

Mass Surrender in Immigration Court

By Michael Kagan*

In theory, the Department of Homeland Security bears the burden of proof when it seeks to deport a person from the United States. But the government rarely has to meet it. This Article presents original data from live observation in Immigration Court, documenting that almost all respondents in deportation proceedings admit and concede the charges against them, even when they have attorneys, without getting anything in return from the government. Focusing especially on the role of immigrant defense lawyers, the Article explores why this is happening. It critiques the legal standards of proof used in Immigration Court, while also exploring normative ambiguities about the role of immigration lawyers in deportation proceedings. Together, these factors are effectively depriving many immigrants of the vigorous legal defense that they deserve.

* Joyce Mack Professor of Law and Director of the UNLV Immigration Clinic at the University of Nevada, Las Vegas, William S. Boyd School of Law. Much credit due to Emily Espinosa, who served as research assistant on this project. Thanks also to Youngwoo Ban for compiling essential materials. My thanks to Linus Chan, Stewart Chang, Eve Hanan, Laila Hlass, Thom Main, Michael Shamoon, Shoba Sivaprasad Wadhia, Jeffrey Stempel, and Jean Sternlight and for helpful input and comments on earlier drafts.

Introduction	164
I. Overview of Removal Proceedings	167
II. Conceding Removability: New Observational Data.....	171
III. Burdens of Proof in Removability.....	176
IV. Critiquing the Burden of Proof in Removability.....	181
A. The Purposes of a Burden of Proof.....	181
B. Arguments for Invalidation of the Alienage Presumptions.....	184
V. Benefits of Denying Charges	195
VI. Normative Confusion About the Role of Immigration Lawyers in Immigration Court	201
Conclusion.....	207

INTRODUCTION

There has been much criticism about the prevalence of plea bargaining in the American criminal justice system. But at least it is a bargain. It may be that too many people accept criminal convictions when the prosecution case might not stand up at trial.¹ And it may be that most plea bargains are extracted from defendants through a system that puts them under duress by threatening to leave them in jail or penalize them with a harsher sentence if they insist on going to trial.² And yet, criminal defendants are at least offered *something* for waiving their constitutional right to insist that the state prove its case. They get a lesser charge or a more favorable sentence. But in the American legal system governing deportation, not so much. When people face deportation, they usually let the government off the hook, without getting any bargain in return.

This Article is the first to document empirically how respondents in deportation proceedings in the United States respond to government charges. The answer is: they usually just concede their own deportability. They do not make the government submit evidence to support its case. Based on observations inside Immigration Court, this Article reports data indicating that there is effectively a mass voluntary surrender of fundamental rights occurring routinely in plain sight every day. Perhaps most notably, even when respondents had legal representation, they still admitted and conceded charges in nearly every case, without getting anything concrete in return. That is to say, even lawyers hired to defend people against deportation do not usually make the government put up a case. In the process, they effectively waive their clients' right to remain silent, a right that has been nominally protected in deportation proceedings, albeit less strongly than in criminal cases.

1. See Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 928 (2016).

2. See Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 408 (2017).

Although Immigration Court is usually open to the public, the filings in deportation proceedings are confidential, so I cannot directly review the filings and evidence of the cases. But I can report on how much time the cases take. As a direct consequence of respondents in Immigration Court conceding government charges without the slightest resistance, the grave question of whether a person can be deported from the United States can be adjudicated incredibly quickly. In one case reported in this Article, it took just ninety-two seconds for an immigration judge to find the government's charges to be sustained and the person removable from the country.³ In nearly every case observed, it took fewer minutes to decide that someone is deportable than are spent on commercials in a typical TV episode of *Law and Order*.⁴ In 94.6% of the cases observed, it took less than eighteen minutes for immigration judges (IJs) to find respondents deportable.⁵

This mass surrender likely has multiple causes. One is that the government's burden of proof in Immigration Court is extremely low and, to a considerable extent, illusory. Although in principle the Department of Homeland Security (DHS) must prove that a person in removal proceedings should be deported, it can escape that burden by relying on rules that presume many people are deportable, especially people who are foreign born.⁶ These presumptions mean that the government's burden of proof in Immigration Court is somewhat a façade, a problem that has recently begun to attract more scholarly attention.⁷ The government's low burden of proof means that most people in removal proceedings would be found removable even if they denied all charges, and even if DHS brought forward no evidence indicating possible birth in a foreign country except for hearsay on a form riddled with obvious errors. Immigrants and their attorneys may thus reason that there is little to be gained by fighting at this stage of the proceedings, especially since many people can try to avoid deportation in other ways.

Another reason for mass surrender is that many people in removal proceedings do not have lawyers. Previous empirical research has shown that most people facing deportation do not have legal representation, and that one of the tangible impacts of giving immigrants lawyers is that they are more likely to assert plausible legal claims in Immigration Court.⁸ And yet, this also cannot explain the phenomenon. As the data presented in this Article illustrates, even with legal representation people almost always concede deportation without getting anything in return.

3. See *infra* Part II.

4. See *How Many Minutes of Commercials Are Shown in an Average TV Hour?*, TVWEEK (May 13, 2014), <https://www.tvweek.com/tvbizwire/2014/05/how-many-minutes-of-commercial> [<https://perma.cc/Z9WL-L3V2>].

5. See *infra* Part II.

6. See discussion *infra* Part IV.

7. See Fatma Marouf, *Immigration Law's Missing Presumption*, 111 GEO. L.J. 5 (2023).

8. See discussion *infra* Part IV.

A final, significant reason for mass surrender in Immigration Court may be confused norms of practice that prevail among many immigration lawyers and in some immigration courts. There are training materials from the leading national bar association of immigration lawyers instructing that the government should be made to prove its case, but there are other training materials that say the opposite.⁹ Some immigration judges and some deportation prosecutors react with surprising hostility when immigrant defense lawyers deny charges for their clients. For some lawyers, admitting allegations may reflect a reasonable fear that taking a more aggressive posture in court would antagonize the immigration judge and the DHS attorney, upon whose discretion the client's fate (and the lawyer's law practice) may turn.

Confusion over what immigrant defense lawyers should do reflects a deeper confusion about the nature of deportation proceedings, specifically whether they are more like civil litigation or more like criminal trials.¹⁰ In the 1960s, the Supreme Court found that deportation is something in the middle, at least as far as the burden of proof is concerned.¹¹ But what about the role of the defense lawyer in these proceedings? Under the Federal Rules of Civil Procedure, a lawyer for the defense would be mandated to admit objectively true allegations by the plaintiff.¹² But in criminal defense, a vigorous defense would mean insisting on making the government prove its case. Which model better fits deportation defense?¹³ Do ethical obligations require an attorney to admit factual allegations against her client that she knows are true? I will argue that a zealous immigrant defense attorney would likely do the opposite—deny charges—but it is understandable that there would be normative confusion about the role lawyers should play in this context.

These problems have consequences. Both government and academic studies have found that the U.S. immigration enforcement system incorrectly detains and deports U.S. citizens.¹⁴ That fact ought to increase concern about whether the procedural safeguards and practices involved are adequate. More broadly, in any system adjudicating the deprivation of fundamental liberty, lawyers and judges have a critical role in making sure that the government has taken the required level of care. When the government is routinely able to escape from meeting a meaningful burden of proof, enforcement officers can cut corners with little consequence, creating risks of flawed decision-making in future cases.

In addition to reporting novel data about what actually happens inside Immigration Court, this Article offers multiple arguments as to why removal defense lawyers should have their clients deny removability much more often. First, I will suggest that there is a plausible argument that the burdens of proof of

9. See discussion *infra* Part VI.

10. See Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 137–38 (2015) (describing the origins of the civil-criminal distinction in immigration law).

11. See discussion *infra* Part IV.

12. See Fed. R. Civ. P. 11(b)(4).

13. See discussion *infra* Part VI.

14. See *infra* Section IV.B.

removability in Immigration Court are actually illegal. In particular, the foreign-birth presumption has breathtaking implications for millions of U.S. citizens and conflicts with the text of both statute and regulation.¹⁵ Created by the Board of Immigration Appeals, the foreign-birth presumption is nearly a half century old, but it has been subject to remarkably little judicial scrutiny.¹⁶ Such scrutiny is overdue. But even if this argument fails, I will argue that there are still good reasons to deny charges and force the DHS to prove its case. If nothing else, a respondent should not concede procedural rights without a compelling reason.

This Article proceeds as follows. Part I gives an overview of removal proceedings in Immigration Court. In Part 0, the Article reports new data from observation of the Las Vegas Immigration Court illustrating how immigrant respondents respond on the record to the allegations and charges levied against them by the DHS. In Part 0, the Article then examines the burdens of proof and evidentiary presumptions that make it extremely easy for DHS to obtain orders of removal without substantial evidence. Part I0 outlines critiques that might be used to challenge these burden-of-proof rules, especially the foreign-birth presumption. Part 0 discusses other reasons for respondents to deny and contest charges, while Part 0 identifies normative confusions about the role of immigration lawyers in Immigration Court that may deter some attorneys from doing so. In conclusion, the Article argues that, even assuming the validity of current burden-of-proof rules, immigrants would be better off denying charges far more often, and immigration judges should change the way they take pleadings from unrepresented respondents.

I. OVERVIEW OF REMOVAL PROCEEDINGS

Since 1996, deportation has been known in immigration law as “removal,” and the hearings in Immigration Court that decide whether a person should be deported are known as “removal proceedings.”¹⁷ Given that this Article is about the technical legal procedures, it often refers to these proceedings and related rules by this technical legal name. However, I will also use the term “deportation” interchangeably. As an early commentator on the 1996 immigration law wrote, the word deportation “better reflects the real impact of the laws.”¹⁸ As I will emphasize in Part 0, it is critical for lawyers and the Immigration Courts to keep front of mind what is at stake in these proceedings.

Deportation proceedings involve the DHS, or more specifically Immigration and Customs Enforcement (ICE), seeking an order of removal against an individual, who is referred to as the “respondent.” The proceedings have two substantive

15. See discussion *infra* Section IV.B.

16. See *infra* Part IV.

17. See 8 U.S.C. § 1229(a) (describing “removal proceedings”).

18. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936 n.3 (2000); see also MICHAEL KAGAN, *THE BATTLE TO STAY IN AMERICA: IMMIGRATION’S HIDDEN FRONT LINE* 61 (2020) (critiquing the term “removal”).

stages. First, the immigration judge must decide whether the person is “removable.”¹⁹ Second, “[n]oncitizens who are deemed ‘removable’ may be eligible to apply for ‘relief from removal.’”²⁰ Relief from removal includes several forms of protection based on danger of human rights violations in the country to which the person would be deported (asylum, withholding of removal, or protection under the Convention against Torture).²¹ Relief also includes Cancellation of Removal, which is based on the possibility that deporting the Respondent would cause unusual hardship to an immediate family member who has a legal right to be in the United States.²² And it can include adjustment of status, which is when the respondent is eligible for immediate lawful permanent resident status.²³ There are also ways in which a respondent can put removal proceedings on pause in order to wait for a visa application to be adjudicated by a different federal agency, U.S. Citizenship and Immigration Services (USCIS). Needless to say, there are many procedural and substantive issues involved in each of these and other forms of relief. However, since this Article is about charges of removability, I will not explore these issues. Once a respondent in Immigration Court is applying for relief, she has already been found removable from the United States. The focus in this Article is how a person gets to that point.

The Immigration and Nationality Act (INA) states that “at the conclusion of the proceedings the immigration judge shall decide whether an alien is removable from the United States.”²⁴ This means that if the immigration judge finds the respondent removable, and if the respondent fails to claim or win some form of relief, the immigration judge will issue an order of removal. This authorizes DHS to deport the person from the country.

Removal proceedings in Immigration Court begin with DHS filing a “charging document” against a person.²⁵ There are three kinds of charging documents that can accomplish this task, but the most common by far is the Notice to Appear (NTA).²⁶ The NTA is a standardized form—Form I-862—that asks DHS to check one of three boxes. DHS can allege one of the following:

1. The Respondent is an “arriving alien”
2. The Respondent is “an alien present in the United States who has not been admitted or paroled”

19. See AM. IMMIGR. COUNCIL, THE REMOVAL SYSTEM OF THE UNITED STATES: AN OVERVIEW 2 (2022), <https://www.americanimmigrationcouncil.org/research/removal-system-united-states-overview> [<https://perma.cc/PA37-JTHR>].

20. *Id.* at 4.

21. *Id.*

22. *Id.*

23. *Id.*

24. 8 U.S.C. § 1229a(c)(1).

25. 8 C.F.R. § 1003.14(a).

26. The other two are a “Notice of Referral” and a “Notice of Intention to Rescind and Request for Hearing by Alien.” 8 C.F.R. § 1003.13.

3. The Respondent is a person who was “admitted to the United States, but is removable” for other reasons

As we will see below, much depends on which box DHS chooses to check. It is worth asking whether a pro se respondent is likely to understand the terminology. But the form is not entirely just a check-the-box document. It also includes a series of specific factual and legal allegations. DHS then recites a legal charge referencing the provision of the INA under which those facts render the person removable from the United States.

U.S. Department of Homeland Security **Notice to Appear**

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: _____ FINB: _____ File No: _____
 DOB: _____ Event No: _____

In the Matter of: _____

Respondent: _____ currently residing at: _____
 _____ (Number, street, city and ZIP code) _____ (Area code and phone number)

1. You are an arriving alien.
 2. You are a person present in the United States who has not been admitted or paroled.
 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security charges that you:

This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
 Section 235(b)(1) order was vacated pursuant to: 8CFR 208.30(f)(2) 8CFR 235.3(b)(5)(ii)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

_____ (Complete Address of Immigration Court, including Room Number, if any)
 on _____ at _____ to show why you should not be removed from the United States based on the
 (Date) (Time)
 charge(s) set forth above.

