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Fabricating the Crime of Undocumented Presence

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FABRICATING THE CRIME OF UNDOCUMENTED PRESENCE

*Eric S. Fish & Doug Keller**

In 2025, the Trump administration's Office of Legal Counsel (OLC) declared that it is a federal crime simply to be an undocumented immigrant. Congress has enacted no such crime. Congress has made it a crime for an immigrant to enter the United States in a manner that "eludes examination or inspection." For nearly 100 years, this "elude" offense has been understood to occur only at the moment an immigrant enters the country. But the Trump administration's OLC has reinterpreted this crime as a continuing offense. Under this new reading, an immigrant who entered unlawfully eludes examination until the moment of their arrest. The OLC's interpretation thus converts the crime of illegal entry into the crime of undocumented presence. This has major implications for federal immigration prosecutions. Illegal entry, already the most frequently charged crime in the federal system, can now be prosecuted in nonborder states. To date, dozens of immigrants in states like Kansas, Oklahoma, Nebraska, and Utah have been convicted under this novel theory. In addition, this theory eliminates any statute of limitations for illegal-entry prosecutions, and it significantly expands U.S. Immigration and Customs Enforcement's (ICE) power to conduct searches and arrests.

This Article shows that the OLC's interpretation is baseless. It does so by examining the history of the illegal-entry statute, including through original research into documents from the National Archives. This history reveals that when illegal entry was criminalized, legislators, judges, and executive branch officials all understood it to only occur at the moment of entry. That interpretation was memorialized in numerous legislative and administrative documents during and after the law's enactment. It was also reflected in prosecution patterns and judicial rulings. And it is confirmed by a straightforward analysis of the statute's text and structure. The Trump administration has thus been convicting immigrants of a nonexistent crime.

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Unfortunately, being wrong on the law will not necessarily stop them. Federal immigration prosecutions suffer from a fundamental rule-of-law deficit. It is hard for defendants to argue that the charge doesn't apply, because the system ordinarily forces them to plead guilty quickly. This Article explores that problem and proposes a path for contesting the Trump administration's implausible interpretation.

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INTRODUCTION

In December 2025, federal prosecutors in Utah charged Florencio Franco-Sandoval with the crime of "elud[ing] examination and inspection

by immigration officers."[1] According to the charging document, Mr. Franco-Sandoval had been committing this crime without interruption from his entry into the United States in 2004 until his arrest over two decades later, in 2025.[2] During those twenty-one years, he was in a constant state of "eluding" immigration officers. By the U.S. Department of Justice's (DOJ) logic, his very presence in the United States was a decades-long crime. Mr. Franco-Sandoval pled guilty and served about a month in jail.[3]

There is just one problem: the crime Mr. Franco-Sandoval pled guilty to does not exist. The Trump administration's Department of Justice invented it.

Since 1929, it has been a federal misdemeanor for a noncitizen to enter the United States illicitly.[4] We refer to this crime as "Illegal Entry."[5] It can be committed in three ways. First, a noncitizen can enter the United States at a place not designated for entry by, for example, crossing the border through the desert between ports of entry.[6] Second, a noncitizen can enter by eluding examination or inspection by, for example, hiding in the trunk of a car that is driven through a port of entry.[7] Third, a noncitizen can enter by committing fraud or misrepresentation by, for example, presenting a false visa to customs officials.[8]

In June 2025, the Trump administration's Office of Legal Counsel (OLC) issued a memorandum ("2025 OLC Memo") reinterpreting the second form of Illegal Entry—"eludes examination or inspection"—as a continuing offense.[9] In doing so the OLC reversed its own prior position, memorialized in 1978, that this crime only takes place at the moment of entry.[10] The 2025 OLC Memo also largely ignored a nearly century-long

1. Misdemeanor Information at 1–2, United States v. Franco-Sandoval, No. 25-po-00928 (D. Utah Nov. 6, 2025), Dkt. No. 1.

2. *See id.* ("[T]he defendant . . . between on or about May 14, 2004, and November 5, 2025, did knowingly elude examination and inspection by immigration officers until his apprehension on or about November 5, 2025, by immigration officers in the District of Utah, all in violation of Title 8, United States Code, Section 1325(a)(2).").

3. Judgment in a Criminal Case at 1–2, *Franco-Sandoval*, No. 25-po-00928, Dkt. No. 20 (imposing a time served sentence after the defendant spent about a month in custody).

4. *See* Undesirable Aliens Act of 1929, ch. 690, 45 Stat. 1551 ("An Act [m]aking it a felony with penalty for certain aliens to enter the United States of America under certain conditions in violation of law."). For the enactment history of this law, see Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1080–90 (2022); BENJAMIN GONZALEZ O'BRIEN, HANDCUFFS AND CHAIN LINK: CRIMINALIZING THE UNDOCUMENTED IN AMERICA 4 (2018); CÉSAR CUAHTÉMOC GARCÍA HERNÁNDEZ, WELCOME THE WRETCHED 44–71 (2024). *See generally* KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965 (2017).

5. 8 U.S.C. § 1325.

6. *See id.* § 1325(a)(1).

7. *Id.* § 1325(a)(2).

8. *See id.* § 1325(a)(3).

9. Whether Eluding Inspection Under 8 U.S.C. § 1325(a)(2) is a Continuing Offense, 49 Op. O.L.C. (June 21, 2025) (slip op. at 1) [hereinafter 2025 OLC Op.].

10. Immigration and Nationality Act (8 U.S.C. § 1329)—Eluding Inspection—Criminal Offense—Venue, 2 Op. O.L.C. 110, 110–12 (May 18, 1978) [hereinafter 1978 OLC Op.].

executive, legislative, and judicial consensus that Illegal Entry is not a continuing offense.[11] Simply existing as an undocumented immigrant has never been a crime in the United States.[12] But the 2025 OLC Memo purports to make it one.

This novel interpretation has three major implications for the federal system of immigration prosecutions. First, it expands the number of states where cases can be brought. Illegal Entry has by far been the most frequently charged federal offense over the last twenty years, with an average of over 45,000 cases brought per year.[13] The first Trump administration prosecuted more than 80,000 Illegal Entry cases in a single year.[14] And the second Trump administration has announced that increasing Illegal Entry prosecutions will be a major priority for all U.S. Attorney's Offices.[15] Until 2025, these cases had been almost entirely confined to four border states: California, Arizona, New Mexico, and Texas.[16] That is because those are the only states where venue exists to prosecute the crime of crossing the U.S.-Mexico border. But the 2025 OLC Memo's interpretation of Illegal Entry empowers the Trump administration to prosecute immigrants arrested in nonborder states. Indeed, the DOJ has already started to do so in states like Utah, Kansas, Nebraska, and Oklahoma.[17]

Second, the OLC's new interpretation lets the DOJ prosecute Illegal Entry without regard to the statute of limitations. Normally these cases must be charged within five years of the defendant's entry into the United States.[18] But if Illegal Entry is a continuing offense, the statute of limitations does not start running when a defendant enters the United States.

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11. *See infra* Part II.

12. As noted, entering the United States illicitly is a crime. So is reentering or being found in the United States after deportation. However, mere undocumented presence is not. *See* Arizona v. United States, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States."). People who overstay visas, for example, are not subject to criminal prosecution. *See* Fish, *supra* note 4, at 1095–96.

13. *See Prosecuting People for Coming to the United States*, AM. IMMIGR. COUNCIL (May 29, 2026), https://www.americanimmigrationcouncil.org/fact-sheet/immigration-prosecutions [https://perma.cc/2BRR-P4C7] (showing data from 2004 through 2025).

14. *See id.* (showing that in 2019 there were 80,886 prosecutions for Illegal Entry).

15. *See* Memorandum from Acting Deputy Att'y Gen. Emil Bove, Interim Policy Changes Regarding Charging, Sentencing, and Immigration Enforcement (Jan. 21, 2025), https://www.documentcloud.org/documents/25501043-memorandum-from-the-acting-deputy-attorney-general-01/ (on file with the *Fordham Law Review*).

16. *See Prosecuting Immigration Crimes Report (PICR)*, OFF. OF U.S. ATT'YS, U.S. DEP'T OF JUST. (Jan. 9, 2026), https://www.justice.gov/usao/resources/PICReport [https://perma.cc/D694-UEMC] (documenting the location of § 1325 prosecutions from fiscal years 2020–2026); U.S. CONST. amend. VI (providing a right to trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law").

17. *See generally, e.g.*, Criminal Complaint, United States v. Lopez-Mendez, No. 25-cr-00123 (E.D. Okla. July 2, 2025); Indictment, United States v. Chavira-Medrano, No. 25-cr-40041 (D. Kan. July 23, 2025); Judgment in a Criminal Case, United States v. Aguilera-Santacruz, No. 25-po-0001 (D. Neb. Mar. 3, 2025); Misdemeanor Information, United States v. Gonzalez-Chavez, No. 25-po-00764 (D. Utah Nov. 6, 2025).

18. 18 U.S.C. § 3282(a).

Charges can be brought against someone who has lived in the country for decades. Someone like Mr. Franco-Sandoval.[19]

Third, this new interpretation gives U.S. Immigration and Customs Enforcement (ICE) significantly broader search and arrest powers. Administrative warrants for immigration enforcement do not allow ICE agents to enter private buildings without permission.[20] However, if undocumented immigrants' mere presence is a crime, ICE agents can seek judicial warrants that let them enter buildings, including private homes, to conduct searches and arrest people.[21] This dramatically expands ICE's power to conduct immigration raids.

In this Article, we show that the OLC's interpretation is wrong. To do so, we conduct a deep dive into the history of the law criminalizing Illegal Entry. Our analysis incorporates numerous previously unreported documents found in the National Archives in Washington, D.C., and Fort Worth, Texas.

The story begins in 1924 when the Illegal Entry provision, modeled after a similarly worded Canadian law, was first proposed in Congress.[22] Five years later, Congress enacted the crime with the understanding that it would only be prosecutable at the border.[23] The crime was then reenacted in 1952, with some modifications urged by the DOJ and the U.S. Immigration and Naturalization Service (INS). The INS's lobbying caused the 1952 law to make reentry after prior deportation prosecutable in interior states.[24] But it left Illegal Entry prosecutable only at the border.[25] Documents from the National Archives reveal that authoritative contemporaneous sources—including the U.S. Attorneys' Manual and records from the Commissioner of the INS, the General Counsel of the INS, and high-level DOJ officials—

19. *See* Misdemeanor Information, *supra* note 1, at 1–2 (explaining a charge was brought more than 20 years after entry into the United States).

20. *See* HILLEL R. SMITH, CONG. RSCH. SERV., LSB10362, IMMIGRATION ARRESTS IN THE INTERIOR OF THE UNITED STATES: A PRIMER 3 (2025) ("Unlike *judicial* warrants, warrants issued by ICE are purely administrative, as they are neither reviewed nor issued by a judge or magistrate, and therefore do not confer the same authority as judicially approved arrest warrants." (emphasis added)); Payton v. New York, 445 U.S. 573, 573 (1980) (requiring a judicial warrant supported by probable cause of a crime to enter a home and make an arrest). Administrative warrants are nothing but "a form labeled 'warrant'" in which immigration "enforcement officers may authorize their fellow officers or themselves to make deportation arrests." Lindsay Nash, *Inventing Deportation Arrests*, 121 MICH. L. REV. 1301, 1311 (2023).

