Catholic University Law Review

Volume 68
Issue 4 *Fall 2019*

Article 12

2019

Crystal Clear Vagueness: The Board of Immigration Appeals Hampers Justice with its Vague "Process of Justice"

Maria Natera

Crystal Clear Vagueness: The Board of Immigration Appeals Hampers Justice with its Vague "Process of Justice"

Cover Page Footnote

J.D., *magna cum laude*, The Catholic University of America, Columbus School of Law, 2019; B.B.A., The University of Texas at Austin, 2015. The author would like to her family for their unwavering support, Francisco Hernandez for his feedback and guidance, and the Catholic University Law Review for its hard work and assistance in readying this paper for publication.

CRYSTAL CLEAR VAGUENESS: THE BOARD OF IMMIGRATION HAMPERS JUSTICE WITH ITS VAGUE "PROCESS OF JUSTICE"

By Maria Natera[+]

Immigration and deportation were the topics du jour in the last presidential election.[1] Under the new administration, the number of immigration arrests and deportations have skyrocketed from the past administration, which also oversaw a notable increase in such proceedings.[2] In an area of law that can have such drastic repercussions to the constitutional tenants of life and liberty, it is one that "lacks some of the most basic due process protections and checks and balances that we take for granted in our American system of justice."[3]

Due Process is a fundamental right that is enshrined within the United States Constitution.[4] Every individual that falls under the jurisdiction of the United States is entitled to both procedural and substantive due process protections.[5] Those protections have developed in American jurisprudence since the creation of the nation. One legal protection in this category holds that if a statute does not allow a person of reasonable intelligence to understand what he is and is not legally entitled to do, then that statute should be struck down for being unconstitutionally vague and reworked so that it fits a reasonableness standard.[6]

[+] J.D., *magna cum laude*, The Catholic University of America, Columbus School of Law, 2019; B.B.A., The University of Texas at Austin, 2015. The author would like to her family for their unwavering support, Francisco Hernandez for his feedback and guidance, and the Catholic University Law Review for its hard work and assistance in readying this paper for publication.

1. Dan Nowicki, *Immigration at Front of 2016 Presidential Race*, USA TODAY (May 15, 2015, 9:39 AM), https://www.usatoday.com/story/news/politics/elections/2015/05/15/immigration-2016-presidential-race/27360717/.

2. Maria Sacchetti, *Immigration Arrests Soar under Trump; Sharpest Spike Seen for Noncriminals*, WASH. POST (May 17, 2017), https://www.washingtonpost.com/local/immigration-arrests-up-during-trump/2017/05/17/74399a04-3b12-11e7-9e48-c4f199710b69_story.html?utm_term=.fab588d9919d.

3. AMERICAN BAR ASSOCIATION, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS 1, https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/2008dec_immigration.authcheckdam.pdf (last visited Mar. 11, 2019).

4. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

5. Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

6. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning . . . violates the first essential of due process of law.").

In the area of immigration law, the issue of unconstitutional vagueness has become more prominent in recent years,[7] with the United States Supreme Court striking down as unconstitutional an immigration statute under the void-for-vagueness doctrine.[8] The Immigration and Nationality Act provides definitions for certain crimes that are grounds for legal immigrants to be placed in removal proceedings, with the possibility of deportation.[9] With such severe potential consequences, it is crucial that the statutes be crystal clear on what every crime entails in order to give immigrants fair warning, a touchstone of the due process protections in this area.[10]

One such crime that may subject an immigrant to removal proceedings and deportation is a conviction for an "aggravated felony," coupled with a sentence of more than one year imprisonment.[11] The definition of the crime includes, among other things, any offense involving "obstruction of justice."[12] Over the years the Board of Immigration Appeals (BIA), which is generally the final arbiter and enforcer of immigration laws and oversees all appeals regarding removal proceedings,[13] has created several different definitions of what crimes constitute "obstruction of justice."[14] This comment will analyze these varying definitions, and discuss how they can be used to improve upon the most recent "obstruction of justice" definition provided by the BIA.

Most recently, in *Valenzuela Gallardo v. Lynch*, the BIA defined "obstruction of justice" as any "specific intent to interfere with the process of justice," and as such, no requirement of an ongoing criminal proceeding or investigation is needed.[15] The BIA did not fully define what "process of justice" entails.[16] The Ninth Circuit correctly held that this definition was unconstitutionally vague, and if it had been allowed to stand, could potentially allow almost any specific intent crime to be included under this category.[17] However, the Ninth Circuit

7. *See* Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1128 (2016) (discussing recent immigration cases dealing with unconstitutional vagueness issues).

8. Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2017).

9. *See* 8 U.S.C. § 1101(a)(43) (2012).

10. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (stating that vague laws have the ability to trap innocent people when a fair warning is not provided).

11. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (An "alien who is convicted of an aggravated felony at any time after admission is deportable.").

12. 8 U.S.C. § 1101(a)(43)(S).

13. Exec. Office of Immigration Reform, Board of Immigration Appeals, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/board-of-immigration-appeals (last visited Mar. 12, 2019).

14. *See* Valenzuela Gallardo v. Lynch, 818 F.3d 808, 813–14 (9th Cir. 2016) (comparing the BIA's prior interpretations of "obstruction of justice" with its most recent).

15. *Id.* at 812.

16. *Id.* at 819.

17. *Id.* at 822.

remanded the case, and instructed the BIA to attempt to rework the definition, providing no additional guidance as to what the definition should be.[18]

Part I of this comment explains the relevant background of the void-for vagueness doctrine. It delves into the historical use of the doctrine in Supreme Court cases involving convictions of criminal law statutes in combination with civil immigration provisions that can lead to removal and deportation proceedings, as well as its modern-day challenges. Additionally, Part I discusses *Valenzuela Gallardo v. Lynch*, and the various definitions of "obstruction of justice" the BIA has created over time. Finally, Part I discusses the *Sessions v. Dimaya* decision, which was recently decided by the Supreme Court of the United States, and its potential effects on the void-for-vagueness doctrine in this area of law. Part II compares the past "obstruction of justice" definitions, with the most current one discussed in *Valenzuela Gallardo*, explains the possible ramifications of allowing the current definition to stand, and discusses the heightened need to protect due process requirements for non-citizens.

Finally, Part III argues that the BIA should in fact include a temporal nexus requirement to the definition of "obstruction of justice," in order to eliminate any unconstitutional vagueness issues. While the Ninth Circuit refrained from holding that the BIA should include such a nexus,[19] the requirement would be in line with the definition of obstruction of justice crimes found in standard criminal law.[20] Additionally, it would help resolve the issue of vagueness, by narrowing the scope of crimes included. This, in turn, would provide necessary constitutional notice and satisfy the due process constitutional protection afforded to every person in the United States. This Comment concludes that when dealing with non-citizens, who are generally under-protected within the law, the Constitution demands the most rigorous application of constitutional safeguards, and as such, the "obstruction of justice" definition is especially lacking.

I. CRIMINAL IMMIGRATION LAW'S VOID-FOR-VAGUENESS PROBLEM

A. Void-for-Vagueness Doctrine

The United States Supreme Court famously noted:

---

18. *Id.* at 824.

19. *Id.* at 822.