Date: _____ (Signature and Title of Issuing Officer)
 _____ (City and State)

See reverse for important information Form I-862 (Rev. 08/01/07)

During the removability phase of proceedings, the respondent will be asked to plead to the allegations and charges on the NTA. This is analogous to pleading in criminal prosecutions, though the terminology is different. The equivalent of a “guilty” plea would be to “admit” the allegations and to “concede” the charge, after

which the immigration judge would “sustain” the charge.²⁷ After that, the immigration judge will ask the respondent if she would like to designate a country of removal. It is customary for someone who wants to avoid deportation to not want to designate a country of removal, especially when a person intends to apply for asylum because of a fear of persecution. Immigration lawyers speaking in shorthand in Immigration Court will sometimes say that they “admit, concede and decline” the charges. That is, they admit the factual allegations, concede the legal charge of removability, and decline to designate a country to go to.

But people fighting deportation do not have to admit and concede. The alternative, the equivalent of a not guilty plea, is to deny the allegations and/or the charge. When DHS seeks to deport a legal resident because she has been convicted of a crime, it would state in the allegations the alleged crime for which the respondent was convicted and the provision of the INA that makes that conviction removable. To deny the factual allegation would create a factual dispute about whether the respondent was actually convicted of a crime. However, the respondent can also admit the fact of a conviction and still contest the charge. That would create a legal dispute over whether the conviction is actually for a removable crime. There is a vast and complex body of law attempting to define whether state criminal convictions are removable under federal immigration law.²⁸

When DHS seeks to deport a person who it believes entered the country illegally and then resided in the United States unlawfully, the focus will usually be on the factual allegations, not on a question of law. An undocumented immigrant who is “present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than [a legal port of entry]” is removable.²⁹ In such a case, the common form of factual allegations on the NTA would assert four factual claims. I will quote here from the language used repeatedly in NTAs filed against multiple clients of the UNLV Immigration Clinic in Las Vegas, which I direct³⁰:

1. You are not a citizen or national of the United States.
2. You are a native of [COUNTRY] and a citizen of [COUNTRY].

27. EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL § 4.15(h) (2008) (prescribing the method of pleading in removal proceedings, including the terminology).

28. See, e.g., CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* (2d ed. 2021); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L. REV. 1669 (2011); Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553 (2013).

29. 8 U.S.C. § 1182(a)(6)(A)(i) (defining grounds of inadmissibility). A person in removal proceedings “may be charged with any applicable ground of inadmissibility” under 8 U.S.C. § 1182(a). 8 U.S.C. § 1229a(a)(2). In addition, an undocumented immigrant who is “present in violation of law” would be removable under 8 U.S.C. § 1227(a)(1)(B).

30. There are other patterns of charging—for instance, for lawful residents charged with removability because of a criminal conviction. However, the four charges listed here appear to be the most common pattern by far.

3. You arrived in the United States at or near [BORDER LOCATION], on or about [DATE].³¹
4. You were not then admitted or paroled after inspection by an Immigration Officer.

If the respondent admits these allegations, removability is the only plausible legal conclusion. If the respondent denies the allegations, DHS would have to introduce evidence to support the allegations. But, as we will see in Part II, DHS rarely is forced to do that.

II. CONCEDED REMOVABILITY: NEW OBSERVATIONAL DATA

There is a good deal of data available about some aspects of removal proceedings. For example, studies have long documented high levels of inconsistency in asylum adjudication.³² There is fairly up-to-date data about the willingness of each individual immigration judge to grant asylum.³³ We also know a good deal about how often DHS charges respondents on the basis of a criminal conviction versus charging them simply for being in the country without admission.³⁴ And we know a lot about the lack of legal representation in removal proceedings and the impact of legal representation on improving a respondent's chances of avoiding an order of removal.³⁵

Yet, there is little data about how immigration judges adjudicate removability itself or about how respondents and their lawyers handle that stage of the proceedings. This reflects the tendency in much of the literature on Immigration Court to focus on relief from removal—asylum in particular. The one exception to this is the wide literature examining the categorical approach, the way in which immigration law decides whether a state criminal conviction is a removable offense.³⁶ But this is not how most undocumented immigrants are found

31. Some NTAs state that the location or the date is “unknown.”

32. See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

33. See *Judge-by-Judge Asylum Decisions in Immigration Courts: FY 2017-2022*, TRAC IMMIGRATION (Oct. 26, 2022), <https://trac.syr.edu/immigration/reports/judge2022/> [<https://perma.cc/NY77-HPGD>].

34. See *New Deportation Proceedings Filed in Immigration Court*, TRAC IMMIGRATION (Feb. 2022), <https://trac.syr.edu/phptools/immigration/ntanew/> [<https://perma.cc/4NF7-XXNT>].

35. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 11 (2015); *State and County Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGRATION, <https://trac.syr.edu/phptools/immigration/nta/> [<https://web.archive.org/web/20220715191604/https://trac.syr.edu/phptools/immigration/nta/>] (last visited July 15, 2022).

36. See 8 U.S.C. § 1227(a).

removable.³⁷ DHS need not allege any criminal conviction at all if a noncitizen is present in the country without having been legally admitted.³⁸

For this Article, a law student research assistant observed more than 100 master calendar hearings in the Las Vegas Immigration Court in December 2022 and January 2023. She observed hearings with all four immigration judges who are based in and who regularly hear cases in Las Vegas. Master calendar hearings are usually relatively short and can address a wide range of topics, including pleadings and adjudication of charges of removability. After eliminating hearings that covered only other topics, we were left with a sample of seventy-five hearings in which pleadings were taken. The Las Vegas Immigration Court has four permanent judges, though immigration judges from other locations sometimes conduct hearings by video in Las Vegas. The four regular Las Vegas judges have asylum grant/denial rates that are roughly on par with the national average or slightly more generous than IJs nationally, and certainly not at any extreme end of the spectrum, making it appear to be a relatively typical court.³⁹

For each hearing, the research assistant recorded the following information:

- Name of the immigration judge
- Whether the respondent was detained
- Whether the respondent had legal representation
- Whether the respondent admitted or denied charges
- Whether the judge found the respondent removable
- Total duration of the hearing.

Court filings in Immigration Court are confidential and thus could not be accessed. However, the research assistant also made notes for each case about key issues that were discussed in the hearing and whether any potential relief from removal was named. As a result, for each of the cases in which the respondent denied charges we are able to report why they did so.

The majority of the sample—forty-three of seventy-five cases—had legal representation. Of the seventy-five cases observed, twelve were detained.⁴⁰ Only three of the detained respondents had legal representation, which is consistent with

37. *See Fewer Immigrants Face Deportation Based on Criminal-Related Charges in Immigration Court*, TRAC IMMIGRATION (July 28, 2022), <https://trac.syr.edu/immigration/reports/690/> [<https://perma.cc/D4RT-QA55>].

38. *See* discussion *infra* Part IV.

39. *See Judge-by-Judge Asylum Decisions in Immigration Courts: FY 2017-2022*, TRAC IMMIGRATION (Oct. 26, 2022), <https://trac.syr.edu/immigration/reports/judge2022/> [<https://perma.cc/NY77-HPGD>].

40. Since the sample had a small number of detained cases, it is not possible to report any particular differences between detained and non-detained respondents with respect to pleading.

data showing that people in ICE detention are far less likely to obtain legal representation than those who are free.⁴¹

Figure 1: Basic Profile of the Sample

Represented: 43

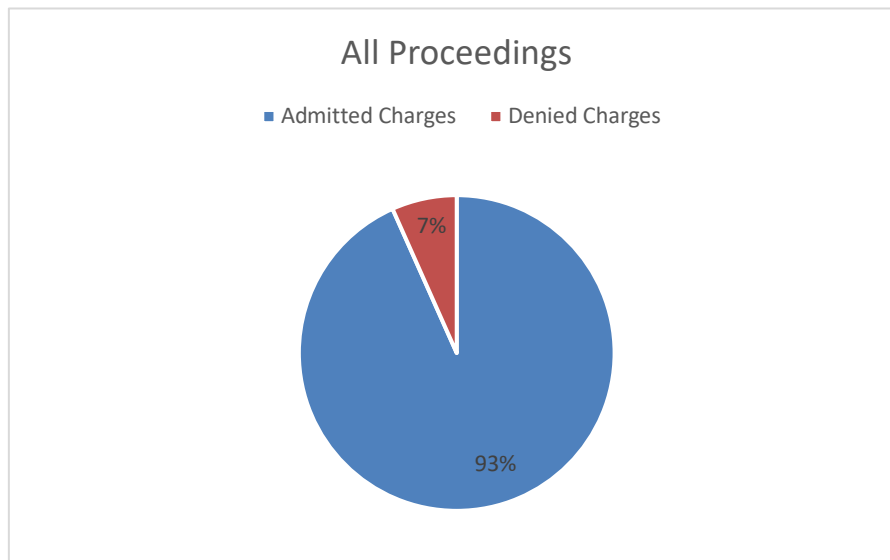
Not Represented: 32

Detained: 12 (*3 with legal representation*)

Not Detained: 63 (*40 with legal representation*)

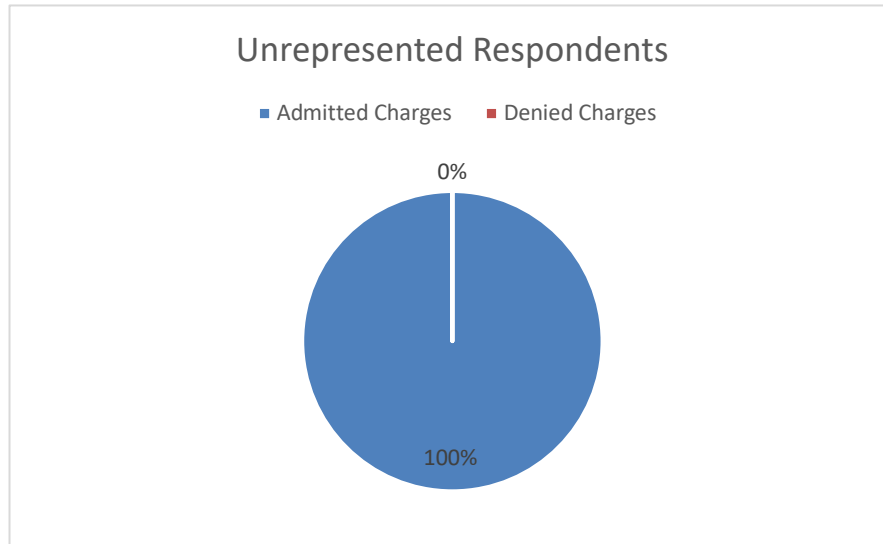
Overwhelmingly, almost all —seventy of seventy-five of them, or 93%— admitted and conceded charges of removability. Even with the tiny number of respondents who contested charges, we can say a bit more about what makes a respondent more likely to do so. All five shared one key characteristic: they had lawyers.⁴²

Figure 2: Admitting v. Denying Charges in All Proceedings



41. See Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court> [<https://perma.cc/U7YU-9TQL>].

42. One might reasonably hypothesize that detention status would impact the likelihood to fight charges of removability. However, this sample was too small to meaningfully test this hypothesis. Three of the five respondents who denied charges were detained, and two were not. That is far too small a sample from which to draw any conclusions.

Figure 3: Unrepresented Respondents

This finding is not surprising. Past research has shown that respondents with legal representation are far more likely to seek relief from removal.⁴³ We can generalize that having a lawyer is essential for respondents in Immigration Court to take advantage of any legal means of resisting deportation, including both applications for relief and contesting charges of removal. For people without lawyers, removal proceedings are disempowering. They are unlikely to effectively contest the case against them, which makes it very easy for DHS to deport them with little examination of all relevant issues. When immigration judges take pleadings from pro se respondents, they do not usually tell the person that they have the right to not answer questions and to make the government prove its case. Instead, immigration judges typically ask what may sound like innocent questions that most people would not hesitate to answer, like “where were you born?” A pro se respondent with little understanding of the legal rules may feel they should try to please the judge and certainly should not refuse to answer basic factual questions from an authority figure. But the answers to such questions can serve the same function as a full confession in a criminal case, for reasons I will explain in Part 0.

Only one of the respondents who denied charges in our sample did so in a manner that forced DHS to meet its burden of proof as to alienage, which is on paper the central issue in proving removability.⁴⁴ That respondent was also the only one of the five who was immediately found removable by the immigration judge. The other four presented a legal dispute in which they implicitly or explicitly conceded that they were not U.S. citizens. Two of them argued that they had been

43. Eagly & Shafer, *supra* note 35, at 30.

44. See discussion *infra* Part IV.

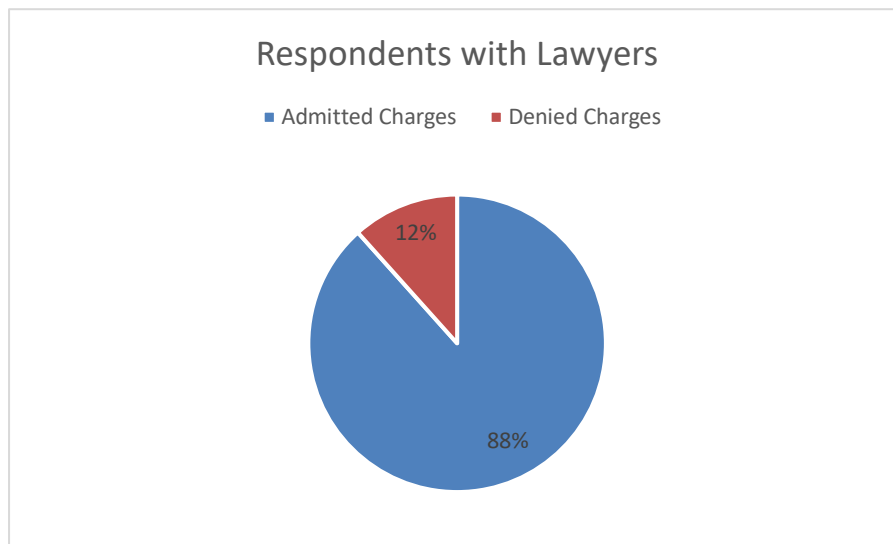
paroled into the United States, which changes eligibility for certain forms of relief from removal. One contested whether his criminal conviction was removable. And the last one argued that there had been a clerical error that led to a denial of adjustment of status. None of the four who raised these legal disputes were found removable at the same hearing. That is, four of the five respondents who contested charges forced the immigration judge to take more time to adjudicate the issues.