21. *See* Shawn Musgrave, *ICE Duped a Federal Judge into Allowing Raid on Columbia Student Dorms*, INTERCEPT (May 14, 2025, at 15:35 ET), https://theintercept.com/2025/05/14/yunseo-chung-ice-search-warrant-columbia-immigrants/ [https://perma.cc/GC48-ME7U] (explaining how ICE obtained a criminal warrant to conduct a raid in Columbia University dorms to find a student).

22. *Proposed Deportation Legislation: Hearings Before the H. Comm. on Immigr. & Naturalization*, 68th Cong. 2 (1924) (statement of Rep. William N. Vaile).

23. Undesirable Aliens Act of 1929, ch. 690, § 2, 45 Stat. 1551, 1551 (codified at 8 U.S.C. § 180, repealed 1952).

24. *See infra* Part II.C.2.

25. *See infra* Part II.C.2.

confirm this understanding.[26] It was also confirmed by U.S. Supreme Court dicta in *United States v. Cores*,[27] a 1958 case about a separate immigration crime.[28] In short, examining the Illegal Entry crime's history reveals the error of the OLC's new interpretation.

Unfortunately, being wrong on the law will not necessarily stop the Trump administration from prosecuting immigrants. Illegal Entry cases are notoriously hard to litigate, even if the defendant is factually innocent. The pressure to quickly plead guilty precludes most defendants from briefing motions to dismiss.[29] Indeed, the expedited nature of federal Illegal Entry prosecutions ordinarily prevents defendants from raising legal arguments at all.[30] To circumvent this rule-of-law problem, we recommend an unconventional (but established) method of contesting the government's theory: defendants charged with Illegal Entry should plead guilty and then appeal their convictions. In doing so, they should argue that the factual basis for the plea does not establish that they committed the charged crime. This strategy should let judges review the government's interpretation without subjecting immigrant defendants to more jail time.

This Article is organized into four parts. Part I lays out the arguments in the 2025 OLC Memo and describes how it purports to expand the government's power to prosecute immigrants. Part II explores the history of Illegal Entry in depth, focusing on its original enactment in 1929 and its reenactment in 1952. Part III returns to the 2025 OLC Memo, using the historical record and basic statutory interpretation principles to explain why its arguments are wrong. Part IV considers how immigrant defendants can contest the government's new position despite the powerful pressure to plead guilty.

I. THE 2025 OLC MEMO AND ITS CONSEQUENCES

The 2025 OLC Memo lays out the Trump administration's position that 8 U.S.C. § 1325(a)(2) (the "Elude Offense") is a continuing offense.[31] It advises the DOJ to allow prosecutors to charge the crime in any federal district where a defendant is found.[32] The OLC reasons that, because the crime is a continuing offense, a defendant commits the crime in every federal district they enter.[33] Venue to prosecute the Elude Offense is

26. *See infra* Part II.D.
27. 356 U.S. 405 (1958).
28. *Id.* at 408.
29. *See* Eric S. Fish, *Resisting Mass Immigrant Prosecutions*, 133 YALE L.J. 1884, 1932–38 (2024) (explaining the pressure to plead guilty quickly in Illegal Entry cases).
30. *See id.*
31. 2025 OLC Op., *supra* note 9.
32. *Id.* at 1 (recommending that "the Criminal Division should rescind its instruction to prosecutors not to charge section 1325(a)(2) outside the district in which an alien entered the country").
33. *Id.* at 6, 18.

therefore proper where the defendant enters, where the defendant is found, and everywhere in between.

The 2025 OLC Memo rescinded a 1978 OLC memorandum ("1978 OLC Memo") that reached the opposite conclusion.[34] Before the 1978 memorandum, a judge in the U.S. District Court for the District of Idaho determined that the Elude Offense is not a continuing offense.[35] Reacting to this decision, the OLC considered whether the government must prosecute defendants charged with the Elude Offense only in the district of entry.[36] The venue statute for Illegal Entry, codified at 8 U.S.C. § 1329, provides that defendants can be charged in any federal district "at which the violation may occur" or "at which the person . . . may be apprehended."[37] This means statutory venue exists in both the district of entry and the district of arrest. The U.S. Constitution, however, provides that federal crimes must be prosecuted in the "[s]tate and district wherein the crime shall have been committed."[38] Thus, while § 1329 purports to establish venue in the district of arrest, the Constitution restricts venue to only the district where the crime occurred.[39] The 1978 OLC Memo reasoned that, because the Elude Offense only occurs at the time of entry, § 1329 is unconstitutional when it provides venue in other districts.[40] The OLC therefore instructed U.S. Attorney's Offices to only prosecute Illegal Entry in the district where the defendant entered the United States.[41]

The 2025 OLC Memo changes the OLC's decades-long position by concluding that the Elude Offense is a continuing offense. To support this new interpretation, the OLC makes three arguments. First, a textual argument: the OLC contends that "elude" is synonymous with "escape," and a person on the run thus "eludes" authorities until apprehension.[42] The 2025 OLC Memo does, however, acknowledge that a person might "elude" authorities at a specific moment.[43] Second, an argument from statutory context: the OLC points out that a separate provision, codified at 8 U.S.C.

34. *See* 1978 OLC Op., *supra* note 10. The 2025 OLC Memo purports not to revisit the "core analysis" of the 1978 OLC Memo, asserting that the 1978 memo simply "assumed" that the Elude Offense was not a continuing offense. 2025 OLC Op., *supra* note 9, at 1. As discussed below, this is misleading. The 1978 OLC Memo reflected a settled executive branch view, reached after significant deliberation, that the Elude Offense only occurs at the point of entry. *See infra* Part II.D; *see also* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1448 (2010) (showing that it has been rare for the OLC to openly diverge from its prior opinions).

35. 1978 OLC Op., *supra* note 10, at 110 (referring to *United States v. Wissel* as "the recent unreported decision of the Idaho Federal District Court"). The authors have not located a copy of this decision, despite substantial efforts. The author of the 2025 OLC Memo also could not find a copy of the decision. *See* 2025 OLC Op., *supra* note 9, at 2 n.1.

36. 1978 OLC Op., *supra* note 10, at 110–12.

37. 8 U.S.C. § 1329.

38. U.S. CONST. amend. VI; *see also id.* art. III, § 2.

39. With the important exception of crimes that occur in U.S. territories, as discussed below. *See infra* Part II.B.

40. 1978 OLC Op., *supra* note 10, at 110.

41. *Id.* at 112.

42. 2025 OLC Op., *supra* note 9, at 6–7.

43. *Id.* at 7.

§ 1225, imposes a general duty on immigration officers to inspect any noncitizen "who has not been admitted or paroled" into the United States.[44] Because this duty continues beyond the moment of entry, the OLC reasons that the crime of eluding inspection is also continuing.[45] Third, an argument from constitutional avoidance[46]: The 1978 OLC Memo concluded that treating the Elude Offense as noncontinuing renders its venue provision partly unconstitutional.[47] To avoid that result, the 2025 OLC Memo argues that the Elude Offense should be treated as a continuing offense.[48]

The 2025 OLC Memo also makes clear that its goal is to help the DOJ prosecute more immigrants. It complains that the 1978 OLC Memo's interpretation "severely curtail[s] prosecution of aliens who are not immediately apprehended at the border."[49] To facilitate such prosecutions, the OLC instructs U.S. Attorney's Offices in interior states to charge undocumented immigrants with the Elude Offense.[50]

Characterizing the Elude Offense as a continuing offense transforms the federal system of immigration prosecutions in significant ways. Here we identify four.

First, it expands the number of states where immigrants can be prosecuted for Illegal Entry. Illegal Entry is already by far the most frequently charged federal crime, even though it was essentially only prosecuted in the four U.S.-Mexico border states before the 2025 OLC Memo.[51] Under the memo's theory, the DOJ can dramatically expand these prosecutions by bringing them in the other forty-six states. Now, whenever an undocumented immigrant is arrested anywhere in the United States, that immigrant can be prosecuted for Illegal Entry at the local federal courthouse. Previously, if an immigrant were arrested in a state like Utah and federal prosecutors wanted to charge them with Illegal Entry, the government would need to send them to the state where they originally entered. This is not a common occurrence.[52] Such transportation takes up significant resources. And it is difficult for prosecutors to identify the time, place, and manner of initial entry for immigrants arrested in interior states.[53] Expanding venue to all states thus makes prosecutions

44. *Id.* at 8.
45. *Id.* at 8–10.
46. *Id.* at 10–12.
47. 1978 OLC Op., *supra* note 10, at 110.
48. 2025 OLC Op., *supra* note 9, at 11.
49. *Id.* at 3.
50. *Id.* at 1–2.
51. *See supra* notes 13–14 and accompanying text.
52. In their time defending misdemeanor Illegal Entry cases as federal defenders in San Diego, the authors never saw any such transfers. Interdistrict transfers normally only occur in more serious felony cases. However, the authors are aware of a small number of misdemeanor Illegal Entry transfers since the start of the second Trump administration.
53. These concerns motivated the expansion of Illegal Reentry to include a "found in" provision. *See infra* Part II.C.2. Due to that provision, a noncitizen previously deported can be prosecuted in the district of arrest without the prosecutor having to prove their place or manner of entry. *See* 8 U.S.C. § 1326(a)(2).

significantly easier. It also, if done at scale, would devote even more of the federal criminal justice system's resources to jailing immigrants. In the last decade, immigration crime has become the largest category of federal prosecutions.[54] Expanding Illegal Entry prosecutions to interior states would accelerate that trend.

Second, the 2025 OLC Memo essentially eliminates the statute of limitations for Illegal Entry. Under federal law, the statute of limitations starts to run when the crime is completed.[55] Like most federal crimes, Illegal Entry has a five-year statute of limitations.[56] That means the defendant must be charged within five years of their entry into the United States. But if the offense is a continuing one, no such time limit exists.[57] The government may prosecute a defendant at any time, even many decades after their entry. For example, Mr. Franco-Sandoval was prosecuted after living in the United States for twenty-one years.[58] The OLC's interpretation dramatically increases the number of people who could be charged with Illegal Entry. An estimated fourteen million undocumented immigrants live in the United States.[59] And an estimated 80 percent of those immigrants have lived here for more than a decade.[60] Removing the statute of limitations would thus expand the number of potential defendants by millions.[61] And it would create a permanent risk of criminal prosecution for a population whose lives are already defined by exclusion, surveillance, and the threat of arrest.[62]

Third, the 2025 OLC Memo significantly expands immigration authorities' power to conduct searches. Under the Fourth Amendment, a warrant to search a building can only be issued by a judicial officer, and only if the agent seeking the warrant establishes probable cause of a

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54. *See* AM. IMMIGR. COUNCIL, *supra* note 13; Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 647 (2013) ("[I]mmigration offenses are now the single most commonly prosecuted federal criminal offenses.").

55. *See* Toussie v. United States, 397 U.S. 112, 115 (1970) (discussing what triggers the statute of limitations for federal criminal offenses).