20. *Obstruction of Justice*, BOUVIER LAW DICTIONARY (Desk ed. 2012). Obstruction of Justice is defined as:

> [A] broad term for conduct that interferes with any aspect of the system of justice, including any act that interferes with or endeavors to interfere with: an investigation, prosecution, administrative process, or trial; the police, agencies, prosecutors, or courts; their personnel or offices; or the witnesses, parties, or evidence that may be relevant to such proceedings.

Id.

> Vagueness doctrine is an outgrowth…of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.[21]

For more than 125 years, the Supreme Court has stricken criminal statutes as being unconstitutionally vague,[22] and over that time, the doctrine has come to be considered "among the most important guarantees of liberty under the law."[23]

The doctrine itself can be implicated for one of two reasons.[24] The first deals with notice, a requirement of the Due Process Clause.[25] A criminal statute will be held unconstitutionally vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits."[26] This gives people the ability to adjust their behavior in order to conform to the requirements as set out in the law.[27] As such, a criminal statute should be unambiguous, as "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning."[28] It should provide "relatively clear guidelines"[29] that outline what conduct is prohibited, and set forth "objective criteria"[30] to assess whether the statute has been violated.

The second reason that a criminal statute may be held unconstitutionally vague is "if it authorizes or even encourages arbitrary and discriminatory enforcement."[31] The concern with such a statute is that it would impermissibly delegate basic policy matters to law enforcement, judges, and juries on a subjective basis, resulting in possible arbitrary and discriminatory application.[32] Thus, a statute must "provide explicit standards for those who apply them"[33] in order to avoid an unconstitutional vagueness issue.

---

21. United States v. Williams, 553 U.S. 285, 304 (2008) (citing Hill v. Colorado, 530 U.S. 703, 732 (2000)).

22. Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 280 (2003).

23. *Id.* (quoting CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 102 (1996)).

24. *Hill*, 530 U.S. at 732 (discussing that a statute may be impermissibly vague if, first, people of normal intelligence cannot understand the conduct it prohibits and, second, if it allows for arbitrary and discriminatory enforcement).

25. Colautti v. Franklin, 439 U.S. 379, 390 (1979).

26. *Hill*, 530 U.S. at 732 (citing Chicago v. Morales, 527 U.S. 41, 56–57 (1999)).

27. *Morales*, 527 U.S. at 58 (discussing the purpose of the fair notice requirement).

28. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

29. Posters 'N' Things v. United States, 511 U.S. 513, 525 (1994).

30. *Id.* at 526.

31. *Hill*, 530 U.S. at 732 (citing *Morales*, 527 U.S. at 56–57).

32. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

33. *Id.* at 108.

B. Going Up: Supreme Court Tackles Possible Vagueness Issues in Immigration Law

The Supreme Court has unequivocally held that any foreign national within the jurisdiction of the United States is entitled to the protections of the Due Process Clause of the Fifth and Fourteenth Amendment.[34] However, it has yet to strike down an immigration provision, using the void-for-vagueness analysis discussed above, in connection with a removal proceeding.[35] Despite this fact, in recent years, the use of the void-for-vagueness doctrine has skyrocketed in the intersection of criminal law and immigration law.[36] However, this is not the first time the doctrine has appeared in that context, as the Supreme Court addressed this concern twice before.[37] Most recently, the Court decided a case that upheld a constitutional challenge on the basis of vagueness to an immigration provision, causing the provision to be struck down.[38]

1. Emergence of Vagueness in Immigration Case Law

The earliest case that dealt with the possibility of unconstitutional vagueness in a federal immigration statute was the Supreme Court's 1951 decision in *Jordan v. De George*.[39] In that case, the Court analyzed a statute declaring an Italian immigrant potentially deportable for a conviction of a "crime involving moral turpitude."[40] De George had been previously convicted of conspiracy to defraud the United States of taxes on distilled spirits on two separate occasions.[41] He was placed in removal proceedings while serving his second sentence.[42] Despite the fact that neither party actually raised nor argued the issue of vagueness,[43] and despite the fact that the statute itself was an immigration

34. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments, and that even aliens shall not…be deprived of life, liberty or property without due process of law.").

35. *See* Kara Goad & Elizabeth Sullivan, *Supreme Court Bulletin:* Sessions v. Dimaya, LEGAL INFO. INST., https://www.law.cornell.edu/supct/cert/15-1498 (last visited Mar. 17, 2019). Since removal proceedings are generally considered to be civil penalties, there has been some discussion as to whether the same void-for-vagueness analysis used in criminal proceedings, as protected by the Fifth Amendment, applies in civil cases as well. In Sessions v. Dimaya, the Supreme Court ended such discussion by affirming that the void-for vagueness analysis applies to removal proceedings in the same way it applies to any other proceeding. Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

36. Koh, *supra* note 7, at 1128.

37. *See* discussion *infra* Part B.1.

38. *Dimaya*, 138 S. Ct. at 1223 (striking down a statutory clause that "produces more unpredictability and arbitrariness than the Due Process Clause tolerates").

39. *See* Jordan v. De George, 341 U.S. 223 (1951) (discussing whether a fraud conspiracy against the United States is a crime involving moral turpitude under the Immigration Act of 1917).

40. *Id.* at 224–26.

41. *Id.* at 226.

42. *Id.* at 225.

43. *Id.* at 228.

provision rather than a criminal statute,[44] the Supreme Court, sua sponte, went through the two-step analysis of the vagueness doctrine.[45] The Court found that the two-step test was satisfied, and that the statute at issue was not unconstitutionally vague.[46]

In 1967, the Supreme Court heard *Boutilier v. INS*, its second case dealing with vagueness in the immigration law context.[47] The provision at issue in that case prohibited entry into the United States to individuals "afflicted with psychopathic personality."[48] At the time, homosexuals were considered to be afflicted with psychopathic personality.[49] Since the petitioner had previously engaged in "homosexual relations,"[50] he was deemed to be afflicted with a "psychopathic personality" and as a result, was subsequently deported.[51] A challenge to the statute was then raised, alleging that the term "psychopathic personality" was unconstitutionally vague.[52] The challenge was subsequently struck down, with the Court finding that the legislative history made it explicitly clear that homosexual relations were included in the phrase "psychopathic personality."[53]

2. Modern Day Vagueness in Immigration Case Law

The Supreme Court's denial of the vagueness challenges to the immigration statutes in both cases remained the standard for many years.[54] However, a recent Supreme Court case involving the vagueness doctrine outside of the immigration law context paved the way for a wider acceptance of immigration provisions

44. *Id.* at 231.

45. *Id.* at 231–32. The analysis itself involved determining "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id. See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (stating that statutes that define terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the . . . due process [clause]).

46. *Jordan*, 341 U.S. at 232.

47. *See* Boutilier v. INS, 387 U.S. 118 (1967) (addressing the case of an alien who was deported on the basis of his homosexuality under the Immigration and Nationality Act of 1952).

48. *Id.*

49. *See id.* at 120 (noting the "Public Health Service issued a certificate" that the petitioner had a psychopathic personality and was a "sexual deviate at the time of his admission").

50. *Id.*

51. *Id.* at 118.

52. *Id.* at 123.

53. *Id.* at 120 (explaining that "[t]he legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals.").