In the vast majority of cases, when respondents admit and concede charges, the hearings are over fast. The average length of hearings in which pleadings were taken was six minutes, fifty-eight seconds, and the median was even faster, meaning that the sample skewed toward the faster end of the spectrum. Of the seventy-five cases, roughly a third (twenty-four cases) took less than four minutes. It should be noted, also, that we recorded the entire duration of the hearing in each case, during which multiple topics were often raised. Thus, the amount of time it took for immigration judges to take pleadings and adjudicate removability only was often even less than these figures would indicate. Even still, the longest hearing in which the respondent was found removable was over before the eighteen-minute mark. The fastest took just ninety-two seconds.

Figure 4: Duration of Hearings in Which Pleadings Were Taken

Mean: 6:58
Median: 5:27
Range: 1:32-17:49
< 4 minutes: 24
> 10 minutes: 21

Finally, this data shows much about how immigration lawyers represent clients fighting removal. In short: they rarely contest deportation. Instead, they focus on applications for relief for clients who they concede are deportable. To be sure, it appears that a respondent needs to have a lawyer for denying charges to even be a realistic possibility. But even with a lawyer, 88% admitted and conceded removability without apparently getting anything in return. That is a stunning figure because it means that most immigrant defense lawyers waive an opportunity to defend their clients. Only in one case did a lawyer deny charges in a manner that forced DHS to submit any actual evidence. The remainder of this Article will examine why this might be happening.

Figure 5: Represented Respondents Admitting or Denying Charges

III. BURDENS OF PROOF IN REMOVABILITY

The first reason why so few people deny allegations in removal proceedings, even when they have attorneys, is likely that the burden of proof is so low that it might seem to make little difference to force DHS to prove its case. Fatma Marouf, who has written the first comprehensive study of standards of proof in immigration enforcement, concluded that the rules applied in Immigration Court lack the presumption of innocence that should animate an area of law in which the government is seeking to deprive a person of liberty.⁴⁵ As she wrote: “From the investigation phase, to the use of detention, to the final hearing in immigration court, immigration law is designed to facilitate deportation, not to guard against unjust government intrusion.”⁴⁶

Rather than a presumption of innocence, the rules governing removal proceedings effectively create a pervasive presumption of removability for any foreign-born person. First, recall that the DHS chooses among three categories under which to charge a respondent in removal proceedings. The statute explicitly assigns the burden of proof to DHS for only one of the categories, for people who were already admitted to the United States but who are deportable for some other reason.⁴⁷ The reason for deportation in such a case might be that the person’s visa expired or that she was convicted of a certain kind of crime. Whatever the cause, in

45. Fatma Marouf, *Immigration Law’s Missing Presumption*, 111 GEO. L.J. 983, 985–86 (2022). Burdens of proof in immigration bond proceedings have also been extensively explored in Mary Holper, *The Beast of Burden in Immigration Bond Proceedings*, 67 CASE W. RES. L. REV. 75 (2016).

46. Marouf, *supra* note 45, at 985.

47. 8 U.S.C. § 1229a(c)(3); *see also* Marouf, *supra* note 45, at 1016; 8 C.F.R. § 1240.8.

this case DHS “has the burden of establishing by clear and convincing evidence” that the person is in fact deportable.⁴⁸ For people who were admitted to the country, the statute states that “no decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.”⁴⁹ But what if DHS checks one of the other two boxes? In this case, the statute is not explicit about the burden of proof.

Let us start with people who were not admitted to the United States. A few things are clear in the statute in this situation. First, the INA is very clear that in applications for relief from removal, such as an application for asylum, the respondent bears the burden to prove eligibility.⁵⁰ But such applications for relief arise only after the person has been found to be removable in the first place. Second, the INA states that

the alien has the burden of establishing, [] if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible . . . or [] by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.⁵¹

This rule mirrors the situation when a person arrives at a U.S. port of entry. On arrival, anyone asking to be allowed into the country bears the burden of proof.⁵² At the border, that includes U.S. citizens returning from abroad, who must “establish” the fact of their citizenship.⁵³ But in Immigration Court, the statutory shifting of the burden of proof is conditional on an underlying factual and legal determination that the person is an “arriving alien.”⁵⁴ This raises a fundamental question. How is the Immigration Court in this situation to know if the person is actually an “alien”? As we have already seen, the first factual allegation that DHS makes in removal proceedings is that the person is not a U.S. citizen. If a respondent charged as an arriving alien or with being present without admission denies the allegation of alienage, who has the burden to prove it? The statute does not explicitly say.⁵⁵

Even assuming that the respondent is indeed a noncitizen, the statute only shifts the burden of proof “if the alien is an applicant for admission.”⁵⁶ “Applicant for admission” is a term of art in immigration law. The INA states that “an alien *present in the United States* who has not been admitted or *who arrives* in the United

48. 8 U.S.C. § 1229a(c)(3).

49. *Id.*

50. 8 U.S.C. § 1229a(c)(4); *see also* 8 C.F.R. § 1240.8(d) (requiring proof by preponderance of the evidence in applications for relief).

51. 8 U.S.C. § 1229a(c)(2).

52. 8 C.F.R. § 1235.1(a).

53. 8 C.F.R. § 1235.1(b); 8 U.S.C. § 1361. *See generally* *Nadal-Ginard v. Holder*, 558 F.3d 61, 66 (1st Cir. 2009).

54. 8 U.S.C. § 1361.

55. *See* 8 U.S.C. § 1229a(c).

56. 8 U.S.C. § 1229a(c)(2); 8 U.S.C. § 1361 (same).

States (whether or not at a designated port of arrival) . . . shall be deemed for purposes of this Act an applicant for admission.”⁵⁷ This category actually encompasses two different categories of people, those who are present inside the country, and those who are arriving at the border. A respondent in Immigration Court is in the former category; she is present inside the country. But in either case, DHS has to allege that the person was not admitted. If the respondent denies that allegation, the statute does not explain which side bears the burden in the resulting factual dispute.

This confusing tangle is clarified by a set of regulations. The regulations set out a general rule that seems to put the burden of proof squarely on DHS: “A respondent charged with deportability shall be found removable if [DHS] proves by clear and convincing evidence that the respondent is deportable as charged.”⁵⁸ That is an ostensibly high burden, higher than the usual preponderance of the evidence standard used in most noncriminal areas of law. But this high burden is something of a mirage that only applies in limited circumstances, as Marouf points out in her study.⁵⁹

First of all, the regulations offer DHS an especially easy path to deportation if DHS charges the person as an “arriving alien.” In this situation, defined as when “proceedings commenced upon a respondent’s arrival in the United States or after the revocation or expiration of parole,” the burden is entirely on the noncitizen to “prove that he or she is clearly and beyond doubt entitled to be admitted.”⁶⁰ These regulations allow DHS considerable latitude to choose its own standard of proof when it chooses which of the three boxes to check and thus how to charge the respondent. Marouf compellingly argues that immigration judges should scrutinize DHS’ charging decisions, given that the entire legal structure of the proceedings depends on them.⁶¹ But it is not actually explicit in the applicable regulations that immigration judges must do this, nor that they even have the authority to do so.⁶² And even if an immigration judge were to scrutinize the charging category, it is not clear what the standard of proof would be for this determination.

In removal proceedings for people charged as being present without admission, the regulations essentially limit DHS’ burden of proof to one question and one question only: alienage. The regulations state that DHS “must first establish

57. 8 U.S.C. § 1225(a)(1) (emphasis added).

58. 8 C.F.R. § 1240.8(a).

59. Marouf, *supra* note 45, at 992.

60. *See* 8 C.F.R. § 1240.8(b).

61. Marouf, *supra* note 45, at 1015.

62. Marouf cites training materials for immigration judges that state that “[i]t is important [for immigration judges] to review [DHS’s] determination as they are often incorrect.” *Id.* at 1020 (quoting JACK H. WEIL, BURDENS OF PROOF IN REMOVAL PROCEEDINGS 1 (emphasis added), https://trac.syr.edu/immigration/reports/211/include/II-06-training_course_burden_of_proof.pdf [<https://perma.cc/ET8S-G3CM>]). However, there does not appear to be any other clear authority on point.

the alienage of the respondent.”⁶³ But once DHS does this, the burden shifts to the respondent to prove either that “he or she is lawfully in the United States pursuant to a prior admission” or “entitled to be admitted.”⁶⁴ Thus, even though DHS must make multiple allegations on its charging document, it really only bears a burden to prove one of them.

This limited burden of proof is rendered even less meaningful by the foreign-birth presumption. The regulations say that DHS bears a burden to prove “alienage” by clear and convincing evidence.⁶⁵ A plain reading of that might lead one to think that DHS must actually prove that the person is not a U.S. citizen. But that is not how this rule is applied. In a 1969 case of disputed citizenship, the Board of Immigration Appeals (BIA) referenced “the presumption of alienage which attaches by reason of his birth in Mexico,” without offering any citation or explanation of the authority for this presumption.⁶⁶ This foreign-birth presumption was fleshed out in *Matter of Gonzalez*, a 1976 case, and reaffirmed in subsequent BIA decisions.⁶⁷ In *Matter of Gonzalez*, the BIA wrote: “One born abroad is presumed to be an alien.”⁶⁸ The foreign-birth presumption is thus a rule invented solely by the executive branch with questionable foundations, and it is a rule with vast implications.

As a factual matter, most foreign-born people in the United States are either citizens or are lawfully present. Under the BIA’s rule, they would have the burden to prove it or be at risk of deportation. Put more bluntly, forty-five million people would be presumed deportable, even though roughly twenty-three million of them are actually U.S. citizens, and many of the others are lawful residents.⁶⁹ In practice, DHS usually relies on the respondent’s own purported admissions, sometimes in combination with the foreign-birth presumption, to prove alienage.⁷⁰ For instance, in one case the BIA wrote that “the respondent’s admission that he was born in Honduras is clear, unequivocal, and convincing evidence that shifts to him the burden of showing the time, place, and manner of his entry.”⁷¹

63. 8 C.F.R. § 1240.8(c).

64. *Id.*

65. 8 C.F.R. § 1240.8(c).

66. *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 330 (B.I.A. 1969).

67. *Matter of Gonzalez*, 16 I&N Dec. 44, 47 (B.I.A. 1976); *see also* *Matter of Benitez*, 19 I&N Dec. 173 (BIA 1984); *Matter of Amaya*, 21 I&N Dec. 583, 588 (B.I.A. 1996); *Matter of Hines*, 24 I&N Dec. 544, 546 (B.I.A. 2008) (“In removal proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to come forward with evidence to substantiate his citizenship claim.”).

68. *Matter of Gonzalez*, 16 I&N Dec. 44, 47 (B.I.A. 1976).

69. U.S. CENSUS, FOREIGN-BORN: 2021 CURRENT POPULATION SURVEY DETAILED TABLES (2021), <https://www.census.gov/data/tables/2021/demo/foreign-born/cps-2021.html> [<https://perma.cc/QNE9-VG78>].

70. *See generally* Linus Chan, *The Promise and Failure of Silence as a Shield Against Immigration Enforcement*, 52 VAL. U. L. REV. 289 (2018).

71. *Matter of Amaya*, 21 I&N Dec. 583, 588 (B.I.A. 1996); *see also* *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (B.I.A. 1999) (finding a minor respondent removable on the basis of the I-213).

One might ask if immigrants could avoid deportation by refusing to answer questions. The answer is: maybe. The BIA has adopted a somewhat nuanced rule, which is less protective than the Fifth Amendment's right against self-incrimination in criminal cases.⁷² On the one hand, an immigration judge can draw a negative inference from a respondent's silence in the face of evidence suggesting alienage or unlawful presence.⁷³ But on the other hand, "the respondent's silence alone does not provide sufficient evidence, in the absence of any other evidence of record at all, to establish a prima facie case of alienage, sufficient to shift the burden of proof to the respondent."⁷⁴ The fact that alienage alone may be enough to support deportation appears significant for triggering some protection against self-incrimination.⁷⁵ And since "silence alone" is not enough to prove alienage, immigrants do have a meaningful right to remain silent. In other words, admitting charges in Immigration Court is optional, and in some cases, silence may make a difference.

Technically, even if a respondent in removal proceedings admits the allegations on the Notice to Appear, an immigration judge could still decline to find her removable. The immigration judge "may" rely on the respondent's admissions, but should be "satisfied that no issues of law or fact remain" and that the admissions are backed up by facts.⁷⁶ But immigration judges are under no obligation to check the accuracy of admissions, and respondents will be held to their attorneys' concessions.⁷⁷ And in practice, immigration judges mechanically accept respondent admissions without further inquiry.

The fact that foreign birth leads to a presumption of alienage aligns with a separate line of case law that permits immigration stops on the basis of ancestry and race.⁷⁸ As Marouf writes:

Lower courts are still struggling to define the circumstances where racial appearance is a permissible factor in an investigative stop by immigration officials. The Fifth Circuit has held, for example, that Latino appearance cannot help establish reasonable suspicion in places with a large Latino population. But subsequent cases arising within the Fifth Circuit indicate that Border Patrol officers continue to argue that relying on racial appearance is permissible . . . [Similarly], the Ninth Circuit has held that officers

72. See Chan, *supra* note 70, at 290-291.

73. *Matter of Guevara*, 20 I&N Dec. 238, 241 (1990).

74. *Id.* at 242.

75. *Cf. United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923) ("[H]is failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien[,] but the Court found that a legal scenario in which alienage alone would not justify deportation negated the right against self-incrimination).

76. *Perez-Mejia v. Holder*, 663 F.3d 403, 411 (9th Cir. 2011) (citing 8 C.F.R. § 1240.10(d)).

77. *Id.* (citing *Hoodho v. Holder*, 558 F.3d 184, 190-192 (2d Cir. 2009)).

78. See Marouf, *supra* note 45, at 996-97 (citing *United States v. Martínez-Fuerte*, 428 U.S. 543, 563 (1976) (discussing caselaw permitting immigration stops based on "apparent Mexican ancestry"))).

should not consider Hispanic appearance in areas with a “vast Hispanic population,” but the court has permitted Latino appearance to be a factor in an area with a sparse Hispanic population.⁷⁹

Angélica Cházaro has critiqued procedures in Immigration Court for giving a harsh deportation system “the patina of due process” without really ensuring fairness.⁸⁰ Taken as a whole, the operative rules governing burdens of proof in deportation are a vivid example of that phenomenon. In essence, we have here a quintessential slippery slope. Through a series of regulations and administrative precedents, a government burden to prove all elements of deportability was reduced to a burden to prove only alienage. Then the burden to prove alienage was reduced to a burden to prove just foreign birth. And at the same time, immigration officers are permitted to stop and interrogate people based on mere racial appearance. The resulting standards effectively presume millions of U.S. citizens and legal residents to be deportable. Yet, this also likely explains why so few respondents in Immigration Court hold the DHS to its nominal burden of proof. They may reasonably ask themselves: what’s the point?