56. *See* 18 U.S.C. § 3282(a); *see also* United States v. Rincon-Jimenez, 595 F.2d 1192, 1193 (9th Cir. 1979) (holding that the five-year statute of limitations applies to the Elude Offense under 18 U.S.C. § 3282).

57. *See* United States v. Bailey, 444 U.S. 394, 414 (1980).

58. *See supra* notes 1–2 and accompanying text.

59. *See* Jeffrey Passel & Jens Krogstad, *U.S. Unauthorized Immigrant Population Reached a Record 14 Million in 2023*, PEW RSCH. CTR. (Aug. 21, 2025), https://www.pewresearch.org/race-and-ethnicity/2025/08/21/u-s-unauthorized-immigrant-population-reached-a-record-14-million-in-2023/ [https://perma.cc/7P9B-9MGK].

60. *See* Karen Aho, *Are More Undocumented Immigrants Living in the US Now?: Here's What the Numbers Say*, AM. IMMIGR. COUNCIL (June 7, 2024), https://www.americanimmigrationcouncil.org/blog/undocumented-immigrants-living-in-united-states-now/ [https://perma.cc/FL97-BWXM].

61. This would include all undocumented immigrants who initially entered without inspection. It would, presumably, exclude the portion of undocumented immigrants who overstayed a visa or otherwise entered with inspection and then became undocumented.

62. *See generally* Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1466 (2019) (describing the impact of pervasive monitoring on long-term undocumented immigrants).

crime.[63] ICE does issue its own "administrative" arrest warrants for removable noncitizens, but these do not confer the power to search buildings without consent.[64] That restriction limits ICE's ability to conduct immigration raids. Because ICE cannot obtain judicial search warrants for immigration enforcement,[65] its agents are trained to trick targets into consenting to searches.[66] If that tactic does not work, ICE has occasionally sought criminal search warrants based on questionable legal theories.[67] For example, in 2025, ICE officers were denied permission to search Columbia University's dorms when they were looking for a student.[68] So, the officers obtained a legally dubious criminal search warrant for the crime of "harboring" undocumented immigrants.[69]

If the OLC's theory is correct, ICE no longer needs to rely on tricks or dubious legal theories to conduct raids. If noncitizens who enter the country illicitly are in a constant state of committing the Elude Offense, ICE can establish probable cause of a crime. That means ICE can seek a criminal search warrant from a federal magistrate any time it wants to search a building for undocumented immigrants. The OLC's theory thus makes ICE raids significantly easier to conduct.

Finally, in a broader sense, the 2025 OLC Memo stigmatizes undocumented immigrants by tarring them with the label of criminality.[70] The memo asserts that such immigrants "represent a 'continuing' threat to the American people," threatening Americans' "health, safety, and national security."[71] Categorizing certain immigrants as inherently criminal helps legitimize such rhetoric. It has not previously been a crime to simply be present in the United States as an undocumented immigrant.[72] Certain

63. U.S. CONST. amend. IV.

64. *See* Lindsay Nash, *Deportation Arrest Warrants*, 73 STAN. L. REV. 433, 453–62 (2021).

65. *See* Emma Winger, *ICE's Secret Policy to Forcibly Enter Homes Without a Judicial Warrant Threatens All Americans*, AM. IMMIGR. COUNCIL (Jan. 27, 2026), https://www.americanimmigrationcouncil.org/blog/ices-secret-warrantless-home-entry-policy/ [https://perma.cc/SG3B-4QW2].

66. Immigrant Defense Project, et al. v. ICE, et al., CTR. FOR CONST. RTS., https://ccrjustice.org/home/what-we-do/our-cases/immigrant-defense-project-et-al-v-ice-et-al (on file with the *Fordham Law Review*) (last visited June 6, 2026) (posting ICE training documents obtained in litigation that describe ruses ICE agents are instructed to use to gain access to homes).

67. *See, e.g.*, Musgrave, *supra* note 21.

68. *See* Dorien Ediger-Seto, *Weaponized Bureaucracy at the Criminal Immigration Divide*, 101 WASH. L. REV. 1, 34–35 (2026) (discussing the case).

69. *Id.* Among other problems with the warrant, the student was a lawful permanent resident. *See id.* at 33.

70. *See* Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality,"* 52 HARV. J. ON LEGIS. 355, 361–73 (2015) (describing the pervasive daily harm of being labeled "illegal"); Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1597 (2005) ("Today the conflation of the racial identity 'Mexican' with the term 'illegal alien' is indisputable. The two terms completely subsume one another in a way that aligns with our everyday understanding of immigration control—even while this does not track empirical fact.").

71. 2025 OLC Op., *supra* note 9, at 10.

72. *See supra* note 12 and accompanying text.

actions are illegal, such as crossing the border or returning after a deportation order.[73] But merely existing in the United States is not a crime. The 2025 OLC Memo purports to change that by making undocumented presence a permanent criminal status.

II. THE HISTORY OF ILLEGAL ENTRY

For nearly a century, Congress has regulated a noncitizen's improper entry into the United States through three interlocking misdemeanor offenses. These offenses criminalize the various ways of illicitly entering the country. A noncitizen might improperly enter (1) between ports of entry (the "Non-Designated-Place Offense"), (2) at a port of entry by slipping past the inspection process that takes place there (the "Elude Offense"), or (3) at a port of entry by lying to immigration officials during the inspection process (the "Misrepresentation Offense").[74] Through these offenses, Congress has established a process for noncitizens to lawfully enter the United States: they must cross at an open, designated entry point; submit to the examination and inspection process; and truthfully answer any questions.[75]

This part traces the history of these illegal entry crimes. The discussion reveals that Congress created entry-focused offenses that the government can only prosecute in the district of entry, a fact widely acknowledged for nearly 100 years. During this extended time, nobody suggested that any of these offenses criminalized post-entry conduct, let alone that any of these offenses criminalized undocumented presence.

A. The 1929 Enactment of the Undesirable Aliens Act

The federal government played a limited role in immigration policy for the first 100 years of the nation's existence.[76] The first major federal restrictions on immigration were enacted in the late 1800s.[77] During this

73. *See* 8 U.S.C. §§ 1325–26.

74. *See supra* notes 6–8 and accompanying text.

75. The civil immigration system similarly requires that "[a]pplication to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise designated in this section." 8 C.F.R. § 235.1(a) (2025). Indeed, some form of this regulation has existed since at least 1952. *See* 17 Fed. Reg. 11506, 11506 (Dec. 19, 1952) (codified as amended in 8 C.F.R. § 235.1(a)–(b)) (requiring that all noncitizens seeking admission into the United States "apply in person at a place designated as a port of entry for aliens" and "at a time when the immigration office at the port is open for the inspection of applicants for admission").

76. *See* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, at 47–213 (1981) (summarizing all immigration legislation enacted between 1860 and 1929); *see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834 (1993) ("Regulation of transborder movement of persons existed, primarily at the state level, but also supplemented by federal legislation.").

77. *See* D'Vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RSCH. CTR. (Sep. 30, 2015), https://www.pewresearch.org/short-

period Congress focused on ending Chinese migration, a focus that later widened to the rest of Asia.[78]

Congress continued to restrict migration in the early 1900s when it imposed quotas on the number of people who could immigrate from particular countries. These quotas dramatically curtailed immigration from around the world, especially Eastern and Central Europe.[79] These country quotas, however, did not apply to countries in the Western Hemisphere, including Mexico.[80] Powerful business interests lobbied for this exemption to satisfy their need for cheap labor.[81] As a result, immigration from Latin America remained numerically unrestricted through the 1920s.[82] However, individuals looking to migrate to the United States from Latin America could lawfully do so only if they passed a literacy test, paid eighteen dollars, and submitted to an invasive physical inspection by immigration officials.[83]

While the business community applauded these loose restrictions on Latin American migration, another powerful group simmered over them: those seeking to maintain the supposed "racial purity" of the United States.[84] This group, which included elected officials, began pushing to "close the back door" by restricting immigration from Mexico.[85]

Relying on explicitly eugenicist arguments, those seeking to restrict migration from Mexico helped enact the Undesirable Aliens Act of 1929[86] (the "1929 Act"). Among other things, the legislation sought to address the

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reads/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/ [https://perma.cc/U94W-XUJR].

78. In 1882, Congress passed the Chinese Exclusion Act, ch. 126, 22 Stat. 58, which banned Chinese laborers from the United States for ten years and limited the ability of Chinese residents already in the United States to become U.S. citizens, among other things. *See* Kitty Calavita, *Collisions at the Intersection of Gender, Race, and Class: Enforcing the Chinese Exclusion Laws*, 40 LAW & SOC'Y REV. 249, 255 (2006) (discussing the Chinese Exclusion Act and the subsequent anti-Chinese legislation passed over the next thirty years). Later, with the Immigration Act of 1917, ch. 29, 39 Stat. 874, Congress "prohibit[ed] immigration of all races indigenous to the so-called Asiatic Barred Zone." Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 13–14 (1998). This had the effect of "completely exclud[ing] immigrants from most of Asia." Fish, *supra* note 4, at 1061.

79. *See* Fish, *supra* note 4, at 1061.

80. *Id.* at 1065 (citing the Immigration Act of 1924, ch. 190, §§ 4, 11, 43 Stat. 153, 155, 159 (1924)).

81. *Id.*

82. *Id.* at 1055.

83. *Id.*; *see also* Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 L. & HIST. REV. 69, 85 (2003).

84. Fish, *supra* note 4, at 1056.

85. *Id.* at 1067 (quoting ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924–1952, at 54 (1957)).

86. Ch. 690, 45 Stat. 1551; Fish, *supra* note 4 at 1067–90 (documenting at length the explicit ties between the passage of the Undesirable Aliens Act of 1929 and racist eugenic theories about Mexicans, and tracing the legislative debate that led to the passage of the Undesirable Aliens Act of 1929, including the flood of racist sentiment that pushed the act to passage).

widespread practice of Mexicans crossing into the United States outside the designated entry points.[87] This practice developed not only because Mexican migrants wanted to avoid the entrance fee, but also to avoid the intrusive border inspection, which "involved a degrading procedure of bathing, delousing, medical line inspection, and interrogation."[88] The secretary of labor—then in charge of immigration—recognized the prevalence of illicit entry and raised his concern with Congress about "those who seek to gain entry through other-than-regular channels."[89]

To deal with noncitizens seeking to "enter the United States surreptitiously,"[90] Congress enacted a criminal regime that was, as the legislative history notes, "broad enough to cover entry in any manner."[91] In crafting this entry-focused regime, Congress created three misdemeanor offenses, punishable by up to a year in custody, that addressed each way someone might try to sneak into the country. These three distinct offenses—the Non-Designated-Place Offense, the Elude Offense, and the Misrepresentation Offense—constitute the crime of Illegal Entry.

The language that became the Illegal Entry provision in 1929 was first introduced in 1924.[92] Congress borrowed the structure of the crime from Canadian legislation.[93] Canada had made it a crime for a noncitizen to enter Canada (1) "except at a port of entry", (2) "at a port of entry" but by "elud[ing] examination by an officer", or (3) "by force or misrepresentation or stealth or otherwise contrary" to law.[94] This is the basic framework of Illegal Entry.