54. *Id.* at 122 (finding that "Congress used the phrase 'psychopathic personality' not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts."); Jordan v. De George, 341 U.S. 223, 232 (1951) (holding that "[w]hatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude.").

being found to be unconstitutionally vague. In that case, *Johnson v. United States*, the Court assessed the Armed Career Criminal Act's "residual clause" for vagueness.[55]

The Act itself included a definition of "violent felony," that listed several offenses.[56] If a person were convicted of any of the listed offenses three or more times, the Act would automatically increase a person's prison term to a minimum of 15 years and a maximum of life.[57] The "residual clause" included in the category of "violent felony," any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[58]

Through its analysis of the residual clause, the Supreme Court held it was unconstitutionally vague.[59] The Court found that there were two specific features of the residual clause that made it unconstitutionally vague.[60] First, it was found that the residual clause left "grave uncertainty about how to estimate the risk posed by a crime."[61] The second issue the Court had with the residual clause was that it left uncertainty regarding the amount of risk it would take for the crime to qualify as a violent felony.[62] As the Supreme Court noted, "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the *Due Process Clause* tolerates."[63]

In its holding the Court broadened the doctrine of void-for-vagueness, stating that in contradiction to prior narrow holdings by the Supreme Court, "a vague provision is [not] constitutional merely because there is some conduct that clearly falls within the provision's grasp."[64] The holding provided an opening for courts throughout the nation to more readily accept the void-for-vagueness doctrine as a successful challenge within the criminal and immigration law cross-section, which was used in a recent Supreme Court case.[65]

---

55. Johnson v. United States, 135 S. Ct. 2551 (2015).

56. *Id.* at 2555–56. Other offenses included "burglary, arson, [] extortion, [or crimes] involv[ing the] use of explosives." 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

57. *Johnson*, 135 S. Ct. at 2555.

58. *Id.* at 2555–56 (quoting § 924(e)(2)(B)(ii)).

59. *Id.* at 2557. The Supreme Court stated that the "residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558.

60. *Id.* at 2557.

61. *Id.*

62. *Id.* 2557–58.

63. *Id.* at 2558.

64. *Id.* at 2560–61. "It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.* at 2558.

65. Koh, *supra* note 7, at 1152–53 (commenting that "[b]y broadening the scope of the vagueness doctrine, *Johnson* provides an impetus for courts to reconsider how void for vagueness challenges should fair in the immigration context.").

Sessions v. Dimaya[66] presented the Supreme Court its first case in over fifty years that dealt with the intersection of immigration provisions and the void-for-vagueness doctrine. In it, the Supreme Court used the *Johnson* decision to strike down an immigration provision using the doctrine of void-for-vagueness.[67] In *Dimaya*, the petitioner sought review as a result of his conviction of a "crime of violence,"[68] which triggered his eligibility for removal proceedings.[69] Dimaya had previously been convicted of first-degree residential burglary on two separate occasions.[70] He claimed that the crime of burglary did not fall under the category of "crime of violence," and that the statute should be struck down for being unconstitutionally vague.[71]

Citing the *Johnson* decision, and using the vagueness doctrine analysis, the Supreme Court agreed with the Ninth Circuit and held that the statute at hand was in fact unconstitutionally vague and struck it down.[72] The Court reasoned that the "substantial risk" element found in the definition of "crime of violence" was too indeterminate to give proper notice as to how much risk was substantial enough to constitute such a crime.[73] However, the Court explained that the issue with the "substantial risk" element alone would not render the statute unconstitutional.[74] It also pointed out that, as in *Johnson*, the statute itself did not offer any parameters as to what an "ordinary case" that violated the statue would look like.[75] Those two factors combined resulted in the residual clause of the statute in *Dimaya* to be deemed unconstitutional under the void-for-vagueness doctrine.[76]

As a result of the decision in *Dimaya*, courts now have a clearer path to finding immigration statutes unconstitutionally vague.[77] Given the increased attention

---

66. *See generally* Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (addressing the immigration status of a permanent United States resident who had been convicted of burglary).

67. *Id.* at 1223.

68. *Id.* at 1211. The "crime of violence" definition is found in immigration provision 8 U.S.C. § 1101(a)(43)(F); it is one of a long list of crimes under the "aggravated felony" category. *Id.* (citing 8 U.S.C. § 1101(a)(43)(F) (2012)).

69. *Dimaya*, 138 S. Ct. at 1210–11. It triggers deportation removal proceedings for a non-citizen if they are also sentenced for a term of imprisonment of more than one year. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

70. *Dimaya*, 138 S. Ct. at 1211.

71. *Id.* at 1211–12.

72. *Id.* at 1223.

73. *Id.* at 1214–15. The section of the definition for "crime of violence" at issue is as follows: "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* at 1211 (quoting 18 U.S.C. § 16(b) (2012) which defines "crime of violence").

74. *Dimaya*, 138 S. Ct. at 1215.

75. *Id.*

76. *Id.* at 1216, 1223.

77. *See id.* at 1223 (comparing an immigration statute from the instant case to a criminal statute which required mandatory minimum prison sentences and was determined to be

to immigration and deportation issues, as well as the increase in deportation rates, the case is sure to have a significant impact on the criminal and immigration law landscape and beyond.

C. Valenzuela Gallardo v. Lynch: *Unconstitutional Vagueness and Immigration Collide*

1. Facts and Procedural History

Another case from the Ninth Circuit involving a vagueness challenge to an immigration provision is *Valenzuela Gallardo v. Lynch*.[78] Valenzuela Gallardo, a citizen of Mexico, was granted lawful permanent residency to the United States in 2002.[79] He was arrested and charged in California on several counts in November 2007, but all charges were dismissed except for one count of accessory to a felony, to which he pled guilty.[80] Valenzuela Gallardo was initially placed on probation but later violated its terms, and as a result, was given a sixteen-month prison sentence.[81]

As a result of the conviction and prison sentence, Valenzuela Gallardo was placed in removal proceedings in June 2010.[82] The proceedings were initiated because the Government argued that Valenzuela Gallardo's conviction of accessory to a felony constituted an "offense relating to obstruction of justice."[83] Such an offense would also qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(S),[84] and made Valenzuela Gallardo eligible for placement in removal proceedings.[85] A motion to terminate removal proceedings was filed in July 2010, and Valenzuela Gallardo contested removability.[86] He argued that his conviction of accessory to a felony[87] was not an offense "relating to

---

unconstitutionally vague in its instant holding that the immigration statute was unconstitutionally vague).

78. Valenzuela Gallardo v. Lynch, 818 F.3d 808, 811 (9th Cir. 2016).

79. *Id.*

80. *Id.* Valenzuela Gallardo had been discovered in a stolen vehicle that contained drugs and a firearm. *Id.* The dismissed charges included "two counts of possession of a controlled substance . . . , one count of possessing methamphetamine while armed . . . , and one count of failing to comply with the terms of his probation." *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 811–12.

84. *Id.* at 812. The statute is also referred to as the Immigration and Nationality Act (INA). INA § 1101(a)(43)(S) (2012).

85. *Valenzuela Gallardo*, 818 F.3d at 811–12.

86. *Id.* at 812.