IV. CRITIQUING THE BURDEN OF PROOF IN REMOVABILITY

A. The Purposes of a Burden of Proof

Burdens of proof are not to be assigned arbitrarily or simply for the convenience of the government. In general, when a statute does not specify which party should bear the burden of proof, the party seeking action by a court to change the status quo bears the burden.⁸¹ That general principle explains the specific rules in Immigration Court that DHS bears the burden to prove removability, while the respondent bears the burden when filing an application for relief from removability. It is also consistent with the Administrative Procedure Act, which provides that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”⁸²

79. *Id.* at 999 (citing *United States v. Orona-Sanchez*, 648 F.2d 1039, 1042 (5th Cir. 1981) (“Nor is there anything vaguely suspicious about the presence of persons who appear to be of Latin origin in New Mexico where over one-third of the population is Hispanic.”)); *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000); *see also* *United States v. Rodriguez*, 976 F.2d 592, 595–96 (9th Cir. 1992) (noting that thousands of law-abiding drivers on southern California highways have a Hispanic appearance); *United States v. Manzo-Jurado*, 457 F.3d 928, 935 n.6 (9th Cir. 2006) (limiting the holding of *Montero-Camargo* to places “heavily populated” by Hispanics but finding that an immigration officer cannot rely solely on appearance, ethnicity, or inability to speak English to establish reasonable suspicion of unlawful presence).

80. Angélica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. REV. 407, 461 (2022).

81. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (citing, *inter alia*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 104 (3d ed. 2003) (“Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims.”)).

82. 5 U.S.C. § 556(d).

A higher burden of proof generally incentivizes the government to exert more “enforcement effort.”⁸³ Thus, if we want a law enforcement agency to be more thorough, insisting that it meet a higher evidentiary burden might be sensible. Likewise, if we think that a particular sanction is severe and should be applied with caution, a higher burden of proof also makes sense. As Louis Kaplow has explained, “When sanctions are socially costly, it tends to be optimal to reduce their imposition, which may seem to favor a higher evidentiary threshold.”⁸⁴ That depends on how the legal system balances the benefits of preventing errant imposition of sanctions versus enhancing deterrence.⁸⁵

The Supreme Court has long recognized that deportation is a grave matter.⁸⁶ In examining the competence of legal advice to a criminal defendant, the Court said, in two different cases, “Preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”⁸⁷ This analogy to criminal sanctions is good reason to rigorously insist on a high burden of proof for the government in deportation cases.⁸⁸ But the stakes are not really only about deportation of immigrants.

When disputes over citizenship reach federal court, the courts have typically more rigorously scrutinized the government’s claims than they usually do in deportation cases in Immigration Court.⁸⁹ But it is not really possible to conceptually distinguish deportation adjudication from citizenship disputes. That is because a government’s first-order obligation in adjudicating deportation is to ensure that its own citizens are protected from it.⁹⁰ As Eisha Jain has written: “Any legitimate immigration enforcement system must be able to recognize its own members . . . [The system] should be ‘just as zealous in making sure that U.S. citizens were not unlawfully removed from the United States as they were in making sure that illegal immigrants were excluded.’”⁹¹ This is a good rationale for forcing DHS to prove alienage, at least, before a case goes any further. “For a citizen, deportation is the legal equivalent of a wrongful conviction.”⁹² That is equally apt for a lawful resident. Yet, as we have seen, DHS is not really forced to prove alienage

83. Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 815 (2012).

84. *Id.* at 823.

85. *Id.* at 822–24.

86. *See* Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893).

87. Padilla v. Kentucky, 559 U.S. 356, 368 (2010) (quoting I.N.S. v. St. Cyr, 533 U.S. 289, 322 (2001)).

88. Marouf, *supra* note 45, at 3.

89. *See* Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1990–91 (2013) (citing *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920) (“It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from this country.”)).

90. *See id.* at 1989 (“A more expansive description of immigration exceptionalism would thus include a second principle: that U.S. citizens are not directly subject to the heightened powers wielded by sovereign nations in the realm of immigration enforcement.”).

91. Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1747 (2021) (quoting *Rivera v. Ashcroft*, 394 F.3d 1129, 1134 (9th Cir. 2005)).

92. *Id.* at 1749.

because it can rely on the foreign-birth presumption. As interpreted by the Board of Immigration Appeals, millions of citizens would not be protected from wrongful deportations. They would be presumed deportable.

In the next section, I will offer a legal critique of the foreign-birth presumption. But before that, it is important to make one further distinction. As the Supreme Court has explained, the broad concept of a burden of proof has often compressed two separate issues: the burden of persuasion and the burden of production.

Burden of proof was frequently used to refer to what we now call the burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production—a party’s obligation to come forward with evidence to support its claim.⁹³

The Supreme Court illustrated the difference between these burdens in a 2022 criminal case about drug possession.⁹⁴ Federal law criminalizes knowing possession of controlled substances “except as authorized.”⁹⁵ Possession of a controlled substance can be authorized. For example, possessing opioids can be legal with a prescription.⁹⁶ So, in a criminal prosecution, which side bears the burden to show that defendant did or did not have authorization to possess the drug? In that case—and unlike in the INA—the statute explicitly says that the government need not prove a negative.⁹⁷ That means the prosecution need not initially prove that the defendant did not have authorization to possess the drug. But the Supreme Court clarified that this rule governs the burden of production only, not the burden of persuasion.⁹⁸ Once the defendant produces evidence that possession of the drug was authorized, the government still bears the ultimate burden of persuasion regarding whether the defendant knew he was not permitted to possess the drug.⁹⁹ The Court called this a “presumpti[on] device.”¹⁰⁰

Arguably, the foreign-birth presumption might be defensible as a similar presumption device, even if it is rejected as a burden of persuasion. Presumptions that shift the burden of production can be helpful in ensuring all of the probative

93. *Dir., Off. of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994); *Schaffer ex rel. Schaffer v. West*, 546 U.S. 49, 56 (2005); James Fleming, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 51–63 (1961); Jerome A. Hoffman and William A. Schroeder, *Burdens of Proof*, 38 ALA. L. REV. 31, 32–34 (1986).

94. *Ruan v. United States*, 142 S. Ct. 2370 (2022).

95. 21 U.S.C. § 841; *Ruan*, 142 S. Ct. at 2374.

96. *Ruan*, 142 S. Ct. at 2375.

97. “Section 885 says that the Government need not ‘negative’—*i.e.*, refute—any exemption or exception.” *Id.* at 2379.

98. *Id.*

99. *Id.* at 2381 (“Once the defendant meets his or her burden of production, then, the Government must prove lack of authorization beyond a reasonable doubt.”).

100. *Id.* at 2380.

evidence comes forward.¹⁰¹ When the Administrative Procedure Act says that the proponent of an order bears the “burden of proof,” it is referring to the burden of persuasion.¹⁰² Congress can and does shift these rules—for instance, because it recognizes that one party’s claims would often be difficult to prove, even if valid.¹⁰³ Evidentiary presumptions are a common tool for this task.¹⁰⁴ However, a regulation that shifts the burden of persuasion without congressional authorization goes too far.¹⁰⁵ An administrative interpretation of a regulation would be even harder to justify. Thus, even if there is a theoretically sound justification for the foreign-birth presumption, it may not be a decision that an executive branch agency can make on its own.

B. *Arguments for Invalidation of the Alienage Presumptions*

One reason for lawyers to contest charges of removability is that this would allow objections to the burden of proof itself. In this Section, I will set out legal challenges that could be brought to challenge the erosion of a meaningful burden of proof in deportation proceedings. I will first outline an ambitious constitutional argument that Congress overstepped by limiting the DHS burden to alienage. Second, I will argue that even if the alienage limitation is valid, the administrative foreign-birth presumption should not stand. The regulatory burden of proof rules and presumptions have largely escaped judicial scrutiny, quite likely because respondents in removal proceedings so rarely raise challenges about the government’s proof at all.

It is worth noting that the burden of proof has not always been tilted so heavily in favor of deportation. Before World War I, internal rules at the Department of Labor required extensive documentation showing that a noncitizen was present in violation of the law in order to authorize an immigration arrest.¹⁰⁶ The clear and convincing evidence standard that is used for deportation was initially imposed by the Supreme Court. In 1966, in *Woodby v. Immigration and Nationalization Service*, the government argued that since immigration enforcement is nominally civil, not criminal, deportation should be subject to the default preponderance of the evidence standard that is used in most civil litigation.¹⁰⁷ The immigrants involved in that case argued the opposite – that deportation should be subject to the “beyond a reasonable doubt” standard used in criminal law.¹⁰⁸ The Supreme Court split the

101. See generally Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413 (1997).

102. Dir., Off. of Workers’ Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 272 (1994).

103. See *id.* at 280 (1994).

104. *Id.*

105. See *id.* at 280–81.

106. See Lindsay Nash, *Inventing Deportation Arrests* (unpublished manuscript) (on file with author).

107. *Woodby v. Immigr. and Naturalization Serv.*, 385 U.S. 276, 284–85 (1966).

108. *Id.* at 284.

difference and imposed the clear and convincing standard, which it noted was already in use in denaturalization cases.¹⁰⁹

The heart of *Woodby* was the Supreme Court's explanation for why deportation is not like private civil lawsuits. The Court stressed the high stakes of deportation to justify a heightened burden of proof:

This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. In words apposite to the question before us, we have spoken of “the solidity of proof that is required for a judgment entailing the consequences of deportation”¹¹⁰

In 1996, Congress partially acquiesced to the clear and convincing standard, but only with regard to “an alien who has been admitted.”¹¹¹ The regulations acquiesce to the *Woodby* standard more fully, at least on the surface.¹¹² But as we have already seen in Part 0, the government has largely slid out of this burden through other rules that create a series of burden shifting presumptions. These rules cannot be reconciled with what the Supreme Court said in *Woodby*. The Court wrote: “We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.”¹¹³ Yet, under the regulations and interpretations adopted by the BIA, DHS really only has to prove foreign birth by clear and convincing evidence. The executive branch has effectively exempted itself from proving all “grounds for deportation” as the Supreme Court said it must.

The first argument against these rules would be rooted in the procedural due process guarantees of the Constitution. It is already well established that people facing deportation are entitled to procedural due process.¹¹⁴ The Court in *Woodby* did not explicitly invoke the Constitution, but its emphasis on the high stakes involved in deportation are a key part of any due process calculus. When an adjudication involves higher stakes for the respondent, she is usually entitled to more process.¹¹⁵ To reduce the burden of proof directly reduces the amount of process. And it means that the government is not really forced to prove all “grounds” for deportation. Instead, today we have a system where the respondent

109. *Id.* at 285–86.

110. *Id.* at 285.

111. *See* 8 U.S.C. § 1229a(c)(3).

112. *See* 8 C.F.R. § 1240.8(a).

113. *Woodby*, 385 U.S. at 286.

114. *See* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[Noncitizens] who have once passed through our gates, even illegally . . . may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”).

115. *See* *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action.”).

ends up bearing the burden to disprove most grounds of deportation simply because the government has hauled her into Immigration Court.

A key step in shifting the burden of proof away from the government was executed by Congress in 1996. Since then, the INA has said that “the alien has the burden of establishing . . . by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.”¹¹⁶ Thus, unless DHS concedes that the person was admitted and was lawfully present in the charging document, the respondent would have to prove it. There is at least a conceivable constitutional liberties question present here about whether Congress can make this change. By changing the burden of proof, Congress removed a safeguard that limits the power the executive branch can wield over individuals. The Court in *Woodby* said that defining the burden of proof “is the kind of question which has traditionally been left to the judiciary to resolve.”¹¹⁷ That suggests a separation of powers concern with allowing the political branches to lower the burden of proof for the government, especially with the executive branch lowering its own burden without congressional authorization.

The fact that so much turns on mere suspicion of alienage raises questions about discrimination. Alienage discrimination is generally subject to heightened scrutiny under the Fourteenth Amendment and usually impermissible.¹¹⁸ But scholars have observed that courts find otherwise impermissible alienage discrimination to be quite permissible when it is limited to immigration law enforcement.¹¹⁹ The entire premise of immigration statutes is discrimination by alienage, between citizens and others. But in this particular context, because of the foreign-birth presumption, the alienage discrimination operates in violation of the statute by sweeping in many citizens.

There is a difficulty with this constitutional line of attack. In *Lopez-Mendoza v. INS*, a case concerning the applicability of the Fourth Amendment, the Supreme Court appeared to sanction the burden shifting rules:

As the BIA has recognized, in many deportation proceedings “the sole matters necessary for the Government to establish are the respondent’s identity and alienage—at which point the burden shifts to the respondent to prove the time, place and manner of entry.” Since the person and identity of the respondent are not themselves suppressible the INS must prove only alienage, and that will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest.¹²⁰

116. 8 U.S.C. § 1229a(c)(2).

117. *Woodby*, 385 U.S. at 284.

118. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

119. See Linda S. Bosniak, *Membership, Equality and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1059–61 (1994).

120. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984) (internal citations omitted).

This passage is non-precedential dicta. In that case, the Court was considering the suppression of evidence under the Fourth Amendment.¹²¹ It correctly summarized the BIA's rules as a factual backdrop to its Fourth Amendment holding, but it did not wrestle with the burden of proof standards directly, which were not at issue in the case.¹²² *Lopez-Mendoza* does not even cite, much less discuss, *Woodby*. But even if *Lopez-Mendoza* does not foreclose a due process challenge, it certainly signals that the Supreme Court did not find the burden shifting rules constitutionally suspect at first glance.

However, there is another problem. *Woodby* was decided at a time when Congress had not been clear about the burden of proof in deportation cases. Since the Administrative Procedure Act (APA) states that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof,”¹²³ it makes sense that the Court thought the entire burden rested with the government for all grounds of deportation. However, now that Congress has revised the statute to specify that the government only bears the burden as to alienage, it is not clear if *Woodby* really poses a constitutional challenge to the statute.