With the Non-Designated-Place Offense, Congress made it a crime for a noncitizen to "enter[] the United States at any time or place other than as designated by immigration officials."[95] Congress had previously enacted various civil immigration restrictions that included language similar to the Non-Designated-Place Offense,[96] and it used this language rather than the

87. S. REP. NO. 70-1456, at 2 (1929).
88. Ngai, *supra* note 83, at 85.
89. S. REP. NO. 70-1456, at 2 (1929).
90. H.R. REP. NO. 70-2418, at 8 (1929).
91. *Id.* at 4 (1929).
92. *Proposed Deportation Legislation*, *supra* note 22, at 2.
93. *Id.* at 8.
94. Immigration Act, S.C. 1910, c. 27, s. 33 (Can.).
95. Undesirable Aliens Act of 1929, ch. 690, § 2, 45 Stat. 1551, 1551 (codified at 8 U.S.C. § 180, repealed 1952).
96. The Immigration Act of 1917, for example, addressed a noncitizen who entered the country "at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials." *See* Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889. The Act similarly made it a deportable offense to enter "by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens." *Id.* Congress had also made it a misdemeanor to "knowingly or negligently land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers." Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085–86; *see also* Act of Mar. 3, 1903, ch. 1012, § 18, 32 Stat. 1213, 1217–18; Act of Feb. 20, 1907, ch. 1134, § 18, 34 Stat. 898, 904. In 1929, Congress used this familiar terminology to criminalize

simpler Canadian legislation that covered noncitizens entering "except at a port of entry."[97] Congress might have chosen the wordy "time or place other than as designated by immigration officials" to give immigration officials the flexibility to designate places for entry that were not technically ports of entry.[98] In any event, whatever the reason for Congress's word choice, the Non-Designated-Place Offense criminalized crossing into the United States outside a designated entry point—typically, outside a port of entry—the prototypical way a noncitizen "surreptitiously" enters the United States.[99] A noncitizen, for example, who (in modern times) climbs over the border wall or crosses the Rio Grande has committed this offense.

At the National Archives, we found documents from early prosecutions of this offense in 1929 and 1930 in Brownsville, Texas. A review of hundreds of Illegal Entry cases from that period found that the overwhelming majority—over 95 percent—involved the Non-Designated-Place Offense.[100] This likely reflects the fact that nearly all the defendants were arrested crossing somewhere other than a designated port of entry.

One representative prosecution involved a Mexican national named Alberto Perez.[101] He surreptitiously entered the United States in the Southern District of Texas by boat outside a port of entry in 1930.[102] He paid someone four dollars to bring him to the United States.[103] He was later caught and charged with entering the United States outside a place designated for entry.[104] He pleaded guilty to the Non-Designated-Place Offense in the same district in which he entered.[105]

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entering the United States outside the designated time and place. *See* Undesirable Aliens Act of 1929, § 2, 45 Stat. at 1551 (codified at 8 U.S.C. § 180(a), repealed 1952).

97. *Proposed Deportation Legislation*, *supra* note 22, at 8. Congress might have also preferred the wordy "time or place other than as designated by immigration officials" because it wanted to give immigration officials the flexibility to designate places for entry that were not technically ports of entry. *Id.*

98. 8 U.S.C. § 1325(a)(1); *see* United States v. Sajous, No. 25-cr-00036, 2025 WL 2097261, at *5−6 (D.V.I. July 25, 2025) (conducting a statutory interpretation of 8 U.S.C. § 1325(a)(1)). The designated place phrase is often shorthanded as port of entry. However, that is not actually what the statute says.

99. H.R. REP. NO. 70-2418, at 8 (1929).

100. This statistic is based on our extensive review of Illegal Entry prosecutions from Brownsville, Texas. *See, e.g.*, Cases Charged in the District Court of the United States in and for the Southern District of Texas, Brownsville Division (Sep. 13, 1929) (on file with Nat'l Archives, Brownsville Court Files) (showing forty-one Non-Designated-Place Offense cases and one Elude Offense case); Cases Charged in the District Court of the United States in and for the Southern District of Texas, Brownsville Division (Oct. 4, 1929) (on file with Nat'l Archives, Brownsville Court Files) (showing seventy-one Non-Designated-Place Offense cases, one Elude Offense case, and one Misrepresentation Offense case).

101. United States v. Alberto Perez, S.D. Tex., Brownsville Div. (Apr. 18, 1930) (on file with Nat'l Archives, Fort Worth).

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

Congress recognized that noncitizens did not only surreptitiously enter the United States by crossing outside of ports of entry. They could also do so at a port of entry. One way a noncitizen can surreptitiously enter the United States is by slipping past immigration officials at a place designated for entry without submitting to an examination and inspection. For example, the noncitizen might cross into the United States at a port of entry by sneaking past a distracted immigration official. Or the noncitizen might just run or drive through the port without presenting themselves for inspection. These individuals would have entered the United States at a designated time and place and so would not have committed the Non-Designated-Place Offense. Accordingly, Congress needed to create a second offense to cover this situation.

Congress did so with the Elude Offense, which made it a crime for a noncitizen to "elude[] examination or inspection by immigration officials."[106] This provision criminalized entering the United States at a designated entry point (where the inspection or examination is supposed to take place) by slipping past immigration officials. It echoed the Canadian offense of "elud[ing] examination by an officer" at a port of entry.[107]

Why did Congress choose to make it an offense to *elude* examination and inspection rather than merely *enter* without examination and inspection? Representative Elton Watkins—who took credit for modeling the crime after the Canadian law—addressed this point when he introduced the language that became the Illegal Entry statute. When asked why he chose the verb "elude" rather than "enter," he said that the selected language worked "satisfactorily" in Canada.[108] That was his only comment. Another member of the U.S. House of Representatives pointed out that the use of the verb "elude" rather than "enter" was appropriate for a criminal provision because it would prevent the conviction of a noncitizen who walked through a port of entry "in good faith" but was not examined or inspected.[109]

At the National Archives, we located an early example of a prosecution for this offense involving a seventeen-year-old Mexican national named Pedro Castillano.[110] He snuck into the United States in the Southern District of Texas in 1929 after hiding in a bush outside the immigration office at the port of entry near Hidalgo, Texas.[111] According to Mr. Castillano, he wanted to come to the United States to join the U.S. Army; he had heard that doing so would allow him to obtain U.S. citizenship.[112]

106. *See* Undesirable Aliens Act of 1929, ch. 690, § 2, 45 Stat. 1551, 1551 (codified at 8 U.S.C. § 180, repealed 1952).

107. Immigration Act, S.C. 1910, c. 27, s. 33 (Can.); *see Proposed Deportation Legislation*, *supra* note 22, at 8–9.

108. *Proposed Deportation Legislation*, *supra* note 22, at 9.

109. *Id.*

110. United States v. Pedro Castillano, S.D. Tex., Brownsville Div. (Sep. 13, 1929) (on file with Nat'l Archives, Fort Worth, No. 4934).

111. *Id.*

112. *Id.*

Mr. Castillano was caught and charged, having eluded examination and inspection by immigration officials at a port of entry.[113] He pleaded guilty to the Elude Offense in the same district in which he entered.[114]

The final way a noncitizen might enter the United States unlawfully is by presenting themselves to immigration officials and making misrepresentations. For example, a noncitizen could obtain entry by falsely claiming to be a U.S. citizen. A noncitizen who gains entry by lying to an immigration official at the port of entry will have entered at a designated time and place, and so will not have committed the Non-Designated-Place Offense. They also will have submitted to examination and inspection, and so will not have committed the Elude Offense. Congress thus needed to create a third offense to cover this situation.

Congress did so with the Misrepresentation Offense. With this offense, Congress made it a crime for a noncitizen to "obtain[] entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact."[115] Thus, Congress created a crime that covered situations in which a noncitizen obtains entry at a designated entry point through deceit. This is a pared-down version of its Canadian counterpart, which made it a crime to enter "by force or misrepresentation or stealth or otherwise contrary" to law.[116]

At the National Archives, we found an early prosecution for this offense in a case involving Petra Martinez—a Mexican national who ran a prostitution business.[117] In 1929, she obtained entry into the United States in the Southern District of Texas after lying to immigration officials at the port, claiming that she would be in the country for only one day to shop.[118] Several weeks later, however, she remained in the United States, having rented a hotel room not far from the U.S.-Mexico border.[119] Ms. Martinez was arrested and charged with having obtained entry to the United States by a willfully false statement of material fact.[120] She pleaded guilty to the Misrepresentation Offense in the same district in which she entered.[121]

Taken together, these three crimes—the Non-Designated-Place Offense, the Elude Offense, and the Misrepresentation Offense—obligate noncitizens to enter the United States at the designated entry points when they are open, to submit to the required examination and inspection that occurs there, and to provide honest answers to immigration officials during that process.

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113. *Id.*
114. *Id.*
115. Undesirable Aliens Act of 1929, ch. 690, § 2, 45 Stat. 1551, 1551 (codified at 8 U.S.C. § 180, repealed 1952).
116. Immigration Act, S.C. 1910, c. 27, s. 33 (Can.).
117. United States v. Petra Martinez, S.D. Tex., Brownsville Div. (Aug. 13, 1929) (on file with Nat'l Archives, Fort Worth).
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

Congress did not just regulate the bare act of improper entry through these three misdemeanor crimes. In 1929, Congress also made it a felony, punishable by up to two years in prison, for a noncitizen to "enter[] or attempt[] to enter the United States" after "arrest[] and deport[ation]."[122] That is, Congress criminalized a noncitizen's entry into the United States—regardless of the manner of entry—if they had previously been arrested and deported. This Article refers to these offenses (the completed offense and the attempted offense together) as "Illegal Reentry."

Congress's decision to regulate improper entry and reentry—rather than focus on criminalizing undocumented presence—was made against the backdrop of its more general concerns in the 1920s about interior enforcement of immigration laws. These concerns were most evident in the context of congressional discussion about the arrest authority of the U.S. Border Patrol, an agency that Congress created in 1924.[123] In determining when these "low-level" immigration officers could effectuate warrantless arrests, some members of Congress wanted to authorize arrests of noncitizens in the country's interior.[124] These proposals, however, were firmly repudiated.[125] Instead, Congress determined that a border patrol agent could make an arrest—absent permission from the secretary of labor himself—only when a noncitizen had unlawfully "enter[ed] or attempt[ed] to enter the United States" in the "presence" of the agent.[126]

When this provision was introduced in Congress, its U.S. Senate sponsor explained that its purpose was to authorize the arrest of noncitizens "in the act of entering the country"—those who are "caught in the act of getting in."[127] The senator continued: "[Immigration officials] have no right to go into an interior city and pick up aliens in the street and arrest them, but it is

122. Undesirable Aliens Act of 1929, ch. 690, § 1, 45 Stat. 1551, 1551 (codified at 8 U.S.C. § 180(a), repealed 1952). Congress had previously created three other Illegal Reentry crimes, two of which remained on the books in 1929. *See* Doug Keller, *Rethinking Illegal Entry and Reentry*, 44 LOY. U. CHI. L.J. 65, 73–74 & n.27 (2012).

123. Making Appropriations for the Departments of State and Justice and for the Judiciary, and for the Departments of Commerce and Labor, for the Fiscal Year ending June 30, 1925, and for other purposes, ch. 204, 43 Stat. 205 (1924). For an excellent discussion of the formative years of the Border Patrol, see KELLY LYTLE HERNÁNDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL 17−100 (2010).