87. *Id. See* CAL. PENAL CODE § 32 (West 1935):

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

obstruction of justice," since the "federal 'Obstruction of Justice' ground must relate to an" ongoing judicial proceeding.[88]

The motion to terminate removal proceedings was denied by the immigration judge overseeing the removal proceedings,[89] who determined that a conviction under the California statute did constitute an "offense relating to obstruction of justice."[90] The judge noted that the BIA had not "limited the scope of the obstruction of justice aggravated felony to cases in which there is a pending judicial proceeding."[91] The judge then ordered Valenzuela Gallardo to be "removed to Mexico."[92] The order was appealed to the BIA, who dismissed it.[93]

Valenzuela Gallardo then petitioned for review to the federal courts, and requested a stay of his removal order.[94] However, the Ninth Circuit originally dismissed his petition for lack of jurisdiction.[95] The Board of Immigration Appeals reopened Valenzuela Gallardo's proceedings sua sponte,[96] in response to the Ninth Circuit's *Trung Thanh Hoang v. Holder*[97] decision that created a new definition for the "obstruction of justice" offense in the immigration provision at issue.[98] In its further consideration of Valenzuela Gallardo's removal order as a result of the *Hoang* case, the BIA's three-judge panel created a new definition for the crime of "obstruction of justice."[99] In creating the definition, the BIA determined that an offense for "obstruction of justice" solely requires:

> [T]he affirmative and intentional attempt, with specific intent, to interfere with the process of justice . . . . While many crimes fitting this definition will involve interference with an ongoing criminal investigation or trial, we now clarify that the existence of such

Id.

88. *Valenzuela Gallardo*, 818 F.3d at 812.

89. *Id.* (reasoning that the Board of Immigration "had previously held that the federal crime of accessory after the fact . . . is an aggravated felony.").

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* Despite the fact that the BIA is the highest administrative body for enforcing and interpreting immigration laws, an individual is allowed to appeal to the Federal District Court if their petition to the BIA is denied, and their challenge is based on legal or constitutional grounds. *Immigration Law Appeals*, JUSTIA, https://www.justia.com/immigration/appeals/ (last visited Mar. 3, 2019).

95. *Valenzuela Gallardo*, 818 F.3d at 812.

96. *Id.*

97. *See* Trung Thanh Hoang v. Holder, 641 F.3d 1157 (9th Cir 2011) (holding a crime constitutes an obstruction of justice "when it interferes with an ongoing proceeding or investigation" where the court considered two prior BIA decisions).

98. *See* discussion *infra* Part D.

99. *Valenzuela Gallardo*, 818 F.3d at 812 (citing *Trung Thanh Hoang*, 641 F.3d at 1164).

> proceedings is not an essential element of an "offense relating to obstruction of justice."[100]

Using that definition, the three-judge panel found that the California statue under which Valenzuela Gallardo was convicted is "properly classified" as an "obstruction of justice" offense,[101] and dismissed the reopened appeal.[102]

2. Ninth Circuit's Opinion: Unconstitutionally Vague

Following the denial, Valenzuela Gallardo once again petitioned the Ninth Circuit for review.[103] Finding that there was jurisdiction,[104] the court granted the petition.[105] The Ninth Circuit subsequently held that the new construction of "obstruction of justice" created by the BIA, specifically the phrase "process of justice," was unconstitutionally vague.[106] In coming to this conclusion, the Ninth Circuit assessed whether deference was owed to the BIA's definition,[107] and most importantly, whether the definition was in fact unconstitutionally vague.[108]

In determining whether deference was owed, the Ninth Circuit concluded, "where an agency's interpretation of a statute raises grave constitutional concerns, and where Congress has not clearly indicated it intends a constitutionally suspect interpretation, [the Court could] assume Congress did not delegate authority for the interpretation[.]"[109] Given that, the Ninth Circuit first had to determine whether any grave constitutional concerns arose out of the BIA's newest construction of the definition of "obstruction of justice."[110]

In analyzing possible vagueness in the new interpretation of "obstruction of justice," the Ninth Circuit took particular issue with the phrase "process of

---

100. *Valenzuela Gallardo*, 818 F.3d at 812. *See In re* Valenzuela Gallardo, 25 I. & N. Dec. 838, 841 (B.I.A. 2012).

101. *Valenzuela Gallardo*, 818 F.3d at 812; *Valenzuela Gallardo*, 25 I & N. Dec. at 841.

102. *Valenzuela Gallardo*, 818 F.3d at 812.

103. *Id.*

104. *Id.* (citing 8 U.S.C. § 1252(a)(2)(D), which provides the circumstances under which the federal courts can review decisions involving orders of removal).

105. *Valenzuela Gallardo*, 818 F.3d at 825.

106. *Id.* at 812, 824.

107. *Id.* at 815 (using the *Chevron* doctrine, the Ninth Circuit analyzed whether deference was owed to the BIA's interpretation for "obstruction of justice," as it is the highest administrative body for interpreting and applying immigration law). The doctrine itself holds that if there is a binding agency precedent, courts should generally defer to that precedent as long as two requirements are met: 1) "Congress has directly spoken to the precise question at issue" and the statute does not "unambiguously bar" an agency's interpretation, and 2) whether the "BIA's interpretation is 'based on a permissible construction of the statute.'" *Id.*

108. *Id.* at 819–22.

109. *Id.* at 818. In coming to this conclusion, the court applied the constitutional avoidance and constitutional narrowing doctrines, which in the context of the *Chevron* doctrine, allowed the court to refuse to "accord deference to agency interpretations that raise grave constitutional doubts where other permissible and less troubling interpretations exist." *Id.* at 817.

110. *Id.* at 818–19.

justice" within the definition.[111] It stated that because the BIA gave no indication as to what was included within the phrase, or where that process begins or ends, the new phrase was unconstitutionally vague.[112] The court analogized the phrase "process of justice" to the residual clause of the Armed Career Criminal Act in the Supreme Court's *Johnson* decision, which was held unconstitutionally vague.[113]

Like the residual clause in the *Johnson* case, which involved a great degree of uncertainty as to the amount of risk needed to qualify as a violent felony, the new construction including "process of justice" also left a great amount of uncertainty regarding what was included within the "process of justice" phrase, especially if there was no requirement of an ongoing criminal investigation or trial.[114] The uncertainty was exacerbated by the lack of a definition for "process of justice" in any of the BIA's prior case law.[115]

The court found that the uncertainty created by the phrase "process of justice" left it unable to determine exactly what specific intent crimes qualified,[116] noting that almost any specific intent crime could be included.[117] Thus, the Ninth Circuit held that the BIA's new interpretation for "obstruction of justice" was unconstitutionally vague as a result of its use of the phrase "process of justice," and its lack of any additional guidance as to what the phrase includes.[118]

Finally, since the court determined that the new interpretation created serious constitutional doubts, it also had to assess whether Congress "made it clear that it chooses the constitutionally doubtful interpretation."[119] It held that there was no indication that Congress intended such an interpretation, given that its examples of obstruction of justice either are connected to an ongoing proceeding or investigation, or have some additional specificity that provides notice.[120] As

---

111. *Id.* at 819.

112. *Id.*

113. *Id.* at 819. *See also* discussion *supra* Part 2.

114. *Valenzuela Gallardo*, 818 F.3d at 819–20. The court also looked to the other obstruction related crimes listed in the statute that qualified as "aggravated felonies" and found that they both were tied to ongoing criminal proceedings. *Id.* at 821.