Nevertheless, a court need not even reach the constitutional question, nor the alienage limitation, to strike down the foreign-birth presumption. While limiting the government's burden to alienage has its root in the statute, the foreign-birth presumption does not. This rule does not come from the regulations either. The foreign-birth presumption derives from repeated decisions of the BIA which clash with the language of both the statute and regulations.

A key question is whether the BIA's rule can survive thanks to judicial deference. In *Woodby*, the Supreme Court noted that “Congress has not addressed itself to the question of what degree of proof is required in deportation proceedings.”¹²⁴ Under *Chevron* deference, statutory silence signals a congressional intent to defer to the authorized agency to set the necessary rules.¹²⁵ *Chevron* deference has two steps.¹²⁶ First, a court asks if the intent of Congress is clear from the statute.¹²⁷ Second, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”¹²⁸ When the statute is entirely silent on the allocation of the burden of proof, the Attorney General has more latitude.¹²⁹

121. *Id.* at 1034–35.

122. *See id.* at 1039–43.

123. 5 U.S.C. § 556(d).

124. *Woodby v. Immigr. and Naturalization Serv.*, 385 U.S. 276, 284 (1966).

125. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.”).

126. *Id.* at 842 (“When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions.”).

127. *Id.*

128. *Id.* at 843.

129. *See Miranda v. Garland*, 34 F.4th 338, 352 (4th Cir. 2022) (“[T]he Attorney General had discretion to decide who to place the burden of proof on, and it placed it on the aliens”).

Chevron deference has a notably unclear status with the Supreme Court today.¹³⁰ But *Chevron* remains good law and is highly influential with the circuit courts.¹³¹

Chevron deference applies if the statute is actually silent. However, since *Woodby*, Congress has said quite a lot about burdens of proof in deportation, even if it has not been completely explicit on all points.¹³² The INA specifies a number of situations in which the burden of proof shifts to the respondent in removal proceedings, but none of them are triggered by mere foreign birth.¹³³ The following are situations in which the statute puts the burden of proof on a person who is fighting deportation or asking for immigration benefits:

- For an “alien” to prove lawful admission or lawful presence¹³⁴
- In applications for relief from removal¹³⁵
- In applications for a visa or for entry¹³⁶

Given that Congress has been quite specific about cases in which the burden of proof shifts to the noncitizen, there is a plausible argument that the list is exclusive. That is, the agency cannot add additional situations in which the burden shifts, which is what the BIA did by turning foreign birth into a presumption of alienage. If that is correct, then the BIA’s interpretation would fail at *Chevron*’s Step One.

The case is even stronger with respect to the regulations. While the statute leaves unstated how alienage is to be proven, the regulations state clearly that the burden of proof is on DHS: “In the case of a respondent charged as being in the United States without being admitted or paroled, [DHS] must first establish the alienage of the respondent.”¹³⁷ And the regulations establish a baseline rule: “A respondent charged with deportability shall be found to be removable if [DHS] proves by clear and convincing evidence that the respondent is deportable as charged.”¹³⁸ Thus, except where there is a specific provision to the contrary, the burden of proof is on DHS.

To be clear, the BIA can interpret ambiguous regulations, and when it does, its reasonable interpretations are owed deference by courts, similar to *Chevron*

130. See, e.g., *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of certiorari) (“[T]he benefit of the doubt about the meaning of an ambiguous law must be given to the individual, not to the agency.”).

131. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

132. See, *supra*, Part III

133. See, e.g., 8 U.S.C. § 1225(a)(1) and 8 U.S.C. § 1229a(c)(4).

134. 8 U.S.C. § 1229a(c)(2).

135. 8 U.S.C. § 1229a(c)(4).

136. 8 U.S.C. § 1361.

137. 8 C.F.R. § 1240.8(c) (2022).

138. 8 C.F.R. § 1240.8(a) (2022).

deference for agency interpretation of ambiguous statutes.¹³⁹ But the Supreme Court has stressed that this deference attaches only if the regulation is actually ambiguous.¹⁴⁰ As the Court wrote: “If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law.”¹⁴¹ And in this case, the regulation is clear. DHS must prove “alienage,” not mere foreign birth.¹⁴²

There is an important safeguard against error and abuse at stake here. The regulations are careful to only relieve the government of its burden of proof in a deportation case when it is first clear that the person is not a U.S. citizen.¹⁴³ That requirement helps prevent wrongful deportation of U.S. citizens. It is a means of defending American citizens, above and beyond any due process owed to noncitizens.¹⁴⁴ But the BIA’s approach throws this safeguard away by presuming any foreign-born person to be deportable. This may be causing major violations. A 2011 study found that more than 20,000 U.S. citizens were detained or deported by American immigration authorities from 2003 to 2010.¹⁴⁵ The General Accounting Office (GAO) reported that “ICE arrested 674, detained 121, and removed 70 potential U.S. citizens from fiscal year 2015 through the second quarter of fiscal year 2020.”¹⁴⁶ The GAO observed that DHS data did not indicate how often ICE detained or removed U.S. citizens, but that “there may be additional individuals who could be U.S. citizens that ICE arrested, detained, released, or removed that we were unable to identify in the available data.”¹⁴⁷

Effectively, the foreign-birth presumption operates as a procedural shortcut that makes citizenship less secure for millions of people.¹⁴⁸ While most citizens could probably prove their citizenship in a pinch by producing a birth certificate, a passport, or a certificate of citizenship or naturalization, forcing them to do so invites mistakes. Some foreign-born citizens may not even have a certificate—for instance, if they derived citizenship from a parent and never had reason to apply for a passport or certificate of their own. The burden shift is especially onerous for people who are in detention, transient or inconsistently housed, struggling with

139. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019); *Rubalcaba v. Garland*, 998 F.3d 1031, 1037 (9th Cir. 2021) (“[Courts] evaluate the BIA’s interpretation of its own regulations using ‘the deference framework announced [by the Supreme Court] in *Kisor v. Wilkie*.’”).

140. *Kisor*, 139 S. Ct. at 2415.

141. *Id.*

142. 8 C.F.R. § 1240.8(c) (2022).

143. See 8 C.F.R. § 1240.8(c) (2022).

144. See *supra* text accompanying notes 91–92.

145. Jacquelin Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & LAW 606, 608, 630 (2011).

146. U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-487, IMMIGRATION ENFORCEMENT: ACTIONS NEEDED TO BETTER TRACK CASES INVOLVING U.S. CITIZENSHIP INVESTIGATIONS 1, 18 (2021).

147. *Id.* at 21.

148. Cf. Cassandra B. Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND. L. REV. 757, 766 (2020) (exploring the importance of procedural protections of citizenship).

mental illness, or without the assistance of family members—all conditions that can lead a person to lose access to vital records. That risk is especially acute in a system where close to 80% of respondents do not have legal counsel.¹⁴⁹ In this context, it is important to recognize that the law governing citizenship for people born abroad is extremely complicated, with outcomes varying depending on the citizenship of two different parents according to laws that vary depending on the year of birth.¹⁵⁰ For example, a person born abroad to one U.S. citizen parent might be treated differently if born in 1985 than if born in 1986.¹⁵¹

Errors of deportation adjudication are the first-order problem with the presumption of alienage. But there may be secondary negative impacts on immigration enforcement. Because immigration officials only have to prove foreign birth, they have little incentive to fully investigate a case to document alienage in its early stages. This may lead the government to occasionally miss key evidence that would mitigate against deportation. But it may even more frequently prevent ICE from carefully considering the merits of exercising prosecutorial discretion to not pursue deportation. ICE prosecutors often know fairly little about the respondents in removal proceedings at the outset, which gives them an incentive to be initially aggressive and rigid.¹⁵² An ICE attorney may rationally conclude that she will have more information later on, after the respondent has pled and filed applications for relief.¹⁵³ But by then, the government will have already devoted considerable resources to the removal process, making it harder to turn back.

Courts have barely addressed these issues. In 1995, the Ninth Circuit Court of Appeals issued a rare judicial examination of the BIA's foreign-birth presumption.¹⁵⁴ The result confirmed that there may be a legal problem but stopped short of reversing the BIA.¹⁵⁵ In *Murphy v. Immigration and Naturalization Service*, a pro se respondent denied all charges in his deportation hearing—a rarity—and argued that the INS (the predecessor of DHS for these purposes) had not met its burden of proof with regard to his alienage.¹⁵⁶ Murphy said he had been born in the U.S. Virgin Islands, but the immigration judge had told Murphy that he, not the government, needed to find proof of his citizenship.¹⁵⁷ The government offered only circumstantial evidence that he was not a U.S. citizen, principally a declaration

149. See *State and County Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGRATION, <https://trac.syr.edu/phptools/immigration/nta/> (Feb. 2022) [<https://perma.cc/EQM7-A8WA>].

150. See *Acquisition & Derivation Quick Reference Charts*, IMMIGRANT LEGAL RESOURCE CENTER (July 19, 2022), <https://www.ilrc.org/resources/acquisition-derivation-quick-reference-charts> [<https://perma.cc/R36Q-78PN>].

151. *Id.*

152. See Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 53 (2014).

153. *Id.*

154. *Murphy v. Immigr. & Naturalization Serv.*, 54 F.3d 605 (9th Cir. 1995).

155. *Id.*

156. *Id.* at 607.

157. *Id.*

signed by an immigration officer (who was never brought to testify) claiming that Murphy admitted to having been born in Jamaica and incomplete records from the Virgin Islands stating no record of Murphy's birth had been found (but not for all locations).¹⁵⁸ The immigration judge had found this evidence sufficient to shift the burden of proof to Murphy.¹⁵⁹

At some length, the Ninth Circuit stressed that the government had the burden to “*establish*[] alienage”¹⁶⁰ and that foreign birth was not the same thing.¹⁶¹ Discussing a set of prior cases, the court explained:

[W]e acknowledged the “foreign born” presumption as a special case where alienage is established by unrebutted direct proof by the alien’s own testimony at the hearing or admission in evidence of an authenticated foreign birth certificate. We did not suggest that merely setting forth a prima facie case of alienage based on circumstantial evidence of foreign birth shifts the burden of persuasion to the respondent. We specifically discussed the government’s burden of *establishing* alienage as a precondition to the burden-shifting presumption.¹⁶²

The Ninth Circuit also cast severe doubt on the evidentiary value of written documents prepared by immigration officers who are not brought to testify, at least in cases where much of the asserted information is disputed.¹⁶³

Although the Ninth Circuit ostensibly rejected burden shifting based on foreign birth, a degree of burden shifting is nevertheless embedded in the decision’s own logic. In *Murphy*, the respondent asserted U.S. citizenship and directly disputed the government’s factual assertions.¹⁶⁴ This was thus not a case of a person who simply denied charges and insisted on the government meeting its burden. The Ninth Circuit said that a foreign-birth presumption of alienage could be appropriate when foreign birth was “an undisputed fact,” citing the example of people born abroad who claimed derivative citizenship from the naturalization of a parent.¹⁶⁵ But that scenario is quite different, since in that type of case the respondent concedes that she was not a U.S. citizen by birth. The Ninth Circuit in *Murphy* also accepted the foreign-birth presumption when the government produced “unrebutted direct proof by the alien’s own testimony at the hearing or admission in evidence of an authenticated foreign birth certificate.”¹⁶⁶ Thus, the Ninth Circuit rejected a foreign-birth presumption only in a situation where the respondent

158. *Id.*

159. *Id.*

160. *Id.* at 608.

161. *Id.* at 609.

162. *Id.*

163. *Id.* at 610.

164. *Id.* at 608–09.

165. *Id.* at 609.

166. *Id.*

affirmatively claimed U.S. citizenship and there was no direct evidence that would prove alienage.¹⁶⁷

In *Murphy*, the court neither confronted nor explicitly discussed the scenario in which a respondent denies allegations of alienage (hence forcing the government to meet its burden) but does not specifically assert U.S. citizenship (as Murphy did). Nor did the court address a situation like this in which the government relies entirely on hearsay in a government form—which is commonplace—rather than submitting direct evidence.¹⁶⁸ But the implication from *Murphy* is that this would be problematic. The Murphy court critiqued the blurring of lines between foreign birth and the government’s burden to establish alienage, and heavily critiqued reliance on hearsay.¹⁶⁹

The government form signed by an immigration officer in *Murphy* is known as the I-213. It is hearsay, but it is used in nearly every deportation case.¹⁷⁰ Many courts consider I-213 forms to be “presumptively reliable . . . at least when the alien has put forth no evidence to contradict or impeach the statements in the report.”¹⁷¹ However, a respondent might not need to say much to contradict the I-213 and render its contents inadequate to meet the government’s burden. In an unpublished Ninth Circuit decision in which the respondent testified that she did not know where she was born, the Ninth Circuit rejected reliance on her out-of-court statements that were recorded on the I-213 to presume alienage.¹⁷² And there is at least one Ninth Circuit decision where the court allowed reliance on out-of-court statements to prove evidence of alienage only when the government produced the officer who recorded the statements.¹⁷³

Other than the Ninth Circuit’s decision in *Murphy*, there has been little litigation directly challenging the foreign-birth presumption. Most of the circuit court cases addressing burdens of proof focus on legal residents in which DHS had difficulty proving that a respondent was actually convicted of a crime that would make her removable.¹⁷⁴ Other cases addressing the foreign-birth presumption have

167. Elsewhere in the decision, the Ninth Circuit said, “The production of a valid birth certificate from another country in the defendant’s name is sufficient to prove alienage when there is no contradictory evidence.” *Id.* at 610 (citing *Corona–Palomera v. Immgr. Naturalization Serv.*, 661 F.2d 814, 816 (9th Cir. 1981)).

168. *Cf. Gupta v. Lynch*, 661 F. App’x 737, 740 (2d Cir. 2016) (“In contrast to *Murphy*, Agent Doherty testified and was cross-examined regarding the information in the I–213 and the circumstances surrounding its development.”).