124. Nash, *supra* note 20, at 1337. When Congress created the border patrol in 1924, it gave the agency no law enforcement powers, rendering agents "little more than ordinary citizens." HERNÁNDEZ, *supra* note 123, at 35. It was not until February 1925 that Congress gave border patrol law enforcement authority. *Id.*

125. HERNÁNDEZ, *supra* note 123, at 35.

126. Act of Feb. 27, 1925, ch. 364, 43 Stat. 1014, 1049 ("That hereafter any employee of the Bureau of Immigration authorized so to do under regulations prescribed by the Commissioner General of Immigration with the approval of the Secretary of Labor, shall have power without warrant . . . to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission of aliens, and to take such alien immediately for examination before an immigrant inspector or other official having authority to examine aliens as to their right to admission to the United States."). A similar provision exists to this day at 8 U.S.C. § 1357(a)(2).

127. 66 CONG. REC. 3202 (1925).

just at the border where they are patrolling that we want them to have this authority."[128] As Professor Lindsay Nash has observed, throughout the 1920s, "Congress consistently rejected legislation that would have . . . eschewed the idea of warrantless arrests for general interior enforcement."[129] Thus, consistent with this concern, Congress created immigration crimes that focused on regulating noncitizens who were "caught in the act of getting in" rather than on noncitizens living in the country's interior.[130]

In short, in 1929 Congress created crimes that regulated a noncitizen's improper entry into the United States. Noncitizens who entered outside a port of entry committed the Non-Designated-Place Offense. Noncitizens who entered at a port of entry but eluded the examination or inspection committed the Elude Offense. Noncitizens who entered at a port of entry through misrepresentations committed the Misrepresentation Offense. And noncitizens who entered, or attempted to enter, in any manner whatsoever after their arrest and deportation committed Illegal Reentry.

B. Venue for Entry Crimes

By creating entry-focused crimes in 1929, Congress enacted a regime that the government could only enforce at the border.

Many constitutional provisions are ambiguous and subject to reasoned debate about their scope. The constitutional guarantee of venue in criminal cases is not one of them. Article III of the U.S. Constitution provides that the "Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed," except "when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."[131] Similarly, the Sixth Amendment provides that defendants have a right to "an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[132] Thus, when a defendant commits a crime within a state, the government must charge the defendant with the offense in that state, and the jury must be selected from residents of that state (and residents of the same federal district). Courts can determine where a crime occurred for purposes of venue by examining the "nature of the crime alleged and the location of the act or acts constituting it."[133] When a crime

128. *Id.*

129. Nash, *supra* note 20, at 1340.

130. Congress did not pass legislation that authorized interior arrests until 1946. *See id.* at 1351 (citing Act of Aug. 7, 1946, ch. 768, 60 Stat. 865).

131. U.S. CONST. art. III, § 2. Additionally, Rule 18 of the Federal Rules of Criminal Procedure now provides that, "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." FED. R. CRIM. P. 18.

132. U.S. CONST. amend. VI.

133. United States v. Anderson, 328 U.S. 699, 703 (1946).

occurs across multiple venues, the government can prosecute the defendant in any of the relevant venues.[134]

In some criminal statutes, Congress creates a special venue provision that provides the appropriate venue for cases. Congress created such a venue provision for all immigration cases as part of the Immigration Act of 1917[135] (the "1917 Act"). The provision applied to all "prosecutions or suits" under the Immigration Act.[136] That is, by its terms, it applied to both criminal prosecutions and civil lawsuits. The provision established that these cases "may be instituted at any place in the United States [1] at which the violation may occur or [2] at which the person charged with such violation may be found."[137]

The 1917 Act's venue provision remained on the books in 1929 when Congress created the Illegal Entry crime and the Illegal Reentry crime. Thus, the venue provision facially authorized the government to bring those charges in a district where the offense occurred or in a district where the defendant was found.

Clause 1 of the 1917 Act's venue provision mirrors the general constitutional standard. That is, the place where the offense "occur[s]" under Clause 1 reflects the constitutional rule establishing venue where the offense was "committed."[138] Under this clause, the government could only prosecute Illegal Entry crimes in the district of entry, because that district is where the criminal act of improper entry was "committed."[139]

But what about Clause 2, which authorizes prosecution where the defendant was "found"? This provision seems to permit unconstitutional prosecutions. By definition, any prosecution brought in a district in which the defendant was "found" but not in which "the violation . . . occur[red]" disobeys the general constitutional command on venue.[140] Indeed, before 1917, the Supreme Court confirmed the constitutional venue clause's meaning: the government must prosecute defendants in the district in which the offense occurred, not "where [the defendant] may happen to be" when the arrest occurs.[141]

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134. Armour Packing Co. v. United States, 209 U.S. 56, 73 (1908).

135. *See* ch. 29, § 25, 39 Stat. 874, 893–94.

136. *See id.* ("That the district courts of the United States are hereby invested with full jurisdiction of all causes, civil and criminal, arising under any of the provisions of this Act. That it shall be the duty of the United States district attorney of the proper district to prosecute every such suit when brought by the United States under this Act. Such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with such violation may be found. That no suit or proceeding for a violation of the provisions of this Act shall be settled, compromised, or discontinued without the consent of the court in which it is pending, entered of record, with the reasons therefor.").

137. *Id.*

138. *See* U.S. CONST. art. III, § 2.

139. *Id.*

140. Immigration Act of 1917, § 25, 39 Stat. at 893–94.

141. Armour Packing Co. v. United States, 209 U.S. 56, 76 (1908) (affirming that the Sixth Amendment requires the government to prosecute a defendant "where the offense is

Adopting a venue provision that included seemingly unconstitutional applications is puzzling. And because no legislative history discusses why Congress created the provision in 1917, the reason for it is unclear. There are a few possible answers.

The first possibility is offered by the OLC. The OLC first addressed the venue provision in the 1978 OLC Memo.[142] To explain why Congress would pass a provision with unconstitutional applications, the OLC suggested that the provision was likely "an anomaly produced by inartful drafting."[143] The OLC posited that Congress likely intended for the "found" provision to apply to civil cases only.[144] Under this view, Congress did not actually intend to authorize criminal prosecutions outside the district in which a defendant committed an immigration offense. The inartful drafting explanation is perhaps especially persuasive because immigration crimes were almost nonexistent in 1917.[145]

A second possibility is that Congress consciously intended to broaden venue for the few immigration crimes that existed and simply did not consider the constitutional question at all.

A third possibility stems from the exception to the general requirement that the government prosecute defendants in the district in which they committed the offense. As explained, Article III permits Congress to create venue wherever it wants for offenses that are "not committed within any State."[146] Thus, if a defendant commits a crime in a federal territory, which is not located in any state, Congress can constitutionally fix venue in a state or district other than the one in which the defendant committed the offense.

Back in 1917, when Congress enacted the special venue provision for immigration cases, the United States was quickly obtaining federal territories. For example, Hawai'i became a U.S. territory in 1898,[147]

committed" rather than where the defendant happens to "reside at the time of the commission of the offense, or where [they] may happen to be at that time").

142. *See generally* 1978 OLC Op., *supra* note 10.

143. *Id.* at 111.

144. *Id.*

145. An illegal reentry provision passed in 1910 was among the tiny number of immigration crimes in existence by 1917. This provision made it a misdemeanor to "attempt . . . to return to or enter the United States" after having been deported for involvement in the prostitution trade. Keller, *supra* note 122, at 74 (quoting Act of March 26, 1910, ch. 128, § 3, 36 Stat. 264, 264–65 (codified at 8 U.S.C. § 138, repealed 1952)). It appears that the government never meaningfully enforced this provision before its repeal in 1952. *Id.* at 74 n.30. The government did not start to prosecute a meaningful number of immigration crimes until after Congress enacted the entry-focused crimes in 1929. In 1928, the government brought about 600 immigration-related prosecutions. U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1928, at 54 (1928). In 1930, the first full calendar year in which the 1929 Act's criminal provisions were in effect, the government brought about 7,000 immigration-related prosecutions, a more than ten-fold increase. U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1930, at 36–37 (1930).

146. U.S. CONST. art. III, § 2, cl. 3.

147. Newlands Resolution, 30 Stat. 750 (1898).

American Samoa became one in 1900,[148] and Alaska became one in 1912.[149] And in 1917, Congress passed legislation that reorganized the government of Puerto Rico and made its residents U.S. citizens.[150] Some of these territories did not have U.S. federal courts—indeed, American Samoa still does not—and thus federal crimes could not be prosecuted there.[151]

One possibility, then, is that Congress wanted to make sure individuals who committed federal immigration crimes in U.S. territories like American Samoa and who later made it to the continental United States could be prosecuted. Absent a special venue provision empowering the federal government to prosecute the defendant for the immigration offense in the district in which he or she was "found," the defendant could not be prosecuted. This possibility does not require assuming that Congress failed in basic statute drafting or did not consider constitutional problems. It simply posits that § 1329 was oriented, in part, toward noncitizens who originally entered through U.S. territories.

In any event, there is no evidence to suggest that the executive branch ever relied on the 1917 Act's venue provision to prosecute a defendant outside the district of entry for crimes committed under the 1929 Act. It does not appear that any court, for example, ever addressed whether the venue provision was constitutional as applied to a defendant charged in a district other than the one where he or she committed the crime. In fact, as Congress debated immigration reform in 1950, a congressional report pointed out that the 1917 Act's venue provision had been "rarely invoked," given the "general rule that violations must be prosecuted in the judicial district in which the offense was committed."[152] This suggests, then, that the government prosecuted those who committed the entry-focused crimes included in the 1929 Act—Illegal Entry and Illegal Reentry—exclusively in the district where the crime took place.

C. The 1952 Revisions

After creating the crimes of Illegal Entry and Illegal Reentry in 1929, Congress left both alone for over two decades, until 1952. In 1952, Congress passed—over presidential veto—what became known as the Immigration and Nationality Act[153] (INA or the "1952 Act").[154] The INA

148. *See* Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL'Y J. 325, 344–51 (2008) (discussing the history of American Samoa).

149. Act of Aug. 24, 1912, ch. 387, § 4, 37 Stat. 512, 513.

150. The Jones-Shafroth Act, ch. 145, 39 Stat. 951 (1917).

151. Weaver, *supra* note 148, at 352–57 (discussing United States v. Lee, 472 F.3d 638 (9th Cir. 2006), and United States v. Gurr, 471 F.3d 144 (D.C. Cir. 2006)).

152. S. REP. NO. 81-1515, at 65 (1950).

153. Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

154. *See id.* § 275, 66 Stat. at 229; *see also* H.R. REP. NO. 82-1365, at 27 (1951) ("[This bill] represents the first attempt to bring within one cohesive and comprehensive statute the various laws relating to immigration, naturalization, and nationality."). For a full analysis of

repealed and revised prior provisions and created many more. As part of the INA, Congress recodified Illegal Entry at 8 U.S.C. § 1325 and Illegal Reentry at 8 U.S.C. § 1326.[155] Both remain codified there today. Of the thousands of pages of legislative history concerning the 1952 Act, only a few pages address these two criminal provisions. Congress made slight changes to each, and those changes affected the way the government could enforce both in practice, including where the government could prosecute Illegal Reentry.