115. *Id.* at 820. The court noted that there was no definition of "process of justice" within the INA's definition section. *Id.* It also cited Black's Law Dictionary to show that there was no definition for "process of justice" within it. *Id.*

116. *Id.* (explaining that "[a]bsent some indication of the contours of 'process of justice,' an unpredictable variety of specific intent crimes could fall within it, leaving us unable to determine what crimes make a criminal defendant deportable…and what crimes do not."). The court was also concerned about the possibility of the new interpretation inviting arbitrary enforcement, which could result in defense attorneys unable to accurately advise their clients. *Id.* at 820–21.

117. *Id.* at 820. The court further noted, "[i]t is difficult to imagine a specific intent crime that could not be swept into the BIA's expanded definition." *Id.* at 822.

118. *Id.*

119. *Id.* at 823.

120. *Id.* The court also explained that catchall provisions in a federal criminal obstruction of justice provision have been construed by courts as requiring a connection to an ongoing criminal proceeding or trial:

a result, the Ninth Circuit did not defer to the BIA's interpretation, and remanded the appeal to the BIA, instructing it to offer a new construction to the definition of "obstruction of justice," or alternatively, apply a previously used interpretation that complied with the constitutional requirements for due process.[121]

D. The BIA's Past Constructions of "Obstruction of Justice"

One of the earliest constructions of "obstruction of justice" referenced by the Ninth Circuit in *Valenzuela Gallardo*[122] is the one found in the BIA's decision in *In re Batista-Hernandez*.[123] In determining whether the federal offense of accessory after the fact fell under the umbrella of "obstruction of justice" crimes, as outlined in § 1101(a)(43)(S),[124] the BIA had only a cursory discussion.[125] It concluded that the offense qualified as "obstruction of justice," and in turn an aggravated felony, because the statute "criminalizes actions knowingly taken to 'hinder or prevent [another's] apprehension, trial, or punishment.'"[126]

Two years later, the BIA released a differing, and more descriptive, construction for "obstruction of justice" in *In re Espinoza-Gonzalez*.[127] In that case, Espinoza-Gonzalez was a citizen of Mexico, who had gained legal resident status in the United States.[128] He was convicted of the offense of misprision of a felony, which was categorized as an offense constituting "obstruction of justice."[129] Espinoza-Gonzalez was placed in removal proceedings.[130] The immigration judge presiding over the case found that the offense that Espinoza-Gonzalez was convicted of did not constitute an "obstruction of justice" offense.[131] The Immigration and Naturalization Service (INS) appealed the

---

> Recent decisions of Courts of Appeals have likewise tended to place metes and bounds on the very broad language of the catchall provision. The action taken by the accused must be *with an intent to influence judicial or grand jury proceedings*…if the defendant lacks knowledge that his actions *are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct*.

Id. (quoting United States v. Aguilar, 515 U.S. 593, 599 (1995)).

121. *Valenzuela Gallardo*, 818 F.3d at 824.

122. *Id.* at 813.

123. *See* In re Batista-Hernandez, 21 I. & N. Dec. 955 (B.I.A. 1997) (noting that "the wording in 18 U.S.C. § 3 itself indicates its relation to obstruction of justice" and discussing "the nature of being an accessory after the fact").

124. *Valenzuela Gallardo*, 818 F.3d at 813.

125. *Batista-Hernandez*, 21 I. & N. Dec. at 961. The other explanation for its holding was "the nature of being an accessory after the fact lies essentially in obstructing justice and preventing the arrest of the offender." *Id.* at 962.

126. *Id.* at 962 (citing 18 U.S.C. § 3 (1993)).

127. *See In re* Espinoza-Gonzalez, 22 I. & N. Dec. 889 (B.I.A. 1999).

128. *Id.* at 890.

129. *Id.* at 889–90 (stating the statute under which he was convicted is 18 U.S.C.S. § 4).

130. *Espinoza-Gonzalez*, 22 I. & N. Dec. at 890.

131. *Id.* at 892 (explaining that the immigration judge found that the statutory language for misprision of a felony did not directly relate to obstruction of justice).

decision to the BIA.[132] Despite INS's arguments, the BIA agreed with the immigration judge.[133]

In reaching that conclusion, the BIA looked to "obstruction of justice" offenses in the federal criminal statutes.[134] It explained that those "obstruction of justice" offenses "have as an element interference with the proceedings of a tribunal or require an intent to harm or retaliate against others who cooperate in the process of justice or might otherwise so cooperate."[135] The BIA also noted "[i]t is a lesser offense to conceal a crime where there is no investigation or proceeding."[136] Additionally, it specifically mentioned that the Supreme Court narrowly construes a catchall provision found in the federal "obstruction of justice" statutes.[137] The BIA specifically quoted the Supreme Court:

> The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the Court's or grand jury's authority . . . . In other words, the endeavor must have the "natural and probable effect" of interfering with the due administration of justice . . . . If the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.[138]

Using those federal statutes, the BIA thus held that the offense at issue in *Espinoza-Gonzalez*, having none of the limiting elements (i.e., interference in an ongoing investigation or proceeding), did not rise to the necessary level to warrant it being classified as an "obstruction of justice" crime.[139]

It was to this narrower construction that the Ninth Circuit had previously deferred to on three separate occasions.[140] The most recent case illustrating this

---

132. *Id.* at 889.

133. *Id.* at 892 (finding that "the elements of the offense of misprision of a felony do not constitute the crime of obstruction of justice as that term is defined in the United States Code.").

134. *Id.*

135. *Id.* (noting the court specifically looked at the obstruction of justice offenses listed in 18 U.S.C. §§ 1501–1518).

136. *Id.* at 895.

137. *Id.* at 892. The BIA quoted from a Supreme Court case discussing the catchall provision that prohibited a "person who 'corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice'" found in 18 U.S.C. § 1503. *Id.*

138. *Id.* (citing United States v. Aguilar, 515 U.S. 593, 598–99 (1995) (making false statements to an investigating agent who would potentially testify at a grand jury proceeding was not sufficient to constitute an obstruction of justice crime)).

139. *Espinoza-Gonzalez*, 22 I. & N. Dec. at 896.

140. *See* Trung Thanh Hoang v. Holder, 641 F.3d 1157, 1161 (9th Cir. 2011); Salazar-Luviano v. Mukasey, 551 F.3d 857, 860 (9th Cir. 2008) (deferring to the *Espinoza-Gonzalez* construction of "obstruction of justice" when determining if aiding and abetting the attempted escape from custody constitutes an aggravated felony); Renteria-Morales v. Mukasey, 551 F.3d 1076, 1086–87 (9th Cir. 2008) (using the *Espinoza-Gonzalez* definition of "obstruction of justice" to conclude that

deference by the court was its decision in *Trung Thanh Hoang v. Holder*,[141] where a Vietnamese citizen and permanent resident of the United States was convicted of rendering criminal assistance in the second degree.[142] In its reasoning, the Ninth Circuit referenced back to one of their prior decisions stating, "*Espinoza-Gonzalez* 'articulated both an actus reus and mens rea element of the generic definition of [obstruction of justice] crimes for purposes of § 1101(a)(43)(S).'"[143]

Since it determined the construction of "obstruction of justice" in *Espinoza-Gonzalez*, was reasonable,[144] the court used those elements to determine that the conviction lacked the "necessary actus reus" and therefore did not constitute "obstruction of justice."[145] It is with these prior constructions in mind that the Ninth Circuit disapproved of the BIA's most recent definition of "obstruction of justice" in its *In re Valenzuela Gallardo* decision.[146]

II. WHICH IS BEST? COMPETING CONSTRUCTIONS FOR OBSTRUCTION OF JUSTICE

A. Comparing the Narrow and Broad Approaches to "Obstruction of Justice"

As the Ninth Circuit pointed out, it appears that the newest construction of "obstruction of justice" created by the BIA in *In re Valenzuela-Gallardo* departs from its prior interpretations.[147] The constructions can generally be categorized into two approaches: a narrower construction, as seen in the most recent decision, and a broader construction, to which the court has deferred to on several occasions.[148]

---

a failure to appear in court in violation of federal criminal provision qualified as an obstruction of justice).