169. The court repeatedly describes the I-213 as “unauthenticated.” *Murphy*, 54 F.3d at 609–10.

170. See Aruna Sury, *What to Do When ICE Submits an I-213 in Immigration Court*, IMMIGRANT LEGAL RESOURCE CENTER (Sept. 2022), https://www.ilrc.org/sites/default/files/resources/i-213_practice_advisory_final.pdf [<https://perma.cc/7WS6-H824>].

171. *Felzcerk v. Immigr. Naturalization Serv.*, 75 F.3d 112, 117 (2d Cir. 1996).

172. *García v. Holder*, 472 F. App’x 467, 469 (9th Cir. 2012).

173. See *Lopez-Chavez v. Immigr. Naturalization Serv.*, 259 F.3d 1176, 1178 (9th Cir. 2001).

174. See, e.g., *Chavez-Alvarez v. U.S. Att’y Gen.*, 783 F.3d 478 (3d Cir. 2015); *Barakat v. Holder*, 621 F.3d 398 (6th Cir. 2010); *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006); *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346 (11th Cir. 2005).

typically repeated the rule without criticism or analysis.¹⁷⁵ Of course, if immigration lawyers so frequently concede the issue at the outset of proceedings, courts will rarely be presented the opportunity to address these issues head on.

While the BIA's foreign birth presumption clashes with the regulations and statute, it does seem to address a real problem: how in practice can the government prove alienage? In a 1977 case, the BIA offered a brief explanation for the presumption, arguing that the government could not be expected to prove a negative and respondents could be expected to produce evidence within their knowledge and control.¹⁷⁶ Indeed, as Linus Chan has observed, "Alienage is a tricky thing to prove, as it is often best defined as a lack of U.S. citizenship, and proving a negative can be difficult."¹⁷⁷

In light of this rationale, the foreign-birth presumption is probably best understood as a burden of production, not as a shifting of the burden of persuasion. Shifting the burden of production "can force [parties] to collect somewhat more evidence than they might if left to their own devices."¹⁷⁸ But even in this light, the foreign-birth presumption can be hard to justify, for two practical reasons. First, respondents in removal proceedings do not necessarily have easy access to their own nationality documentation. There are many circumstances in which respondents will not have possession of the relevant proof: if they acquired U.S. citizenship as children, if they are detained, if they have been homeless, or if they struggle with mental illness. Second, the entity that should have the most thorough repository of U.S. citizenship documentation is the government of the United States. The foreign-birth presumption permits DHS to seek a person's forcible deportation without even checking its own records to ensure that she is not a citizen.

Foreign birth is of course probative of citizenship, but it is not determinative on its own. In fact, if all one knows about a person is that she was born abroad but is present in the United States, she is statistically likely to be lawfully present.¹⁷⁹ If DHS were actually forced to prove alienage, not foreign birth, it might have to offer additional evidence—for instance, an attestation that government records have been fully checked and no records of citizenship or naturalization found. This would not be overly burdensome. There are isolated cases where this is already done.¹⁸⁰ Moreover, agencies routinely issue "no responsive records" notices in Freedom of

175. See, e.g., *Santos v. Mukasey*, 516 F.3d 1, 4 (1st Cir. 2008); *Ayala-Villanueva v. Holder*, 572 F.3d 736, 738 n.3 (9th Cir. 2009).

176. *Matter of Vivas*, 16 I&N Dec. 68, 70 (B.I.A. 1977) ("[T]he Service is under a serious practical handicap if it must prove the negative proposition.").

177. Chan, *supra* note 70, at 290.

178. Richard Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1491 (1999).

179. See *American Community Survey, Foreign-Born: 2021 Current Population Survey Detailed Tables*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2021/demo/foreign-born/cps-2021.html> [<https://perma.cc/F9GX-SZXX>] (last visited Oct. 18, 2023).

180. See, e.g., *De Brown v. Dep't of Just.*, 18 F.3d 774, 775 (9th Cir. 1994) (providing alienage by submitting "a certified Mexican birth certificate and a Certification of No Record issued by the State of California reflecting that no record of her birth was found.").

Information Act requests.¹⁸¹ Why not also when a person's banishment from the country is at stake?

Under present rules, the government could possess probative evidence of a respondent's citizenship and not disclose it to the court or to the respondent in deportation proceedings. The government need not even look to see if such records exist. There is no general discovery process in Immigration Court and nothing similar to the mandate on criminal prosecutors to turn over exculpatory evidence.¹⁸² Even with a knowledgeable and aggressive attorney it would be difficult at best to force the government to search its own records to ensure the person who might be deported is not potentially a U.S. citizen.¹⁸³ There is a rarely used regulation allowing immigration judges to issue subpoenas, but it requires the party seeking the subpoena to know with some precision what the government has in its files that should be turned over.¹⁸⁴ There is also a provision in the INA requiring that the "the alien shall have access" to entry documents "and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States."¹⁸⁵ There is one circuit court decision, the Ninth Circuit's decision in *Dent v. Holder*, relying in part on that provision of the INA and in part on constitutional due process requiring the government to turn over a respondent's "alien file" (a.k.a. "A-File"), at least in a case in which the respondent was affirmatively contesting his citizenship.¹⁸⁶ But such disclosure remains exceptional at best and, from personal experience in Immigration Court, is vigorously fought by DHS.

DHS should be forced to disclose the A-File as a matter of course and to also produce a sworn statement that relevant records held by DHS and the Department of State have been checked, detailing the personal identifiers used to conduct the search, and that no records indicative of naturalization or U.S. citizen parents could be found. DHS could also introduce copies of past immigration applications filed by the respondent in which she attests to not being a U.S. citizen. A passage in the *Dent v. Holder* decision illustrates how thin the government's objections to such a system would be:

No justification has been offered for the failure to furnish Dent, the IJ, the BIA, and us with the documents in the A-file. . . . The

181. See e.g., 43 C.F.R. § 2.23(a)(3); 10 C.F.R. § 1004.4(d).

182. See *Brady v. Maryland*, 373 U.S. 83 (1963).

183. See Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569 (2014) (describing the lack of discovery in removal proceedings).

184. See 8 C.F.R. § 1003.35(b)(2) (2022) ("A party applying for a subpoena shall be required, as a condition precedent to its issuance, to state in writing or at the proceeding, what he or she expects to prove by such witnesses or documentary evidence, and to show affirmatively that he or she has made diligent effort, without success, to produce the same.").

185. 8 U.S.C. § 1229a(c)(2)(B).

186. *Dent v. Holder*, 627 F.3d 365, 373–74 (9th Cir. 2010). See generally Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491, 537 (2011) (discussing the implications of *Dent*).

government uses the A-file routinely in almost every case to determine whether an alien should be removed and whether an alien should be naturalized, and maintains an automated system to make access easy for its staff. All the official records, correspondence, photographs, applications, petitions, statements, reports and memoranda relating to immigration contacts between the alien and the government are there, yet in the critical proceedings before the IJ neither the IJ nor the BIA nor Dent was furnished with the relevant documents. We have no idea why not. The only justification the government offers for why we all should have been left rooting around in the dark is . . . that the law did not require them to furnish the A-file. The government offers no reason why the A-file should not be furnished.¹⁸⁷

Nevertheless, right now, DHS need not introduce any such evidence. The incentive structure may encourage pushing forward against foreign-born immigrants without fully checking if they actually should be deported under the law, since the immigrant will end up bearing the burdens in court.

These issues deserve more consideration by courts than they have received so far. That can only happen if respondents (and more precisely, respondents with lawyers) deny charges, object to the burden of proof standards applied by immigration judges, and thus set up cases to be reviewed by circuit courts of appeal. That is one reason for more respondents to deny charges in Immigration Court more often. In the next section, I will argue that there are other reasons to do so, even assuming that current burden of proof rules are immovable fixtures of the system.

V. BENEFITS OF DENYING CHARGES

An immigrant defense lawyer denying charges in Immigration Court is analogous to a criminal defense lawyer who, even when representing a clearly guilty defendant, safeguards fundamental liberty by forcing the government to have a solid case. And of course, the threat of doing this often leads to negotiations, at least in the criminal context. In criminal cases, making the prosecution work for a conviction usually offers defendants at least a little leverage. Defendants typically waive their right to trial in exchange for a more favorable sentence or conviction, a.k.a. a plea bargain. What seems to be distinct about Immigration Court is that respondents usually waive their rights while getting nothing concrete in exchange. To be clear, given the government's low burden of proof, respondents in Immigration Court do not have as much leverage in most cases. Under present rules, DHS can count on being able to fairly easily sustain removability charges in most cases. Moreover, criminal cases allow more room for negotiation because the parties can negotiate over the sentence and over the seriousness of the charge. There

187. *Dent*, 627 F.3d at 373.

are varying legal statuses theoretically possible in U.S. immigration law. Lawful permanent residence¹⁸⁸ is better than deferral of removal,¹⁸⁹ for example. But it is questionable whether DHS or an immigration court can negotiate to grant a status unless the person is eligible on the merits. More to the point, it is hard to negotiate over whether a person will remain in the United States; in the end, a person is either allowed to stay or not. There is little middle ground.

A system of plea negotiation in Immigration Court is conceivable and could be rooted in the use of prosecutorial discretion.¹⁹⁰ Since the late Obama Administration, the use of prosecutorial discretion by ICE has expanded, in fits and starts.¹⁹¹ Among other things, it has allowed ICE's Office of Chief Counsel to agree to dismiss or administratively close many cases.¹⁹² This allows Immigration Court time to be prioritized for other cases, which is a substantial advantage to the government in a heavily backlogged system.¹⁹³ Also, even after a final order of removal ICE can agree to stay removal, meaning not carry it out.¹⁹⁴ One can imagine ICE offering stays of removal in exchange for respondents conceding charges and withdrawing applications for relief that would take considerable time to adjudicate. Such arrangements might be advantageous for ICE in that they would allow prioritizations of scarce court time and enforcement resources while allowing fast removals in the future if the respondent were, say, convicted of a crime. And they might be advantageous for undocumented immigrants who stand relatively low chances of success in seeking relief from removal. And yet, DHS's prosecutorial discretion policies to date have not made pleadings a factor in using the agency's discretionary authority.¹⁹⁵ It is not clear whether in the present system immigrants have sufficient leverage to persuade DHS to do so. But if immigrants regularly waive their rights without getting anything in exchange, DHS has little reason to ever consider this possibility.

Even assuming the burden-of-proof rules remain as they are, and even without a regular practice of plea negotiation, there are good reasons for immigrant defense

188. See 8 U.S.C. § 1101(a)(20).

189. See 8 C.F.R. § 1208.17 (2022).

190. For an overview of prosecutorial discretion, see SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2015).

191. See Amer. Immigr. Lawyers Assoc., *Featured Issue: Prosecutorial Discretion*, AILA Doc. No. 22111701 (Aug. 28, 2023), <https://www.aila.org/library/featured-issue-prosecutorial-discretion> [<https://perma.cc/78NJ-9PFS>].

192. See DEP'T HOMELAND SEC., *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor* (Sept. 23, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion> [<https://perma.cc/FYG8-E3BC>] (“OPLA attorneys will independently evaluate cases to determine whether to exercise PD, which may include unilaterally moving to dismiss or administratively close cases; agreeing to stipulations on issues such as relief, bond, or continuances; waiving appeal; or joining in motions to reopen proceedings.”).

193. See *id.* (“PD is the longstanding authority of a law enforcement agency ... that can be used to preserve limited government resources.”); see also WADHIA, *supra* note 190.

194. See DEP'T HOMELAND SEC., FORM I-246: APPLICATION FOR A STAY OF DEPORTATION OR REMOVAL (2023), <https://www.ice.gov/doclib/forms/i246.pdf> [<https://perma.cc/FA45-AP4J>].

195. *Id.*

lawyers to advise their clients to deny charges in Immigration Court. To be clear, denying charges will not lead immigration judges to suddenly reject DHS charges of removability in very many cases. That will happen only occasionally. But even a small chance matters in deportation defense. From October through December 2022, 50,261 people were ordered removed in U.S. immigration courts.¹⁹⁶ If universally denying charges could change the result in just 1% of those cases, roughly 2,000 fewer people would be ordered deported over the whole year. There will also be cases where challenging DHS allegations and evidence will present advantages on the margins—for instance, helping to shape a subsequent asylum application. And they may sometimes change the eventual result in ways that lawyers might have difficulty anticipating in advance—for instance, by preserving issues for appeal that may become more relevant down the road. And even if there are no tactical advantages at all, there are important principles at stake.

One tactical advantage of denying charges in removal proceedings is that it at least forces DHS to disclose some or all of its evidence about the respondent early in the case.¹⁹⁷ Historically, DHS attorneys have often not disclosed I-213 “Record of Deportable/Inadmissible Alien” forms to respondents in Immigration Court. These forms are in essence the immigration equivalent of a police report, usually describing a person’s first encounter with Border Patrol or ICE officers, and also summarizing what DHS believes to be the person’s immigration and criminal history. By denying charges, DHS would have to submit the document, which can be extremely helpful in preparing subsequent applications for the immigrant. Speaking from personal practice experience, people who have had repeated encounters with police often struggle to accurately describe their criminal records, which at a minimum can lead to wasted attorney time and can obscure what options the person has in Immigration Court both to apply for relief from removal and for release from detention. Likewise, having the I-213 form in advance lets an attorney know about possible angles of cross examination that might be used later against an asylum seeker, since it recounts what the person allegedly told immigration officials early on in the process.

Another tactical advantage of denying charges is that every so often it simply catches the prosecutors unprepared. DHS attorneys occasionally do not have access to the respondent’s file when they come to Immigration Court. That means that they could not actually offer any immediate evidence to the court if charges are denied. This practice seems to have changed in 2022, with the advent of electronic filing in Immigration Court. At least in Las Vegas, DHS now usually files the I-213 electronically in advance. However, that seems to be a discretionary policy that

196. *Outcomes of Deportation Proceedings in Immigration Court*, TRAC IMMIGRATION (Jan. 2023), https://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php [<https://perma.cc/HS3Y-DXW6>] (providing fiscal year 2023 data through December 2022).

197. *See* IMMIGRANT LEGAL RESOURCE CENTER, REPRESENTING CLIENTS AT THE MASTER CALENDAR HEARING 2 (2018).

could easily change, it is not consistent locally, and I cannot report whether it is reflected in nationwide practices.

