an Eighth Amendment claim.”³⁶ Thus, in *Chappell*, the Ninth Circuit concluded a constitutional right was not clearly established on circumstances similar to those found in detention facilities.

Courts have reached similar decisions in the context of pretrial detainees. For example, in *Jacoby v. Baldwin County*, the Eleventh Circuit addressed a pretrial detainee’s claim that he was forced to sleep on the floor next to a toilet while in administrative segregation.³⁷ Specifically, the detainee alleged he slept with no mattress and no sheets on the floor during the first night of his confinement in segregation, and he subsequently continued to sleep on the floor after the first night.³⁸ The court concluded the officers being sued were entitled to qualified immunity, noting the detainee has not “pointed to any caselaw clearly establishing that having to sleep on a mattress on the floor violated his constitutional rights.”³⁹ Also, addressing an allegation that an individual “temporarily had to sleep upon a mattress on the floor or on a table,” the Eleventh Circuit held “these conditions did not rise to constitutional violations.”⁴⁰ District courts have also suggested that sleeping on the floor is not a constitutional deprivation, particularly for only short periods of time.⁴¹

Applying decisions from institutional reform litigation to challenges to conditions of immigration

²⁹ 706 F.3d 1052 (9th Cir. 2013).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1059.

³³ *Id.*

³⁴ The term “penological” in this context refers to detention interests, not punitive interests.

³⁵ *Id.* at 1057–60.

³⁶ *Id.* at 1060.

³⁷ 835 F.3d 1338, 1342 (11th Cir. 2016).

³⁸ *Id.* at 1344.

³⁹ *Id.* at 1345.

⁴⁰ *Hamm v. Dekalb Cty.*, 774 F.2d 1567, 1575 (11th Cir. 1985).

⁴¹ See *Jones v. Brown*, 300 F. Supp. 2d 674, 681 (N.D. Ind. 2003) (Even if sleeping on the floor long term was a Constitutional violation, which it is not, sleeping on the floor for the four days over a weekend that it took Captain Tracy Brown to provide Mr. Jones with a replacement mattress after he was notified of the problem could not reasonably be found to be deliberately indifferent.).

detention, compelling arguments can be made that in the short-term immigration detention context, there is no constitutional violation when it comes to sleep. Specifically, given: (1) the policies and procedures in effect at detention facilities are not intended to deprive individuals of sleep; (2) many of the provisions have legitimate penological reasons behind them connected to the basic purpose of these facilities; and (3) any discomfort is for a short duration while detainees are processed and sent to other facilities that are designed for long-term detention, a favorable outcome for the government is foreseeable in this context.

V. Litigating Citizenship Renunciation Claims

District courts, particularly the District Court for the District of Columbia, have experienced an increase in cases filed by persons seeking to renounce their United States citizenship while still present within the United States.⁴² Many of these prospective renunciants are prisoners serving sentences for sex crimes who wish to avoid the strict registration requirements for sex offenders in this country. The plaintiffs in these cases seek to avail themselves of a limited provision of the Immigration and Nationality Act that allows renunciation “in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense.”⁴³

Domestic renunciation litigation showcases a tradition of attacking the constitutionality of the Secretary of Homeland Security’s authority to adjudicate renunciation of citizenship. Although the right to expatriate is not constitutionally based, and exists only in statute, plaintiffs have long presented constitutional challenges to the government’s discretion to determine whether an individual adequately renounced affiliation with the United States so as to trigger the right of expatriation. In *Nishikawa v. Dulles*,⁴⁴ the Supreme Court addressed the issue of voluntariness of citizenship relinquishment under 401(c) of the Nationality Act of 1940.⁴⁵ In determining the government had the burden to establish voluntariness, the Court noted it decided the case in the absence of legislative guidance on the evidentiary standards.⁴⁶ Later, in *Afroyim v. Rusk*, the Supreme Court went further, holding that under “the Fourteenth Amendment . . . every citizen of this nation . . . [has] a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.”⁴⁷ Finally, in *Vance v. Terrazas*, the Supreme Court held that although Congress is constitutionally without power to impose involuntary and unintentional loss of nationality, it does have the power to prescribe the acts, presumptions, and evidentiary standards governing when a voluntary and intentional loss of nationality will be found.⁴⁸ Against this historical and legislative backdrop, substantive constitutional claims of plaintiffs are readily defensible. While Congress may not involuntarily strip an individual of citizenship, the Supreme Court has unequivocally held that Congress may set the standards by which a citizen may voluntarily and intentionally renounce affiliation with the United States.⁴⁹

In the past decade, several district courts reviewed numerous suits where prisoners sought to renounce their United States citizenship under 8 U.S.C. § 1481(a)(6). The courts dismissed each of these

⁴² OIL-DCS works closely with subject-matter experts within the USCIS Office of Chief Counsel in this area to standardize representation in litigation challenging adjudications under 8 U.S.C. § 1481(a)(6), nationwide.