141. *Trung Thanh Hoang*, 641 F.3d at 1161 (stating "[i]n light of our precedent, we look to *Espinoza-Gonzalez* to supply the definition of the generic federal obstruction of justice offense.").

142. *Id.* at 1159.

143. *Id.* at 1161. *See also Renteria-Morales*, 551 F.3d at 1086 (quoting *Espinoza-Gonzalez*, 22 I. & N. Dec. at 893) (discussing actus reus as "either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice")). Furthermore, it described mens rea as "specific intent to interfere with the process of justice." *Renteria-Morales*, 551 F.3d at 1086 (quoting *Espinoza-Gonzalez*, 22 I. & N. Dec. at 893).

144. *Trung Thanh Hoang*, 641 F.3d at 1161. The Court also determined that it did not need to defer to the BIA's conclusion that a particular crime is removable offense, only to its definitions of ambiguous terms. *Id.* at 1163. Additionally, it pointed out that if the BIA is dealing with the interpretation of a state criminal statute, since it is not a matter "committed to the BIA's expertise[,]" the court owed "no deference to the BIA's resolution of [that] question." *Id.*

145. *Id.* at 1165.

146. Valenzuela Gallardo v. Lynch, 818 F.3d 808, 813–14, 816 n.3 (9th Cir. 2016).

147. *Id.* at 813 (stating "[t]he BIA's most recent interpretation departs from its prior interpretations.").

148. *Id.* at 814; *see* discussion *infra* Part A.1.

1. Espinoza-Gonzalez*: Broad "Obstruction" Construction*

The older construction created by the BIA in its *Espinoza-Gonzalez* decision is more expansive and detailed than the subsequent definition of "obstruction of justice."[149] The elements included in the definition were an actus reus, active interference with proceedings, and mens rea, specific intent to interfere with the process of justice,[150] providing more clarity than the preceding construction given in *Batista-Hernandez*.[151] By explicitly stating that an offense constitutes obstruction of justice if there is specific intent to interfere with the process of justice and there must be active interference with criminal proceedings, the construction gives constitutional due process notice to an individual as to what crimes would fall into this category.[152]

2. In re Valenzuela-Gallardo: *Narrow "Obstruction" Construction*

Despite the prior construction passing constitutional muster, the BIA changed the construction of "obstruction of justice" in the *In re Valenzuela-Gallardo* decision.[153] It eliminated completely the actus reus element as delineated previously.[154] This meant that any specific intent crime that interfered with the "process of justice" would fall under that category.[155] However, without defining what "process of justice" entails, and without any further actus reus, the construction is unconstitutionally vague, and fails due process requirements, as it creates an issue of lack of fair notice, and the potential for arbitrary enforcement.[156]

Without the actus reus qualification, any reasonable person would have to guess as to which of his specific intent actions did interfere with the "process of justice," which goes against the very basic tenants of the constitutional void-for-vagueness doctrine.[157] Furthermore, the lack of definition for "process of

149. *Id.* at 824 (referencing the construction found in *Espinoza-Gonzalez* as the broader definition in relation to the newer "obstruction of justice" definition).

150. Renteria-Morales v. Mukasey, 551 F.3d 1076, 1086 (2016).

151. *See generally In re* Batista-Hernandez, 21 I. & N. Dec. 955 (B.I.A. 1997) (determining that a conviction of a controlled substance does not establish deportability).

152. United States v. Williams, 553 U.S. 285, 304 (2008) (citing Hill v. Colorado, 530 U.S. 703, 732 (2000)).

153. *In re* Valenzuela Gallardo, 25 I. & N. Dec. 838, 841 (B.I.A. 2012).

154. *Id.* (clarifying that there is no requirement for the existence of an ongoing criminal proceeding in "obstruction of justice" offenses).

155. *Id.*

156. Valenzuela Gallardo v. Lynch, 818 F.3d 808, 819 (9th Cir. 2016). As pointed out by the Ninth Circuit, when the Government made the unsatisfying argument that the specific intent requirement narrowed the scope of the definition, the crucial question of "specific intent to do what?" was still left open. *Id*. at 821. Furthermore, it explained that despite the fact that the statute defined what intent ("mens rea") was needed, it provided "little instruction on the equally important actus reus." *Id.*

157. Kolender v. Lawson, 461 U.S. 352, 357 (1983) (noting "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary

justice" means that the determination of what falls within that broad category is left wholly to the discretion of the court. This results in arbitrary enforcement, as one court may feel that a crime qualifies, while another disagrees.

B. Susceptibility to Due Process Concerns: Immigrants and Immigration Law

The field of immigration law has been compared to a game of "roulette,"[158] and described as an area where "the normal rules of constitutional law simply do not apply."[159] As a result, immigration laws culminate in the individuals it affects being especially at risk of the problems that underlie the void-for-vagueness doctrine: lack of notice and arbitrary and discriminatory enforcement.[160] The punishments for non-citizens, namely deportation and bar to entry, are extremely severe,[161] so the fact that many of these constitutional safeguards are seemingly weaker in this area should elicit grave concerns all the more.

1. Lack of Fair Notice

The first concern is that of constitutional notice, and whether a reasonable person would understand what conduct conforms to the law, and what does not.[162] As such, statutes are supposed to be unambiguous.[163] Even then, individuals that are put on trial are still guaranteed an attorney, if they so desire

---

people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.").

158. Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 301–02 (2007) (explaining that the discretion that immigration judges have in immigration law proceedings, specifically in asylum cases, are akin to a game of roulette). "Bewildering," "labyrinthine," and "nebulous" are other similar terms that have been used to describe immigration laws. Koh, *supra* note 7, at 1128; *see also* Derrick Moore, "*Crimes Involving Moral Turpitude": Why the Void for Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813, 814 (2008). It is difficult to imagine expecting individuals typically unfamiliar with the language, culture, and legal system of the United States to grasp the intricacies of a complex field of law that eludes even those trained in its practice.

159. Koh, *supra* note 7, at 1153 (quoting STEPHEN H. LEGOMSKY & CRISTINA RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 113 (5th ed. 2009)).

160. *See* United States v. Williams, 553 U.S. 285, 304 (2008) (noting a statute does not comply with due process if a person of ordinary intelligence does not have fair notice of what is prohibited, which leads to discriminatory enforcement).

161. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (stating "deportation is a drastic measure and at times the equivalent of banishment of exile . . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty . . . . [T]he stakes are considerable for the individual"). *See also* Jordan v. De George, 341 U.S. 223, 231 (1951) (stating the Court would analyze the application of the vagueness doctrine to a case involving an immigration provision due to "the grave nature of deportation").

162. Grayned v. Rockford, 408 U.S. 104, 108 (1972) (discussing that when there is no constitutional notice of illegal conduct, laws can be vague and "offend several important values").

163. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

one, to help them in navigating the complexities of the criminal proceedings.[164] However, when it comes to non-citizens, not only must they know what conduct violates criminal law, they must also know what criminal offenses trigger immigration sanctions.[165] Thus, an added level of knowledge of the legal system is expected of individuals who may not have a grasp of the language, much less the legal system. Additionally, there is absolutely no right to court-appointed counsel in removal proceedings,[166] meaning that non-citizens who cannot afford their own representation are forced to enter the immigration minefield alone. These factors demonstrate, in part, the disadvantage challenging individuals who face, or are in the midst of, removal proceedings, and the necessity of having immigration provisions statutes that provide notice as to what offenses can trigger removal proceedings.[167]

2. Substantial Arbitrary Enforcement

Another especially problematic area in immigration proceedings is that of arbitrary or discriminatory enforcement.[168] Immigration judges, as well as the officials that bring forth charges and initiate removal proceedings, are granted a vast amount of discretion.[169] Highlighting precisely that arbitrariness in immigration proceedings, Justice Kagan commented: "[a]n alien appearing before one official may suffer deportation; an identically situated alien appearing before another may gain the right to stay in the country."[170] Ensuring that immigration provisions are as straightforward as possible would help in constraining the risk of arbitrary enforcement that is prevalent in the field today. Given these additional concerns, that are generally non-existent with other

164. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

165. Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L. REV. 1669, 1682–85 (2011) (describing the connection between a criminal conviction and initiations of immigration sanctions, including removal proceedings).

166. 8 U.S.C. § 1362 (2012) (stating "[i]n any removal proceeding before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel").

167. Koh, *supra* note 7, at 1154–59 (discussing the "exceptional need for notice in the immigration context," and providing other factors that further play into the need for a "strong vagueness analysis").

168. *Id.* at 1160 (commenting that "[e]xtraordinary levels of arbitrariness [exists] when it comes to discretionary decision-making in immigration cases"); *see also* Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1071–75 (2017).

169. Koh, *supra* note 7, at 1160–62, 1164–65 (assessing the discretion that ICE prosecutors, officers and the immigration judges have in determining charges to be brought, and the decisions to be reached).

170. Judulang v. Holder, 565 U.S. 42, 58, 64 (2011) (finding that a BIA policy violated the Administrative Procedures Act due to it being an "arbitrary and capricious" restriction on eligibility for relief from removal).

statutory provisions, non-citizens are disadvantaged in their due process rights in removal proceedings.[171] Thus, it is crucial to apply the vagueness doctrine to immigration provisions to ensure compliance.

C. Increase in Immigration Arrests and Deportation Heightens Risk of Possible Constitutional Violations in Removal Proceedings

With the prevalence of constitutional concerns in immigration removal proceedings, the recent increase in arrests of non-citizens, and their deportations, over the past two administrations[172] means that even more individuals will be affected by such an issue. In 2017 alone, more than 211,000 immigrants had been deported,[173] all of which would have been subjected to removal proceeding prior to deportation. Specifically, between January 22 and September 2, Immigration and Customs Enforcement (ICE) arrested more than 28,000 individuals.[174] These arrests will eventually result in removal proceedings.[175]

These numbers only indicate that a great many individuals will continue to be subjected to proceedings that are tainted by violations of their due process rights. It is imperative that any immigration provision be subjected to a critical analysis under the void-for-vagueness doctrine, along with any other doctrine that protects such constitutional rights. By ensuring that immigration provisions abide by the requirement of notice and protection against arbitrary enforcement, the proceedings will not be marred by unconstitutional vagueness concerns.[176]

---

171. Das, *supra* note 165, at 1728 (stating that immigration adjudications do not operate on a level playing field between the parties).

172. Nick Miroff, *Deportations Fall under President Trump Despite Increase in Arrests by ICE*, CHI. TRIB., (Sept. 28, 2017, 8:28 PM), http://www.chicagotribune.com/news/nationworld/ct-trump-deportations-20170928-story.html.

173. *Id.*

174. *Id.* That increase is approximately three times higher than the number of immigrants arrested over the same time period in 2016. *See also* Ted Hesson, *Trump Deportations Lag behind Obama Levels*, POLITICO (Aug. 8, 2017, 8:35 PM), https://www.politico.com/story/2017/08/08/trump-deportations-behind-obama-levels-241420 (explaining that although deportations have lagged, arrest rates and removal orders have increased).

175. Caitlin Dickerson, *Immigration Arrests Rise Sharply as a Trump Mandate is Carried out*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/us/immigration-enforcement-ice-arrests.html. The article also notes that due to a backlog of immigration cases, many of the arrests had not yet triggered removal proceedings. *Id.* However, when they do undergo the proceedings, the possible violations of due process as a result of vague immigration provisions will still lurk. *Id.* Furthermore, the arrests themselves can result in detentions while the detainees await their hearings. Das, *supra* note 165, at 1685. In the meantime, the government has the ability to transfer the individuals to any number of facilities across the country, which may separate them from desperately needed legal counsel or records, further exacerbating due process concerns. *Id.* at 1728.

176. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (stating that the doctrine of void-for-vagueness is "a well-recognized requirement, consonant alike with ordinary notions of fair play and settled rules of law" and that a statute which violates the doctrine "violates the first essential of due process").

D. Examining Obstruction of Justice Outside the Immigration Realm

Finally, it is beneficial to look to criminal statutes that involve obstruction of justice charges outside of the immigration realm. These statutes could help inform the construction of the BIA's definition of its own obstruction of justice statute. It would also aid in determining which of the BIA's previous definitions are more closely in line with obstruction of justice statutes from another area of law.

The United States Code has an entire chapter on obstruction of justice charges.[177] An overview of the chapter shows there are many kinds of obstruction of justice offenses, each having related to a certain kind of crime.[178] One such obstruction statute is for obstruction of court orders, which states:

> Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined under this title or imprisoned not more than one year, or both.[179]

By ensuring the statute specifically outlines what aspects of "justice" would need to be obstructed in order to be a crime, the United States Code has no issue of vagueness, or fair notice, and it does not allow for the possibility of arbitrary enforcement. A reasonable person reading the statute would understand what actions would thus be in violation of the law. This type of specificity should be sought in the BIA's construction of "obstruction of justice."

III. THE TEMPORAL NEXUS REQUIREMENT CLARIFIES VAGUENESS

This part offers up the "temporal nexus" requirement as an addition to the construction of "obstruction of justice" that could potentially alleviate the concerns of notice and arbitrary enforcement that are addressed by the void-for-vagueness doctrine. Despite the fact that the Ninth Circuit declined to hold that a temporal nexus requirement was necessary in the BIA's *In re Valenzuela Gallardo* construction of "obstruction of justice,"[180] such a requirement would resolve the unconstitutional vagueness issue.