Another reason for immigrant defense lawyers to deny charges is that it forces the lawyer to be more thorough. It is now likely a requirement for a competent attorney in immigration court to scrutinize the NTA for defects in form, which can yield objections independent from denying the substantive allegations and charges.¹⁹⁸ Regularly denying DHS allegations encourages immigrant defense attorneys to more closely scrutinize the I-213 forms as well, which are typically the only evidence offered. Immigration judges give the respondents the opportunity to raise objections to these forms. And, it turns out, these immigration encounter reports are often riddled with errors. It is common for Border Patrol officers to write on these forms that a person said they do not fear harm or persecution even for migrants who gave extensive accounts of fear, violence, and human rights violations.¹⁹⁹ A journalistic investigation in 2019 reported that a reporter for *The Intercept*

spoke with over a dozen attorneys and immigration experts, all of whom said they regularly encountered incorrect, or sometimes plainly ridiculous, information on their clients' I-213s. False In reviewing dozens of I-213s and cross-checking them with migrants' own accounts, written testimonies, or attorneys' explanations, *The Intercept* confirmed regular instances of erroneous, fabricated, and downright bogus information recorded on these forms. Many of the forms were even internally discrepant — botching or switching names, as well as mangling dates, mistaking gender, and flubbing countries of origin, among other errors.²⁰⁰

Practice experience at the UNLV Immigration Clinic in Las Vegas is consistent with these reports. Over the years we have seen I-213s reporting a six-year-old girl's occupation as a "laborer," describing men as women and vice versa, identifying Guatemalans as Salvadorans, and so on. Errors in government immigration records have attracted the notice of appellate courts as well.²⁰¹

These errors should lead to objections regarding the reliability of the information on the same forms. The BIA has held that these forms are presumptively reliable, unless the respondent points to reasons why the information

198. See *Matter of Fernandez*, 28 I&N Dec. 605 (B.I.A. 2022) (describing the failure by DHS to state the time and place of the hearing on the NTA is a claim processing objection that must be made at the outset of removal proceedings).

199. See John Washington, *Bad Information*, INTERCEPT (Aug. 11, 2019), <https://theintercept.com/2019/08/11/border-patrol-asylum-claim/> [<https://perma.cc/P2UT-FYN3>].

200. *Id.*

201. See, e.g., *Vega-Anguiano v. Barr*, 982 F.3d 542, 552 (9th Cir. 2019) (Christen, J., concurring) (describing errors in DHS records of a respondent's criminal record).

in it may be incorrect.²⁰² Even if immigration judges defer to the I-213 forms, spotting these errors might raise issues for appeal, or help undermine the reliability of damaging information in the form that becomes relevant later in the proceedings—for instance, during adjudication of an asylum application. As discussed above in Part 0, there is some case law from circuit courts suggesting that when the I-213 form has facial flaws the government should have to produce additional evidence or live witnesses. Thorough scrutiny of I-213 forms is also essential to identify potential search and seizure objections that might be raised as well. Early identification of such problems with the DHS' case is especially important when respondents are held in ICE custody because it may create grounds for releasing a person who otherwise would be subject to mandatory detention.²⁰³

Again, there are no miracles to be worked here. Even when the I-213 has facial flaws, immigration judges often reflexively regard it as reliable. Denying charges may not change the result in the vast majority of cases. But even a minutely improved chance is worth seizing when absolutely nothing is being offered in return for giving it up. Moreover, denying charges may be essential for preserving issues for appeal; admitting them throws issues away.²⁰⁴ In baseball terms, this is the equivalent of running the ball out on a grounder. In nearly every case, it seems to make no difference. But lawyers will probably not be able to anticipate in advance all of the rare cases when it will matter.

There is one tangible reason to admit and concede charges that may counterbalance these advantages. Contesting charges is likely to lead immigration judges to take more time adjudicating removability. That is both logical—indeed, forcing the court to more carefully consider evidence and arguments is the point—and it is also what this observational study found. In this study, most of the very small number of cases where lawyers denied charges for their clients, the immigration judge continued the hearing rather than reach an immediate decision. That could be a serious downside if the person is detained. It could be rational for a detained respondent to want to skip past this stage quickly if she has good reason to believe that she can win relief from removal later on. This is a tactical decision that lawyers should discuss openly with their clients. Moreover, it is not a straightforward trade off. In the Las Vegas Immigration Court in 2022 and 2023, immigration judges often want to conduct hearings in detained cases on such a rapid schedule—asylum and torture cases are heard within a matter of weeks—that it could compromise a thorough attorney's ability to pull together all available evidence. In this scenario, forcing the court to take a few more weeks to adjudicate removability might also give the attorney more time to prepare evidence for the strongest possible asylum application. The central point is not that it is never a good

202. See *Matter of Barcenas*, 19 I&N Dec. 609 (B.I.A. 1988); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785–86 (B.I.A. 1999).

203. See Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1817–18 (2013).

204. See, e.g., *Perez-Mejia v. Holder*, 663 F.3d 403, 411 (rejecting an attempt to challenge removability on appeal where counsel for petitioner admitted charges in Immigration Court).

decision to admit and concede charges. The point is that the default option should be to deny charges, and there ought to be a compelling tactical reason to do otherwise. Usually, there is not one.

We should be clear; how to plead to allegations and charges should be a decision for the client. A lawyer should not adopt a one-approach-for-all policy. Rather, the lawyer should advise the client that this is a choice and that by default the government should be made to bear its burden. But the lawyer should also advise the client if there are tactical advantages in waiving this right. A lawyer should also consider whether her client has already effectively admitted the allegations—for example, by submitting an application that admits to alienage or lack of lawful admission.²⁰⁵ Also, if the client's best option is to be removed quickly, then obviously denying the allegations makes little sense. But when the client's objective is to resist deportation, there ought to be a good reason to make it easier for the government to do so.

Even assuming no tangible benefits for respondents in changing the result, there is principle at stake here. Forcing the government to prove its case is an important safeguard of civil liberties. It may incentivize government officials to do more thorough work before seeking to detain and remove a person from the country. When the respondent in deportation proceedings admits and concedes the charges of removability, the government is freed from its burden. When it happens as a norm, DHS can come to expect that it will be able to secure orders of removal with little to no evidence, which over time is likely to discourage DHS from fully checking and vetting removal cases before bringing them to court. As a training guide published by the American Immigration Lawyer Association (AILA) advises, "Where ICE has the burden of proof, it is important to hold the agency to it."²⁰⁶

Finally, there is a symbolic message to be sent. It is important that everyone involved in a deportation proceeding treat it as a grave matter, not as an assembly line in which a case is passed along as quickly as possible. The first job of the immigrant's lawyer—the defense lawyer—is to push for that level of seriousness in the process. Making the government bear its burden and scrutinizing the evidence are key steps in that direction. Yet, the question remains why so few lawyers seem to do it. In the following section I will try to articulate some remaining normative questions about the role of lawyers in immigration adjudication that may be leading many attorneys astray.

205. *See* IMMIGRANT LEGAL RESOURCE CENTER, REPRESENTING CLIENTS AT THE MASTER CALENDAR HEARING 6 (2018) (recommending situations in which admitting charges may be warranted).

206. AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA), REPRESENTING CLIENTS IN IMMIGRATION COURT, at ch. 1 (5th ed. 2018).

VI. NORMATIVE CONFUSION ABOUT THE ROLE OF IMMIGRATION LAWYERS IN IMMIGRATION COURT

Given that neither DHS nor the Immigration Court offer immigrant respondents anything in return for admitting charges of removability, why do so many immigration lawyers have their clients concede so easily, even when AILA, the main specialty bar association, advises doing the opposite? There are several possible explanations relating to confusion about the role a lawyer should play in Immigration Court. Some of these are not at all compelling. But there are some explanations that warrant serious consideration.

Let us start with the less sympathetic possibilities. There is a particular mode of lawyering for disempowered people in which the lawyer serves not as a vigorous defender and advocate but rather as a “customer service agent for the system.”²⁰⁷ In this mode of lawyering, in the Immigration Court context, a lawyer performs an essential service by helping a person navigate a complex system, often by filing an application that she would be unable to complete on her own. But such a lawyer does not look for ways to resist the system or challenge the government, especially when such challenges have a low chance of success. Laila Hlass has written that this is a way in which immigration lawyers effectively become part of a system that oppresses their own clients.²⁰⁸ She advocates contesting charges in Immigration Court in order to find more opportunities to expose abuses and to resist a deeply flawed deportation system.²⁰⁹ Lawyers in the “customer service” mode may implicitly be working to make the immigration adjudication system work more efficiently. Historically, efficiency has occasionally been a rationale for providing lawyers to people facing deportation, on the theory that improving rates of representation will lead to faster adjudication.²¹⁰ This rationale for providing lawyers in deportation proceedings has rightly been severely critiqued, since it is very much not in the interests of immigrants who do not want to be deported for the deportation system to work faster.²¹¹

207. I learned this phrase from my colleague, Professor Eve Hanan.

208. Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597, 1650 (2022) (“For example, immigrant defenders generally do not push for ICE prosecutors to meet their evidentiary burden to prove removability, but instead often conceded removability quickly. Instead, attorneys could more aggressively litigate removability, through requesting a contested master calendar hearing, or filing motions to suppress evidence of alienage.”).

209. *Id.* at 1650–51.

210. See, e.g., NINA SIULC, ZHIEFEN CHENG, ARNOLD SON & OLGA BYRNE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM (2008), https://www.vera.org/downloads/publications/LOP_Evaluation_May2008_final.pdf [<https://perma.cc/RRE2-24ZH>]; NINA SIULC, ZHIFEN CHENG, ARNOLD SON & OLGA BYRNE, LEGAL ORIENTATION PROGRAM EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, at 66 (2008), https://www.vera.org/downloads/publications/LOP_evaluation_updated_5-20-08.pdf [<https://perma.cc/4YGG-ZV9L>].

211. See Hlass, *supra* note 208, at 227; Cházaro, *supra* note 80, at 48–50; Michael Kagan, *In Defense of Deportation Defense*, 56 U.C. DAVIS L. REV. ONLINE 1, 13–15 (2022).

A conflict-averse mode of lawyering may have institutional roots. Law schools have largely adopted the idea that lawyers should be trained to be “problem solvers” and “peacemakers,” meaning they should be working to narrow and resolve conflicts rather than digging in.²¹² This shift is based in part on a critique that traditional legal education and traditional adversarial norms of lawyering were overly focused on conflict rather than conflict resolution.²¹³ A number of changes have been made to law school curricula, reflecting a normative shift in this direction.²¹⁴ There is nothing wrong with encouraging lawyers to develop strong conflict resolution skills, but it has also long been recognized that if taken too far this orientation might compromise the interests of clients who have genuine and irreconcilable conflicts with the other side.²¹⁵ To the degree that legal education reflects norms of legal practice, it is important to teach young lawyers that conflict resolution has its place, and so does standing firm in defense of a client, even if opposing counsel or the judge reacts badly.²¹⁶ Most importantly, different cases and contexts require different approaches.

Courts that adjudicate the lives of powerless people often discourage them from “talking back” in court in ways that challenge the system.²¹⁷ This has been observed in how courts treat unrepresented parties,²¹⁸ but lawyers may be deterred as well. Lawyers may also learn to admit charges because to deny them can produce hostility from DHS prosecutors, and sometimes from immigration judges. In the Las Vegas Immigration Court, my student attorneys at the UNLV Immigration Clinic and myself have been lectured multiple times by DHS attorneys and by more than one immigration judge when we have denied charges for clients. The hostility has been intense enough that I have often prepped students in advance to be yelled at so that the experience would not be shocking to them. To be clear, I have also heard immigration judges in Las Vegas encourage respondents to deny charges—for instance, when DHS resisted turning over an I-213 form. Nevertheless, it only takes a few such negative incidents to create apprehension among attorneys.

I have seen anecdotal reports from attorneys in other cities of similar court cultures that are hostile to denying charges. Attorneys often report that denying charges induces immigration judges to scold them, and in some cases punish lawyers—for instance, by making them wait longer to have their cases heard—and

212. These terms were prominently used in a speech about legal education by Attorney General Janet Reno in 1999. Janet Reno, *Lawyers as Problem Solvers: Keynote Address to the AALS*, 49 J. LEG. EDUC. 5 (1999).

213. See Michael T. Colatrella, *A “Lawyer for All Seasons”: The Lawyer as Conflict Manager*, 49 SAN DIEGO L. REV. 93, 104–105 (2012).

214. See *id.* at 94.

215. See Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 71 TEMP. L. REV. 811, 831–32 (1999).

216. I am indebted to Thom Main for this insight.

217. See Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493 (2021).

218. See *id.*

can also lead DHS prosecutors to express aggravation.²¹⁹ In principle, asserting client rights in the face of hostile reactions is a professional obligation of attorneys. As one federal court said when a criminal defense attorney complained that a prosecutor had lambasted him in public, such abuse would not “deter a criminal defense attorney of ordinary firmness from continuing to file motions and vigorously defend his client.”²²⁰ But lawyers are human, encountering hostility is not pleasant, and people are likely to instinctively look for ways to avoid it. Moreover, in some situations, immigration judges may even substantively penalize immigrants for denying charges. For example, I have personally encountered immigration judges who insist that respondents who have moved from one city to another concede charges on the NTA in order to grant a motion to change venue. There is no basis in any statute or regulation for judges to impose this condition, but it may be difficult or at least extremely time consuming for people to resist.

Lawyers are hardly unreasonable to worry that irritating judges and prosecutors by denying charges will end up hurting their clients. It is certainly plausible that antagonizing a decision-maker over a procedural issue early in a proceeding might lead the decision-maker to lean against the respondent later on in the process. But if this is the benefit of conceding deportation charges, it is critical for lawyers to recognize that it is usually entirely speculative. The one thing that is for sure is that conceding deportation charges speeds the client along toward deportation, the result that the client presumably wants to avoid. Unlike with plea bargaining in criminal cases, there is no formalized quid pro quo when an immigrant concedes charges in deportation proceedings. There certainly are ample opportunities for an immigration judge to bend an interpretive question or discretionary decision against a respondent. But it is also quite plausible that cases in which animosity from denying charges changes the end result negatively are just as rare as cases in which denying charges changes results in favor of the immigrant. It is also important to recognize that when lawyers prioritize congeniality with each other, their clients may be disempowered.²²¹ As the authors of a sociological study of courts noted, defendants in criminal cases often came to belatedly recognize that “niceness” in the demeanor of judges and other courtroom personnel did not translate into more favorable substantive decision-making.²²²

The visceral adverse reaction to respondents denying charges in Immigration Court is a vivid example of the power of courtroom culture. Scholars have described the powerful impact of courtroom culture on the operation of high volume courts, showing that shared values of practitioners, which are often unwritten, can impact

219. Emails and screenshots on file with author. *See also* Charles Gillman, *Refusal to Concede Removability Blues*, ILW.COM IMMIGRATION DAILY (2005), <https://ilw.com/articles/2005,1111-gillman.shtm> [<https://perma.cc/GMW4-5L98>].