1. Eliminating Jury Trials for Illegal Entry

Leading up to the 1952 Act's passage, the sole concern raised about the Illegal Entry offense was local opposition to its enforcement along the Texas-Mexico border.[156] Prosecutors complained about their struggles to convince grand juries to indict Mexican farm workers for the offense.[157] Rather than taking that as a cue to curb use of the law, Congress reengineered the law to bypass juries and grand juries altogether.[158] Congress lowered the statutory maximum penalty from one year to six months, demoting the crime to petty offense status.[159] And with petty offenses, defendants have no constitutional right to a grand jury indictment or to a jury trial.[160]

While it lowered the statutory maximum penalty for a first-time offense, Congress also set the maximum penalty at two years for a subsequent

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the 1952 Act's immigration crime provisions, and the role of anti-Mexican racism in the law's passage, see generally S. Deborah Kang, *Creating a "Mass Production Technique": Anti-Mexican Racism and the McCarran-Walter Act of 1952*, 3 J. AM. CONST. HIST. 545 (2025). Professor Kang's article, as well as her generous assistance, were enormously helpful in directing us to relevant material in the National Archives.

155. Immigration and Nationality Act, Pub. L. No. 82-414, ch. 477, §§ 275, 276, 66 Stat. 163, 229 (1952).

156. *See Immigration and Naturalization: Hearing Before the S. Subcomm. on Immigration of the S. Comm. on the Judiciary*, 80th Cong. 30 (1948) (noting the local hostility to enforcing immigration law, particularly against farmers and their employees); S. REP. NO. 81-1515, at 654.

157. Keller, *supra* note 122, at 84; Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1327 (2010) ("Along the southwest border, juries could be powerful; grand jury members would often not indict in immigration crime cases because such laws were 'locally unpopular.' For example, in El Paso, Texas in the late 1940s, over 90% of immigration crime cases sent to the grand jury were returned as 'no bills.'" (citing *Immigration and Naturalization*, *supra* note 156, at 30)).

158. Keller, *supra* note 122, at 84; IMMIGR. & NATURALIZATION SERV., REPORT ON S. 3455, A BILL TO REVISE THE LAWS RELATING TO IMMIGRATION, NATURALIZATION, AND NATIONALITY: AND FOR OTHER PURPOSES 355 (1950) (on file with the Nat'l Archives, Record Group 85, Box 19602) (discussing section 275, which became 8 U.S.C. § 1325).

159. Immigration and Nationality Act, § 275, 66 Stat. at 229.

160. As an INS report explained, by lowering the statutory maximum penalty to six months, Congress transformed the offense into a "petty offense," which would allow the cases to be resolved by "United States Commissioners" and juries would no longer be needed. IMMIGR. & NATURALIZATION SERV., *supra* note 158, at 355–56 (discussing section 275, which became 8 U.S.C. § 1325); *see also* Keller, *supra* note 122, at 84; Eagly, *supra* note 157, at 1326–27.

conviction, creating felony liability for repeat offenders.[161] The crime of Illegal Entry appeared otherwise identical to its 1929 predecessor, aside from a cosmetic change in which "immigration officials" were relabeled "immigration officers," reflecting more modern nomenclature.[162]

2. Eliminating Venue Problems with Illegal Reentry

Congress spent a little more time discussing Illegal Reentry. This conversation focused almost entirely on the question of venue. While the 1917 Act purported to authorize prosecution for any immigration crime in the district in which the defendant was "found,"[163] the provision was unconstitutional as applied to a defendant not found in the district of entry (setting aside the case of someone who committed a federal immigration crime in a U.S. territory). The government could thus only bring a charge for illegally reentering in the district of entry. This was the DOJ's primary complaint about the crime leading up to the passage of the 1952 Act. In 1951, the general counsel of the INS complained to Congress that it could be challenging to prosecute noncitizens for Illegal Reentry when it was "not possible to establish the place of [the noncitizen's] entry."[164] The INS thus lobbied Congress to broaden Illegal Reentry to permit prosecution in the district of apprehension.[165]

If the DOJ (or Congress) understood the Elude Offense in neighboring § 1325 as a continuing offense prosecutable in the district of apprehension, it would have made sense for the DOJ to suggest that Congress add the Elude Offense as a basis of liability for Illegal Reentry. That is, the DOJ could have suggested that Congress make it a crime for a noncitizen to "elude[] examination or inspection by immigration officers" after being deported. But the DOJ did not do that—underscoring that it did not view the Elude Offense as a continuing offense that permitted the government to prosecute defendants in the district of apprehension.

To add a theory of liability to § 1326 that made it a continuing offense, the INS general counsel suggested that Congress make it a crime to be "found in" the United States after deportation.[166] In that situation, the government could charge the defendant in the district where they were

161. A defendant twice convicted of the Illegal Entry Crime could receive up to a two-year prison sentence. Immigration and Nationality Act, Pub. L. No. 82-414, ch. 477, § 275, 66 Stat. 163, 229.

162. *Id.*; *see also* IMMIGR. & NATURALIZATION SERV., *supra* note 158, at 356 (documenting requests to change "officials" to "officers" in what became 8 U.S.C. § 1325).

163. Immigration Act of 1917, ch. 29, § 25, 39 Stat. 893−94.

164. *Revision of Immigration, Naturalization, and Nationality Laws: J. Hearings Before the Subcomm. of the Comm. on the Judiciary on S. 716, H.R. 2379, and H.R. 2816*, 82d Cong. 716 (1951) (discussing section 276 of the law, which became 8 U.S.C. § 1326 in the final legislation).

165. *Id.*

166. *Id.*

found because the defendant would have committed the offense in that district.

Congress agreed to the INS general counsel's suggestion. It crafted legislation that altered the Illegal Reentry crime to not only make it an offense to enter or attempt to enter the United States following deportation, but also to be "found in" the United States after being deported (the "Found In Offense").[167] In a congressional report about the new provision, the Found In Offense was "regarded as necessary to overcome the possible inadequacies in existing law which have been observed in those cases in which it is not possible for the [INS] to establish the place of reentry."[168] The "[INS] highly recommend[ed] this addition to existing law" to close this "loophole."[169]

At the same time, Congress did not alter the Illegal Entry crime, choosing to leave it as an entry-focused offense. This should not be surprising because the DOJ never suggested that it wanted to enforce Illegal Entry other than at the place of entry.

Congress also recodified the 1917 Act's venue provision in 8 U.S.C. § 1329,[170] where it remains today. An early version of § 1329 left out the sentence that permitted the government to prosecute immigration crimes in the place in which the defendant was "found," even when the defendant did not commit the crime in that district.[171] One congressional report flagged its absence,[172] stating that it was "not known why this provision was omitted . . . unless it was felt that there were valid constitutional objections to it."[173] The report then states that it was "not aware that any constitutional objections [had] been made to this provision during the time it had been in the Immigration Act of 1917," and suggests that the provision return unless the DOJ "feels that this provision definitely is unconstitutional."[174] With no apparent further public discussion, Congress added the venue provision back in—even though, as discussed momentarily, the DOJ recognized the constitutional shortcomings of the provision.

Congress altered the 1917 Act's venue provision in two ways. First, Congress changed the provision to permit venue where the defendant was "apprehended" instead of where the defendant was "found."[175] Second, while the 1917 Act applied to any immigration offense—civil or criminal—Congress limited the venue provision to apply only to Illegal Entry and

167. Immigration and Nationality Act, Pub. L. No. 82-414, ch. 477, § 276, 66 Stat. 163, 229.

168. *Revision of Immigration, Naturalization, and Nationality Laws*, *supra* note 164, at 716.

169. *Id.*

170. Immigration and Nationality Act, § 279, 66 Stat. at 230.

171. IMMIGR. & NATURALIZATION SERV., *supra* note 158, at 361 (discussing section 279, which became 8 U.S.C. § 1329).

172. *Id.*

173. *Id.*

174. *Id.*

175. Immigration and Nationality Act, § 276, 66 Stat. at 229.

Illegal Reentry.[176] It thus no longer applied to all immigration violations. Legislative history reveals no reason for these changes.

D. Executive Branch and Supreme Court Interpretations of Illegal Entry

Our research at the National Archives uncovered vigorous discussion within the executive branch about the enforcement of both Illegal Entry and Illegal Reentry in the wake of the 1952 Act's passage. This discussion occurred in memoranda written by high-level officials in the DOJ and INS, and in correspondence between those high-level officials and local enforcement agents. These communications were collected in a bound volume of Immigration and Naturalization Service records concerning the interpretation and enforcement of the 1952 Act's immigration crime provisions.[177] The conversations in these documents centered on two things. First, there was widespread agreement that the 1917 Act's venue provision (recodified at 8 U.S.C. § 1329) was unconstitutional to the extent that it allowed prosecution for Illegal Entry in a district other than the district of entry.[178] Second, there was agreement that the Found In Offense in the Illegal Reentry crime could be prosecuted in the interior of the country when the noncitizen was apprehended in the interior.

Around the time that the 1952 Act became law, a DOJ administrative official tasked the INS commissioner with determining the effect of its criminal provisions on government resources.[179] In September 1952, the commissioner's panicked response estimated that the new legislation would add over 5,000 prosecutions and nearly 500,000 days of detention per year.[180] This would have reflected a 25 percent year-over-year increase in immigration prosecutions and a much larger increase in detention costs.[181] The commissioner believed that this reflected a "conservative estimate."[182] He suggested that a dramatic increase in prosecutions would take place in

176. *Id.*

177. Records of the Immigration and Naturalization Service Regarding the Immigration & Nationality Act (Reentry of Deported Alien) Sec. 276 (Sep. 1952–Oct. 1954) (on file with Nat'l Archives, Record Group 85).

178. This constitutional deliberation by executive branch officials, which resulted in self-limiting policies that implemented the Constitution's venue provisions, is a prime example of what legal scholars have called "administrative constitutionalism." *See, e.g.*, Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897–98 (2013); Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1604–05 (2019); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010); Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 252 (2017); Bertrall L. Ross II, *Administrative Constitutionalism as Popular Constitutionalism*, 168 U. PA. L. REV. 1783, 1798 (2019).

179. Letter from Argyle Mackey, Comm'r, INS, to S.A. Andretta, Admin. Assistant Att'y Gen. (Sep. 23, 1952) (on file with Nat'l Archives, Record Group 85).