⁴³ 8 U.S.C. § 1481(a)(6) (referring to the Attorney General although authority was transferred to the Secretary of Homeland Security under 6 U.S.C. § 557); see *Kaufman v. Mukasey*, 524 F.3d 1334 (D.C. Cir. 2008).

⁴⁴ 356 U.S. 129 (1958).

⁴⁵ 54 Stat. 1169 (codified as 8 U.S.C. § 1482, repealed by Pub. L. No. 95-432, § 1, Oct. 10, 1978, 92 Stat. 1046).

⁴⁶ *Nishikawa*, 356 U.S. at 129.

⁴⁷ 387 U.S. 253, 268 (1967).

⁴⁸ 444 U.S. 252, 265–66 (1980).

⁴⁹ See *Lozada Colon v. U.S. Dep’t of State*, 2 F. Supp. 2d 43, 45 (D.D.C. 1998) (rejecting quasi-constitutional argument that the Secretary of State must approve a certificate of loss of citizenship because of an alleged “inherent, natural right to expatriate”).

cases for various reasons. First, in *Sluss v. USCIS*,⁵⁰ and *Turner v. Beers*,⁵¹ the district court dismissed prisoners' claims as moot where the agency had responded to the renunciants' requests and informed them that it would consider their requests once released from prison. Over time, in response to these requests, U.S. Citizenship and Immigration Services (USCIS) concluded that the United States was not in a state of war for purposes of triggering the statute's provisions, and continued to instruct the potential renunciants that they needed to present themselves for in-person interviews in support of their requests to renounce. The D.C. Circuit reviewed a challenge to this latter argument in *Schnitzler v. United States* and held a prisoner did have standing and could state a claim under the Administrative Procedure Act, 5 U.S.C. § 706, for agency action unlawfully withheld or unreasonably delayed or to challenge an action as being arbitrary and capricious.⁵² Further, in *Sze v. Johnson*, a district court denied a prisoner's request for mandamus relief and held USCIS's policy of requiring an in-person interview was neither arbitrary nor capricious, and the inmate did not have a right to renounce his citizenship while incarcerated.⁵³ Importantly, the D.C. Circuit summarily affirmed this decision, and also found the inmate's claim was moot where he had not pursued an interview after his release from prison.⁵⁴

In addition to the increasing case law on this topic, USCIS continues to develop policies and arguments related to renunciation under 8 U.S.C. § 1481(a)(6) for persons within the United States. Specifically, whether or not the United States is in a "state of war" for purposes of the statute is not a static determination, but subject to change over time and, therefore, available to be challenged in future litigation. Historically, the government summarily denied domestic renunciation requests on the ground that the United States was not in a state of war. Accordingly, renunciations occurred only overseas and were processed by the Department of State. Indeed, *Kaufman* involved the first 8 U.S.C. § 1481(a)(6) adjudication since the close of World War II, owing to the Executive Branch's consistent application of section (a)(6)'s "state of war" requirement as not having been met by any instance of United States military intervention after World War II.⁵⁵ For example, in 1967, the then-Immigration and Naturalization Service General Counsel Charles Gordon issued an opinion concluding that the Vietnam conflict was not a "state of war" for purposes of this statute.⁵⁶

VI. Conclusion

This article shows that immigration litigation may touch on a variety of substantive areas of law. The article highlights the diversity of tools available for civil immigration enforcement and provides an overview of contemporary topics in immigration litigation, specifically issues concerning: (1) parole of foreign nationals for law enforcement purposes; (2) administrative records and executive privilege; (3) constitutionality of short-term detention conditions; and (4) the Executive's authority to standardize

⁵⁰ 899 F. Supp. 2d 37, 39–41 (D.D.C. 2012).

⁵¹ 5 F. Supp. 3d 115, 120 (D.D.C. 2013).

⁵² 761 F.3d 33 (D.C. Cir. 2014).

⁵³ 172 F. Supp. 3d 112 (D.D.C. 2016).

⁵⁴ *Sze v. Johnson*, No. 16-5090, 2017 WL 2332592 (D.C. Cir. Feb. 21, 2017).

⁵⁵ *Kaufman v. Mukasey*, 524 F.3d 1334 (D.C. Cir. 2008).

⁵⁶ INS Gen. Counsel Op. No. 349-P (Feb. 23, 1967).

procedures for renunciation of United States citizenship. Awareness of these issues is essential to successfully defending a federal immigration enforcement action. If you encounter any of these issues in your litigation, OIL-DCS is available to provide guidance.

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Thank you,

K. Tate Chambers