220. *Mezibov v. Allen*, 411 F.3d 712, 721 (6th Cir. 2005).

221. Taylor Needham, Abena Subira Mackall & Becky Pettit, *Making Sense of Misdemeanors: Fine Only Offenses in Convivial Court Rooms*, 63 SOC. PERSPS. 962, 972 (2020).

222. *Id.* at 973.

the operation of a court as much as explicit rules and structures.²²³ For example, courts in which all of the key players share a belief that efficient resolution of cases should be prioritized often work faster than other courts, even under the same rules of procedure.²²⁴ Courtroom culture can create an appearance of informality that actually makes it harder for the people whose interests are at stake to be heard. A recent study of criminal courts in England and Wales found that when courts operated more informally, it made it harder for defendants to participate in their own proceedings because the attorneys and judges were more focused on processing the cases efficiently.²²⁵ Studies of plea bargaining have observed that in criminal cases defense attorneys and prosecutors form a “courtroom workgroup” who have incentives to work together to make the criminal courts function smoothly and with minimal effort, despite the fact that they ostensibly represent adverse interests in that process.²²⁶ Plea bargaining “promotes cordial and comfortable relationships with prosecutors and judges.”²²⁷ So might admitting charges, avoiding the most tenacious possible defense, and simply moving the proceedings forward.

Denying charges is explicitly allowed by the rules of the court, and yet is not infrequently greeted with surprise and even outrage. The fact that immigrant defense lawyers rarely do so indicates that they have either adopted a shared, unwritten norm that the government should not be made to prove its case, or at least they have acquiesced to it. One former immigration lawyer told me: “I practiced in immigration court in NY and NJ, [admitting charges] was the norm so much so that when I did not concede the charges . . . I was approached by other immigration lawyers to fill me in on how things are done.”²²⁸ The pliant conduct of defense lawyers reinforces the norm because admitting and conceding charges without evidence is the empirically normal thing to do. Any lawyer who does the opposite – even though that might be what zealous representation requires – will be breaching the norms and offending the culture of the courtroom.

If the fear is of a generalized animosity from opposing counsel or the immigration judge, it is important to remember that asserting a substantive right should not require a lawyer to be rude. There is no need to pound the table when denying charges. Nor does denying allegations on the charging document preclude defense lawyers from being accommodating if, say, DHS attorneys ask for extra

223. Maria Hawilo, Kat Albrecht, Meredith Martin Roundtree & Thomas Geraghty, *How Culture Impacts Courtrooms: An Empirical Study of Alienation and Detachment in the Cook County Court System*, 112 J. CRIM. L. & CRIMINOLOGY 171, 177–80 (2022).

224. *Id.* at 179–80.

225. Lucy Welsh, *Informality in Magistrates’ Courts as A Barrier to Participation*, 74 INT’L J. L., CRIME & JUST. 100606 (2023).

226. JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1991).

227. Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 938 (2016).

228. E-mail from attorney Teresa Woods Peña to author (March 4, 2023) (on file with author).

time to file material. I am not advocating being stubborn or argumentative at every procedural turn in Immigration Court, but I am arguing that lawyers should be very reluctant to surrender their clients' procedural rights without compelling reasons. The real problem here is that some judges and prosecutors find an immigrant's refusal to simply surrender to be shocking. That will only change if lawyers for immigrants stop doing it.

Because most immigration lawyers are repeat players in Immigration Court, there are some fraught ethical concerns at play here. Immigration lawyers may feel the need to maintain good relationships with immigration judges and DHS lawyers not only to benefit the client in an individual case, but also to benefit their overall law practices. This can lead lawyers to avoid conflict in court at the expense of vigorously asserting individual clients' rights.²²⁹ As one writer described this challenge for attorneys, "They are repeat players and remain sensitive to the impressions of the judge, not just in the present case, but in future ones as well."²³⁰ A 1974 essay observed that a "one-shooter" has an advantage in that he can "do his damndest without fear of reprisal next time around" while repeat players may hesitate.²³¹

Economic incentives may also play a role. If a lawyer contracts with a client to present an asylum case, she may not want to spend extra time litigating removability. In our sample, in four of the five times when respondents denied charges, the immigration judge did not make an immediate decision and scheduled additional hearings or briefing. That means more attorney time and effort. Admitting and conceding the charges allows the process to skip quickly ahead to asylum or any other form of relief that the lawyer and client may see as the heart of the case. The same may happen with a pro bono lawyer who takes on an asylum case out of a desire to defend a refugee fleeing persecution. Indeed, there are reputable training materials on representing asylum seekers that suggest that asylum seekers should usually admit and concede charges and move on to their asylum cases.²³² One asylum manual that was published in 2000 falsely states, "In order to be eligible to apply for asylum, the respondent, through the attorney, must admit removability under one of the grounds."²³³ That is not so; if a respondent denies charges but they

229. See Donna Erez-Navot, *The Repeat Player Effect in Child Protection Mediation: Dangers of and Protections Against Second-Class Justice for Marginalized Parties*, 16 CARDOZO J. CONFLICT RES. 831, 835–36 (2015) (discussing the tendency for lawyers who are repeat players to be co-opted by systems due to a need to maintain strong relationships within the system).

230. Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitation the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REV. 1, 35 (2007).

231. Marc S. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 117 n.10 (1974).

232. See, e.g., LegelEDWeb, *Master Calendar Hearing*, YOUTUBE (2017) (written and directed by Professor Michele Pistone, Villanova University), <https://www.youtube.com/watch?app=desktop&v=gZqHZKO6nJg> [<https://perma.cc/BU3R-2AZT>]; ASYLUM MANUAL § 26.1.6, IMMIGRATION EQUALITY (2000), <https://immigrationequality.org/asylum/asylum-manual/immigration-court-proceedings/> [<https://perma.cc/G5P8-LUTA>].

233. ASYLUM MANUAL, *supra* note 232.

are sustained by the immigration judge the respondent would still be able to apply for asylum. But this errant advice indicates the degree to which contesting removability was simply not a major focus of programs aimed at expanding legal representation of asylum seekers. In general, there appears to be far fewer training programs available on how to contest charges of removability than on how to apply for asylum and other forms of relief.

There is another possible concern that needs serious examination: rules of professional responsibility. Is it ethical for a lawyer to enter a plea denying that a client is not a U.S. citizen when the lawyer knows that the client is in fact not a U.S. citizen? In civil litigation a lawyer could not ethically deny a purely factual allegation that the lawyer knows to be true. The Federal Rules of Civil Procedure Rule 11 requires that “the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information” and authorizes sanctions if attorneys deny factual allegations without such a basis.²³⁴ If that rule applied in Immigration Court, then an immigrant defense lawyer would indeed be prohibited from denying charges that she knows to be factually correct.

But the Federal Rules of Civil Procedure do not apply in Immigration Court. In *Woodby*, the Supreme Court explained that while deportation is not a criminal matter, it is not analogous to civil litigation either:

To be sure, a deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case.²³⁵

There are in fact specific regulations defining attorney misconduct in the context of immigration practice. They repeat a standard from the American Bar Association’s *Model Rules of Professional Responsibility*, Rule 3.1, requiring “an arguable basis in law or in fact” for pleading.²³⁶ The remainder of the rule prohibits filing baseless affirmative applications, but does not include any analog to Rule 11’s prohibition on denying allegations that are known to be true.²³⁷

The full Model Rule 3.1 states,

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. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may

234. FED. R. CIV. P. 11(b)(4); ASYLUM MANUAL, *supra* note 232 (“If all of the information is correct, the attorney should admit the charges.”).

235. ASYLUM MANUAL, *supra* note 232, at 285.

236. 8 C.F.R. § 1003.102(j)(1) (2022).

237. *Id.*

nevertheless so defend the proceeding as to require that every element of the case be established.²³⁸

This rule explicitly permits not guilty pleas in criminal cases even when the client is in fact guilty of the crime, but it does not discuss the deportation context.

The Model Rules, properly understood, permit denying charges in all cases in removal proceedings. That is because lawyers may deny charges for a client, even without a factual basis, if there is a basis in law for doing so. And there is a legal basis. First and foremost, DHS bears the burden of proof.²³⁹ Second, the BIA has made clear that respondents in removal proceedings can remain silent, and that their silence alone is not a sufficient basis for ordering removal from the United States.²⁴⁰ If a respondent's lawyer were forced to admit charges, this right of respondents would be entirely dismantled. There is thus a basis in law for lawyers to deny allegations on a Notice to Appear in Immigration Court, even if the lawyer knows the allegations to be true. Such denials are not an assertion of any facts. They are simply a legal posture, a procedural mechanism that forces the state to prove its case, as required by law.²⁴¹

CONCLUSION

Immigration policy is a famously contentious, high stakes issue in American politics, in American courtrooms, and for millions of people throughout the country.²⁴² Border policy and asylum law are common topics in high profile litigation in the federal courts. Immigration litigation constitutes a major portion of the dockets of several federal circuit courts of appeal.²⁴³ It is thus paradoxical that adjudication of the fundamental question of whether a person is legally deportable is anything but contentious most of the time. This is in part a product of the fact that the burden-of-proof rules governing this adjudication are slanted heavily in favor of deportation. But it is also because lawyers representing immigrants in these proceedings are not making the DHS even do the minimum to prove its case.

While deportation is a grave infringement on personal liberty and civil rights, the procedures set up to handle it treat the matter as if the stakes are far lower. The Supreme Court may have once said that deportation is a much more serious matter

238. MODEL CODE OF PRO. RESP. r. 3.1 (AM. BAR ASS'N) (2023).

239. See discussion *supra* Part III.

240. *Matter of Guevara*, 20 I&N Dec. 238, 241 (B.I.A. 1990).

241. This debate is the most common theme of pushback from immigration judges and DHS counsel when the UNLV Immigration Clinic denies charges. Immigration judges have repeatedly asked if we are asserting a claim to U.S. citizenship for our clients. Our student attorneys and staff attorneys are trained to reply that we are not making any assertions at all but are merely insisting that DHS meet its burden of proof.

242. There were more than 2 million cases pending in U.S. Immigration Courts as of January 2023. See *Historical Immigration Court Backlog Tool*, TRAC IMMIGRATION (Jan. 2023), https://trac.syr.edu/phptools/immigration/court_backlog/ [<https://perma.cc/BXU4-G3QU>].

243. See Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337, 339 (2014) (citing data showing that immigration cases make up 11% of federal circuit court cases nationally).

than a typical negligence case,²⁴⁴ but a typical negligence case is nevertheless heard by a court with more resources and with procedures that are considerably more methodical. A prominent immigration judge has compared removal proceedings to “death penalty cases heard in traffic court settings.”²⁴⁵ Rapid findings of removability with little argument from the parties and no evidence are indicative of that reality.

Several things need to change. First, there should be more scrutiny and reconsideration of the low and often illusory standards of proof used in removability determinations. The foreign-birth presumption is particularly deserving of closer scrutiny, though the problem is much broader. Even with current rules, immigration judges should review the way they take pleadings from pro se respondents. When I have observed these proceedings in court or reviewed transcripts for clients who were previously unrepresented, it is typical for judges to ask questions from respondents in a conversational manner, without telling respondents that answers to seemingly innocent questions like “Where were you born?” can serve as a confession in these proceedings. Immigration judges should warn pro se respondents that they are under no obligation to answer, that it is likely in their interest not to answer, and they should stress that “it may be in your interest to ask the government to prove its case. Would you like to do that?” If there is any hesitation, the immigration judge should enter a denial by default. Under no circumstances should an immigration judge reprimand an attorney for simply forcing DHS to meet its burden of proof. Nor should an immigration judge use a procedural motion, like a change of venue, as leverage to relieve the government of its burden of proof.

Clearly, immigration lawyers also need to reconsider their practice. Non-profit organizations that develop training materials on immigrant legal defense should make contesting removability a greater focus. Even when there is little to be gained, attorneys should not waive substantive rights for their clients unless they can point to something worthwhile that they are getting in return. The Immigrant Legal Resource Center has issued a practice advisory that seems helpfully nuanced in explaining when it may be appropriate to advise a client to concede allegations and charges, while maintaining the norm that the government should usually be held to its burden.²⁴⁶ In general, pleadings should require a similar level of counseling with respondents in Immigration Court as a criminal guilty plea would require between defendants and defense

244. *Woodby v. Immigr. and Naturalization Serv.*, 385 U.S. 276, 285 (1966).

245. Dana Leigh Marks, Opinion, *Immigration Judge: Death Penalty Cases in Traffic Court*, CNN OPINION (June 26, 2014, 9:29 AM), <https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html> [<https://perma.cc/84QJ-X7QX>].

246. IMMIGRANT LEGAL RESOURCE CENTER, REPRESENTING CLIENTS AT THE MASTER CALENDAR HEARING 6 (2018).

attorneys. For all involved, the default in principle and in practice should be to leave the burden of proof with the government.

An attorney defending a person against a government seeking to banish him or her from the country needs to take on a posture and approach that is likely qualitatively and procedurally quite different from helping someone apply voluntarily for a government benefit. This shift in approach has been labeled a form of abolitionist lawyering.²⁴⁷ But a lawyer need not adopt a call to abolish the whole deportation system to accept the need for this kind of legal defense. Nor, for that matter, would a judge need to endorse this ideological orientation. One must only agree that deportation is a serious matter, and that when the government seeks to impose it on someone, the government ought to be put through its paces. This idea is not radical in American law generally. But it is radical in American immigration courts. That should change.

247. Hlass, *supra* note 208, at 1650.