180. *Id.*

181. *Id.*

182. *Id.*

the country's interior, expecting there to be "no substantial increase in the number of prosecutions in the Mexican border districts or in Honolulu."[183]

The commissioner's reasoning is illuminating. He wrote that before 1952, "criminal prosecutions may be instituted only in the judicial districts within which violations occur."[184] Thus, a noncitizen "apprehended in Chicago who entered the United States illegally within the Southern District of Texas may be prosecuted only in the United States District Court for that district."[185] There was no suggestion, then, that any of the Illegal Entry crimes could be prosecuted in the district of apprehension. The commissioner then cited the 1952 Act's venue provision—the same provision that mostly recodified the 1917 Act's venue provision—but discussed it with the assumption that this provision had no predecessor under prior law. Based on that unstated assumption, the commissioner believed that the 1952 Act's venue provision "corrected" the flaw in prior law that required Illegal Entry and Illegal Reentry to be prosecuted in the district where the offense occurred.[186] He therefore believed that both offenses would now be regularly prosecuted in the interior of the United States, a significant change in practice.[187]

The DOJ official wrote back to the commissioner to correct these misunderstandings.[188] The official wrote that he consulted with DOJ lawyers who pointed out that the venue provision in the 1952 Act was not new. Instead, it was a "reenactment" of prior law—"merely a revision" of the 1917 Act's venue provision.[189] The DOJ lawyers also echoed the longstanding view that the Illegal Entry crime focused on the act of improper *entry* rather than any ongoing status of undocumented presence: "Since the illegal entry of an alien into the United States is accomplished upon a traverse of the imaginary border line, the crime is complete upon physical arrival in the United States and cannot in any sense be construed as a continuing offense."[190] The response continued: "Prosecution therefore in any district other than that in which the illegal entry can be proved, is therefore, forbidden by the Constitution."[191] That is, "it will continue to be impossible to successfully prosecute illegal entrants in the particular districts where the evidence shows they actually crossed the border, and in the absence of such information no prosecutions may be maintained."[192] With that correction, the DOJ official told the commissioner that the "law

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. Letter from S.A. Andretta, Admin. Assistant Att'y Gen., to Argyle Mackey, Comm'r, INS (Nov. 24, 1952) (on file with Nat'l Archives, Record Group 85).
189. *Id.*
190. *Id.* (citing United States v. Doyle, 181 F.2d 479 (2d Cir. 1950)).
191. *Id.*
192. *Id.*

will make no change in securing convictions, since it must be proved where the alien crossed the border."[193]

In response, the commissioner sent a legal opinion drafted by the INS's general counsel and approved by the commissioner.[194] This document did not dispute anything about Illegal Entry, including that it still could not be prosecuted in the country's interior.[195] Instead, the opinion pointed out that the new Found In Offense permitted prosecution in the district in which the previously deported reentrant had been found.[196] The opinion discussed U.S. Supreme Court precedent on venue and explained how the Found In Offense could be constitutionally enforced wherever the government found the defendant.[197] From there, he suggested that, while they should not expect more prosecutions for Illegal Entry, they should expect more prosecutions for the Found In Offense under 8 U.S.C. § 1326.[198] He concluded that § 1325 "can only authorize prosecution in the district in which the violation described in that section occurs."[199] In subsequent correspondence, a regional INS director referred to this memorandum as an "opinion" of the INS's general counsel, "approved by the Commissioner," in which "it was definitely stated that prosecutions under Section 275 for illegal entry under the new Act were to be *only* in the District where the illegal entry occurred."[200]

Later, the INS commissioner wrote to the INS general counsel about the same subject.[201] Immigration officials in Buffalo, New York, had asked whether they could prosecute a noncitizen for the Found In Offense when the noncitizen was found outside the district of entry.[202] The commissioner first echoed the prior advice he had received about prosecuting defendants for any of the *non*–Found In Offenses: that they must be prosecuted in the district of entry.[203] The commissioner, however, wrote that it "seem[ed] clear" that a noncitizen could be prosecuted for the Found In Offense "in the jurisdiction where found, irrespective of the date or place of reentry."[204]

In 1953, the DOJ memorialized its official legal position on §§ 1325, 1326, and 1329 in the first version of the United States Attorneys'

193. *Id.*

194. Letter from the General Counsel to the INS Commissioner (Dec. 16, 1952) (on file with Nat'l Archives, Record Group 85).

195. *Id.*

196. *Id*.

197. *Id.* ("With respect to section 275 . . . I am constrained, in view of US v. Capella; US v. Krsteff; ex Parte Lair, to agree that prosecutions under that section can be had in the district only in which the illegal entry occurred.").

198. *Id.*

199. *Id.*

200. Letter from E.E. Salisbury, Vt. Dist. Dir., INS, to General Counsel, INS (Oct. 19, 1954) (on file with Nat'l Archives, Record Group 85) (emphasis added).

201. Interpretation of Section 276 of the Immigration and Nationality Act by Argyle Mackey, Comm'r, INS (May 21, 1953) (on file with Nat'l Archives, Record Group 85, No. 56336).

202. *Id.*

203. *Id.*

204. *Id.*

Manual (the "Manual")—a document that gives policy guidance to federal prosecutors.[205] The Manual provided that prosecutions for violations of § 1325 should be brought "in the district where the alien actually entered or attempted to enter and not in the district where found," "notwithstanding the provisions of Section 1329."[206] In support, the Manual cited the Sixth Amendment.[207] Thus, nearly seventy-five years ago, the DOJ officially recognized that the Illegal Entry crimes—including the Elude Offense—were not continuing offenses that criminalized undocumented presence, but entry-focused crimes committed in the district of entry. The Manual also explained that someone charged with the Found In Offense "may be prosecuted in the district where he is apprehended[.]"[208]

This memorialization of official policy resulted in more questions from prosecutors. For example, in December 1953, the U.S. Attorney for the Eastern District of Michigan wrote the attorney general to confirm that, despite the broad language of § 1329, prosecutions of Illegal Entry should be brought "in the District where the alien actually entered or attempted to enter" the country, as the Manual required.[209] In response, the chief of the DOJ's Criminal Division "question[ed] whether it would be proper to prosecute an alien under Section 1325 except in the district where the alleged offense was committed," based on the "Sixth Amendment," given that none of the crimes in § 1325 "seems to be continuing."[210] He noted that the Found In Offense, however, appeared to be "different."[211]

A similar inquiry came from an immigration official in Vermont. The official wrote to the INS general counsel in 1954 about a case in which a noncitizen illegally entered in Vermont but was found in Boston.[212] The INS general counsel explained that "under the Sixth Amendment to the Constitution[,] a prosecution for violation of [§ 1325] must be brought in the district where the violation occurred."[213] In the cited example, then, the noncitizen would need to be "brought to Vermont" for prosecution.

Soon after, the Supreme Court weighed in on proper venue for Illegal Entry and echoed the consensus view, albeit in dicta. The Court did so in *United States v. Cores*, which addressed whether the crime of a noncitizen crewman who "willfully remains in the United States" beyond the time

205. U.S. Dep't of Just., U.S. Att'ys' Manual 77 (1953); *see* Fish, *supra* note 178, at 271–72 (describing the manual's role in enforcing constitutional rights above the baseline set by judicial doctrine).

206. U.S. Dep't of Just., U.S. Att'ys' Manual 77 (1953).

207. *Id.*

208. *Id.*

209. Letter from Fred W. Kaess, U.S. Att'y, and William M. Lambert, Assistant U.S. Att'y, to Kinard D. Abbott, Chief, Immigr. Unit, Dep't of Just. (Dec. 14, 1953) (on file with Nat'l Archives, Record Group 85).

210. Letter from Rufus D. McLane, Chief, Admin. Regs. Section, Crim. Div. to L. Paul Winings, General Counsel, Immigr. & Naturalization Serv. (Jan. 14, 1954) (on file with Nat'l Archives, Record Group 85).

211. *Id.*

212. Letter from E.E. Salisbury, *supra* note 200.

213. Letter from General Counsel to Vt. Dist. Dir., INS (Oct. 27, 1954) (on file with Nat'l Archives, Record Group 85).

permitted by their landing permit was a continuing offense for purposes of venue.[214] If it were a continuous offense, it could be prosecuted in the district where the crewman was "found."[215] If it were complete at the moment the permit expired, it could be prosecuted only in the district in which expiration occurred.[216] Ultimately, the Court decided that the offense continued as long as the crewman remained in the United States, mostly because the "word 'remains' permits no connotation other than continuing presence."[217]

In reaching that conclusion, the Court discussed Illegal Entry and Illegal Reentry. The Court noted that the offense at issue was "unlike crimes of illegal entry set out" in § 1325 and § 1326.[218] The Court wrote that "[t]hose offenses are not continuing ones, as 'entry' is limited to a particular locality and hardly suggests continuity," confirming that these entry-focused crimes did not criminalize an ongoing undocumented status.[219] Thus, the Court followed the consensus view that the entry-focused offenses were not continuing offenses, but were instead completed in the district of entry.

The Court also addressed the special venue provision in § 1329, the successor to the 1917 Act. Without deciding the provision's constitutionality, the Court wrote that the "venue provision . . . was required before illegal entry cases could be prosecuted at the place of apprehension."[220] The Court, then, took the venue provision as evidence that Congress had not intended the entry-focused offenses to be continuing offenses.[221] If they were continuing offenses, there would have been no need to specially authorize their prosecution in the district of apprehension.

A decade later, in 1978, the OLC issued its memorandum about venue and the Elude Offense. Given the settled view on the proper venue for § 1325 and § 1326 offenses, there had been little litigation over venue and those offenses. But around this time, the government charged a defendant with the Elude Offense in the state where he was found, Idaho, even though he had entered the United States elsewhere.[222] The District of Idaho held that the court did not have venue.[223] The OLC was asked to weigh in on whether that was correct, and the OLC agreed it was.[224]

As an initial matter, the OLC pointed out that the venue provision in § 1329, to the extent it authorized the government to prosecute § 1325 in a district other than where the offense was committed, violated the

214. *Id.* at 405.
215. *Id.* at 405–06.
216. *Id.* at 406.
217. *Id.* at 408.
218. *Id.* at 408 n.6.
219. *Id.*
220. *Id.*
221. *Id.*
222. 1978 OLC Op., *supra* note 10, at 110 (citing United States v. Wissel). *See supra* note 35 for more information regarding this unpublished opinion.
223. *Id.*
224. *Id.*

unambiguous command of the U.S. Constitution.[225] In discussing the provision, the OLC documented that Congress passed the original venue provision in 1917.[226] As noted, the OLC commented that Congress likely authorized prosecution in a district in which the defendant was found (even if the offense was not committed in that district) through "inartful drafting."[227]

The OLC also flagged that Congress created the Found In Offense for § 1326 in 1952.[228] This made § 1326, at least the found in provision, a "continuing offense" that continued until the defendant was "found."[229] The OLC explained the venue-based concerns—that it was hard to prove "where an alien had entered the country"—that led to the creation of this new offense.[230] The OLC noted, however, that the "difficulties inherent in proving" entry were identical "under § 1325," but that "no comparable amendment to [§ 1325] was recommended."[231] For this reason, the Elude Offense—like all the offenses in the entry-focused § 1325—needed to be brought in the district of entry.[232]

The OLC thus stated that it could not "reconcile the language of § 1329 with the requirement that prosecutions be undertaken in the district where the crime was committed."[233] From there, the OLC "recommend[ed] that no future prosecutions under § 1325 be instituted except in such districts."[234] The OLC also recommended that the U.S. Attorneys' Manual reflect this, as the language inserted into the first version of the Manual in 1953 had been removed over the intervening years.[235]

Accordingly, the OLC reaffirmed what had been the widespread understanding of Illegal Entry. The statute governed the various methods of improper entry into the United States, and the government therefore needed to prosecute such cases in the district of the improper entry. As the Supreme Court put it: These "entry" crimes are "limited to a particular locality and hardly suggest[] continuity."[236] Finally, in 2005 Representative F. James Sensenbrenner Jr. introduced House Resolution 4437, the "Border Protection, Antiterrorism, and Illegal Immigration

225. *Id.* at 111.
226. *Id.*
227. *Id.* The 1978 OLC Memo did not consider the point about cases originating in U.S. territories.
228. *Id.* at 111–12.
229. *Id.*
230. *Id.*
231. *Id.* at 112.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*; *see* Dep't of Just., U.S. Att'ys' Manual 77 (1953) ("Cases of illegal entry into the United States . . . notwithstanding the provisions of Section 1329, should be prosecuted in the district where the alien actually entered or attempted to enter, and not in the district where found. See the Sixth Amendment to the Federal Constitution.").
236. United States v. Cores, 356 U.S. 405, 408 n.6 (1958).