---

177. *See* 18 U.S.C. §§ 1501–1521 (2012).

178. *See id.* For example, § 1509 specifically relates to obstruction of a court order, while § 1506 criminalizes theft or alteration of record of process, as well as false bail. *Id.* §§ 1506, 1509. These specified offenses lend credence to the argument that an obstruction of justice definition should be narrow, as opposed to broad.

179. *Id.* § 1509.

180. Valenzuela Gallardo v. Lynch, 818 F.3d 808, 822 (9th Cir. 2016) (noting "[t]he dissent reads our opinion as imposing a 'temporal nexus requirement' on the BIA's definition of 'crimes relating to obstruction of justice' . . . . It doesn't. We do not hold that the BIA's definition of 'obstruction of justice' must be tied to an ongoing proceeding.").

A temporal nexus in this context would mean that, as in the *Espinoza-Gonzalez* construction,[181] an ongoing criminal trial or investigation would need to be taking place for the crime to constitute an "obstruction of justice" offense. Such a requirement would result in more context for the amorphous "process of justice," resolving many of the issues that the Ninth Circuit had.[182] Take for example, the federal crime of misprision of felony, which states:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.[183]

With a brief reading of the offense, a reasonable person would know that the crime of misprision of felony would not qualify as an "obstruction of justice" offense, if using the *Espinoza-Gonzalez* construction.[184] The analysis of the actus reus element of interference with proceedings is simple; it is automatically not met because there is no requirement in the statute that the concealment of the felony be during an ongoing proceeding.[185] The specific intent to interfere is met by the requirement of having knowledge of the felony and concealing it anyway.

Thus, the notice requirement of the void-for-vagueness analysis is easily met. The addition of a temporal nexus provides crucial protection against arbitrary and discriminatory enforcement, which non-citizens are particularly susceptible to,[186] because by requiring specific elements to be met, the determinations of the court will not have room for arbitrary variation in its holdings. A construction similar to this, as a result of meeting both the requirements of the Due Process Clause, would have no issue passing the two-step void-for-vagueness analysis.

In contrast, when applying the narrow "obstruction of justice" construction to the same misprision of felony offenses, the vagueness issues are stark. The elimination of a temporal nexus to ongoing proceedings results in a lack of context for the phrase "process of justice."[187] One judge could determine that the "process of justice" begins as soon as the individual convicted of misprision

---

181. *In re* Espinoza-Gonzalez, 22 I. & N. Dec. 889, 896 (B.I.A. 1999).

182. *Valenzuela Gallardo*, 818 F.3d at 820 (stating the construction including "process of justice" did not provide sufficient enough standards that would enable a reasonable person to understand what offenses would be categorized as such).

183. 18 U.S.C. § 4 (2012).

184. *Espinoza-Gonzalez*, 22 I. & N. Dec. at 892 (finding the BIA also concluded in its *Espinoza-Gonzalez* decision that such an offense did not qualify as "obstruction of justice," using their very own construction of the phrase).

185. *See* 18 U.S.C. § 4.

186. *See* discussion *supra* Part B.

187. *Valenzuela Gallardo*, 25 I. & N. Dec. 838, 841 (noting the only requirement as outlined by the BIA was just the specific intent to interfere with "process of justice").

of felony[188] gained the knowledge of the actual commission of the knowledge. However, another judge could decide that the "process of justice" comes in to effect when police are called to the scene of the felony.[189] The Supreme Court had similar concerns in its *Johnson* and *Dimaya* decisions, describing a scenario in which judges have different ideas as to what an "ordinary case" of attempted burglary looks like.[190] A higher risk of arbitrary enforcement would be likely to abound. Furthermore, if a well learned judicial official would have such different opinions as to the meaning of "process of justice," it seems illogical to expect surety from foreigners of both this country and legal system.

The temporal nexus would also satisfy the other concerns brought forth by the Supreme Court in its most recent decision in *Sessions v. Dimaya*, addressing a void-for-vagueness challenge to a statute.[191] The uncertainty and "indeterminacy" that arose in the statute ultimately caused the Court to hold that it was unconstitutionally vague.[192] The addition of a temporal nexus to the "obstruction of justice" construction would result in no such uncertainty, it would clarify what an "ordinary case" would look like, and it would create the requirement that the crime be committed in connection to an ongoing proceeding.[193] Finally, by including a temporal nexus, the definition of

188. 18 U.S.C. § 4.

189. *See Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1162–63 (9th Cir. 2011) (reasoning that yet another could hold that it wasn't until the arrest of the individual who committed the felony that the "process of justice" begins). The possibilities for such disparate determinations are numerous, and it is this very possibility of varying holdings from the judges that goes against the very nature of the Due Process Clause. The Ninth Circuit in its *Trung Thanh Hoang* decision made a similar argument about the broadness of a different criminal offense, stating:

> A defendant could be convicted of rendering criminal assistance . . . if he provided transportation to an individual he knows is subject to a pending investigation or proceeding—but he could also be convicted if he provides transportation to an individual he knows has committed a crime, *before* any investigation or judicial proceeding has begun. The state statute of conviction is divisible . . . . Because [the statute] does not require the necessary actus reus, a violation of that statute is not categorically obstruction of justice.

Id.

190. Sessions v. Dimaya, 138 S. Ct. 1204, 1214 (2018) (reasoning "one judge, contemplating the 'ordinary case,' would imagine the 'violent encounter' apt to ensue when a 'would-be burglar [was] spotted by a police officer [or] private security guard' . . . . Another judge would conclude that 'any confrontation' was more 'likely to consist of [an observer's] yelling "Who's there?" . . . and the burglar's running away'").

191. *Id.* at 1216 (holding that a residual clause of an immigration statute should be struck down for being unconstitutionally vague by "unpredictability" and "arbitrariness").

192. *Id.* at 1223. *See also* Koh, *supra* note 7, at 1149 (explaining "the Court found that the residual clause reached a level of 'indeterminacy' that was not tolerable from a vagueness perspective.").

193. This was also a concern that was noted by the Ninth Circuit. *See* Valenzuela Gallardo v. Lynch, 818 F.3d 808, 820 (9th Cir. 2016) (stating "[t]he BIA's new construction leaves grave uncertainty about the plethora of steps and after an 'ongoing criminal investigation or trial' that comprise 'the process of justice,' and hence, uncertainty about which crimes constitute 'obstruction of justice.'").

"obstruction of justice" would be more akin to the obstruction of justice crimes that are found in the United States Code, which have no issue with due process comportment.[194]

IV. CONCLUSION

Immigrants have flocked to America's shores for centuries and will continue to do so for years to come. The Supreme Court has repeatedly held that the Due Process protections that are at the very heart of our Constitution apply to those immigrants, as well as citizens. In the immigration system today, which can have such drastic consequences on the lives of individuals and their families, it is imperative that protections are applied. Notice and arbitrary enforcement concerns permeate immigration removal proceedings and using the vagueness doctrine to rework unconstitutional immigration provisions would be a crucial step in applying Due Process protections to everyone. Adding a temporal nexus to the BIA's construction of "obstruction of justice" would be another measure that would aid such an endeavor.

194. *See* discussion *supra* Part D.