Control Act of 2005."[237] Among other provisions, H.R. 4437 would have created a new crime of "Unlawful Presence."[238] It proposed to amend 8 U.S.C. § 1325(a) by adding "Unlawful Presence" to the section heading, and by adding a fourth way of committing the crime: "(D) is otherwise present in the United States in violation of the immigration laws or the regulations prescribed thereunder."[239] H.R. 4437 passed the House in December 2005, but failed in the Senate.[240] Of course, this proposal would have been redundant if the Elude Offense had already criminalized unlawful presence.

E. The First Trump Administration and the Elude Offense

This widespread practice and understanding of Illegal Entry remained unchallenged for several decades. During those years, the executive branch prosecuted *hundreds of thousands* of noncitizens for violating § 1325 and § 1326.[241] Indeed, Illegal Entry and Illegal Reentry became the most prosecuted federal crimes by the early 2000s.[242] Most of those convictions occurred as part of Operation Streamline, a mass prosecution program that began in 2005 in Eagle Pass, Texas, but quickly spread along the U.S.-Mexico border.[243] As part of the program, dozens of noncitizens were

237. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005); *see* Rachel L. Swarns, *House Bill Cracks Down on Illegal Immigrants*, N.Y. TIMES (Dec. 15, 2005), https://www.nytimes.com/2005/12/15/world/americas/house-bill-cracks-down-on-illegal-immigrants.html (on file with the *Fordham Law Review*).

238. H.R. 4437 § 203.

239. *Id.*

240. *See Sensenbrenner Act (2005)*, *in* THE OXFORD ENCYCLOPEDIA OF LATINOS AND LATINAS IN CONTEMPORARY POLITICS, LAW, AND SOCIAL MOVEMENTS 329–30 (Suzanne Oboler & Deena J. González, eds., 2015).

241. *See* Keller, *supra* note 122, at 87, 112, 136 (documenting the annual prosecutions under 8 U.S.C. § 1325 and 8 U.S.C. § 1326 between 1978 and 2005). During this time, nothing suggests that the government prosecuted defendants found in the interior of the country for violating 8 U.S.C. § 1325 with one exception. There were undoubtedly some defendants found in the interior of the country who were charged with the felony in 8 U.S.C. § 1326 (or who could have been charged with the felony in § 1326) who agreed to plead guilty to 8 U.S.C. § 1325 as part of a charge bargain. *See* United States v. Ramirez, 675 F.3d 634, 642 (7th Cir. 2011) (referencing this charge bargain practice); Caleb E. Mason & Scott M. Lesowitz, *A Rational Post*-Booker *Proposal for Reform of Federal Sentencing Enhancements for Prior Convictions*, 31 N. ILL. U. L. REV. 339, 340 n.1 (2011) (same). That is, a defendant who could be charged with a felony in § 1326 would agree to plead guilty, usually to the Non-Designated-Place Offense, and waive any venue defense. This common plea bargain (which happens in border districts too) allows defendants to plead guilty with a lower statutory maximum penalty, and thus to receive a lower sentence than they otherwise would have received.

242. Fish, *supra* note 29, at 1897–98.

243. *See* Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1983–85, 2002–09 (2020).

prosecuted each day in large group hearings for violating 8 U.S.C. § 1325.[244]

The federal government, through several administrations, used Operation Streamline along the entire international border with Mexico, except for the Southern District of California.[245] When President George W. Bush launched it in 2005, the U.S. Attorney in charge of that district resisted its implementation.[246] But in 2018, during President Donald J. Trump's first term, Attorney General Jeff Sessions extended Operation Streamline to the Southern District of California as part of his "zero tolerance" program.[247]

An accident of timing then led the Trump administration to challenge the traditional understanding of Illegal Entry. In 2018, when the U.S. Attorney for the Southern District of California started to ramp up prosecutions for Illegal Entry, the local federal public defenders' office organized a systematic litigation strategy to fight the new program.[248] With the early, pre-Streamline cases, the government charged defendants with the Non-Designated-Place Offense, since nearly all of them were arrested entering between ports of entry.[249] As part of the planned resistance to the system, federal defenders raised a nondelegation challenge to the Non-Designated-Place Offense.

The nondelegation doctrine provides that "Congress may not constitutionally delegate its legislative power to another branch of Government."[250] The Supreme Court struck down two federal statutes in 1935 for violating the nondelegation doctrine,[251] but has not struck down a statute on that basis since.[252] Still, the doctrine has generated significant academic interest and calls for its revival.[253] In 2018, just as the Trump

244. *See id. See generally* Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481 (2010) (describing the early years of Operation Streamline); Fish, *supra* note 29, at 1897–905 (discussing the evolution of Operation Streamline through the first Trump administration); Keller, *supra* note 122, at 125–37 (discussing the evolution of Operation Streamline and its general ineffectiveness).

245. *See* Fish, *supra* note 29, at 1899–901.

246. *Id.* at 1906 n.86. The U.S. Attorney in the Southern District of California declined to adopt Operation Streamline because "she considered it a waste of government resources," and President Bush later fired her, in part for her refusal. *Id.*

247. *Id.* at 1905–06.

248. *Id.* at 1907–19 (discussing the efforts of the defense bar in the Southern District of California to combat Operation Streamline); Eagly, *supra* note 243, at 2005–09 (same).

249. Both authors were federal public defenders in the Southern District of California during the time in which President Trump brought Operation Streamline to the Southern District of California. Doug was on a special task force created within the office to defend individuals charged as part of the program. Some of the discussion that follows comes from his personal knowledge. Eric has also written an article that broadly discussed the office's efforts to combat the program. *See* Fish, *supra* note 29, at 1907–19.

250. Touby v. United States, 500 U.S. 160, 165 (1991).

251. Gundy v. United States, 139 S. Ct. 2116, 2129 (2019).

252. *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

253. *See*, *e.g.*, Martin H. Redish, *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 LOY. U. CHI. L.J. 363, 368 (2019) (arguing for a revival of the nondelegation doctrine); Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019) (arguing that, even though the nondelegation doctrine

administration talked about expanding Operation Streamline, the Supreme Court granted review in *Gundy v. United States*,[254] a case asking whether the Sex Offender Registration and Notification Act[255] violated the nondelegation doctrine.[256] In that act, Congress had delegated to the attorney general the power to determine whether the act's criminal prohibition applied retroactively to offenders who had committed their sex crime before the act's enactment.[257] When the Court granted review to determine whether that provision violated the nondelegation doctrine, many thought that the Court intended to breathe new life into the doctrine and usher in a revolution in administrative law.[258]

The federal defenders' office in 2018 wanted to get in front of that coming wave—a wave, incidentally, that never came.[259] As a result, immediately before the government officially brought Operation Streamline to the Southern District of California, public defenders started to raise nondelegation challenges to the Non-Designated-Place Offense. With that offense, Congress made it a crime for a noncitizen to enter the United States "at any time or place other than as designated by immigration officers."[260]

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has not resulted in the striking down of any federal statute, it has still affected the development of the law); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000) (arguing that the nondelegation doctrine should be considered as a series of interpretation canons).

254. 139 S. Ct. 2116 (2019).

255. 34 U.S.C. §§ 20901–20962.

256. *Gundy*, 139 S. Ct. at 2121.

257. 34 U.S.C. § 20913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).").

258. From the time in which the Court granted review in *Gundy* to the time it issued a decision, many commentators suggested the decision could revolutionize the moribund nondelegation doctrine. *See*, *e.g.*, Matthew Cavedon & Jonathan Skrmetti, *Party Like It's 1935?:* Gundy v. United States *and the Future of the Non-Delegation Doctrine*, 19 FEDERALIST SOC'Y REV. 42, 42 (2018) (explaining that *Gundy* could be "historically important" and would likely "be a landmark decision"). More generally, the grant of certiorari at the time garnered significant attention and numerous commentators wrote about what the Court might do. *See generally, e.g.*, Jennifer L. Mascott, Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 GEO. MASON L. REV. 1 (2018) (discussing *Gundy* in depth, including the court filings and the oral argument, before the Court issued a decision).

259. In *Gundy* itself, a four-justice plurality of the Court held under traditional nondelegation principles—which were incredibly deferential to Congress—that Congress had not improperly delegated its legislative authority to the executive branch in the Sex Offender Registration and Notification Act. 139 S. Ct. at 2121 (plurality opinion). Justice Alito concurred in the judgment, noting that because a "majority" of the Court was unwilling to "reconsider the approach" it had taken in nondelegation cases "for the past 84 years," he would not either. *Id.* at 2130–31 (Alito, J., concurring). Justice Gorsuch, Chief Justice Roberts, and Justice Thomas dissented and suggested a more robust version of the nondelegation doctrine. *Id.* at 2131−48 (Gorsuch, J., dissenting). Justice Kavanaugh took no part in the decision. *Gundy*, then, did not even make a ripple in the law, let alone usher in a tidal wave of change. Since *Gundy*, the Court has shown no appetite to make the nondelegation doctrine more robust.

260. 8 U.S.C. § 1325(a)(1).

Congress, then, delegated to executive branch officials—and lowly immigration officers at that—the power to decide the location of designated entry points and the times they could be open. The challenge argued that this delegation of authority violated the nondelegation doctrine.[261]

To avoid the nondelegation challenge, the government stopped charging noncitizens arrested between ports of entry with the Non-Designated-Place Offense. Instead, the government charged those defendants with the Elude Offense, a crime that did not include any legislative delegation of authority.

Previously, the government had occasionally charged defendants along the border with the Elude Offense, even if they entered the United States *between* ports of entry, contrary to the traditional understanding of the crime as only regulating entries *at* a port of entry.[262] To defend this view, the government, at least in the Southern District of California, argued that when a noncitizen crosses into the United States by traversing through the desert between designated entry points, the noncitizen will have necessarily "elude[d] examination or inspection by immigration officers."[263]

Even under this view, the Elude Offense still regulated an improper *entry*, but the improper entry could occur anywhere along the border where the noncitizen did not submit to an examination and inspection. Indeed, when the Trump administration started charging defendants with the Elude Offense, the government never suggested that the offense was a continuing one that lasted beyond the improper entry. In fact, the United States Court of Appeals for the Ninth Circuit had already held, in 1979, that the offense was complete at the moment of entry and thus not a continuing offense.[264]

In 2019, the Ninth Circuit addressed the appropriateness of the government's improper entry charging practice in the Southern District of California in *United States v. Corrales-Vazquez*.[265] In that case, Mr. Corrales crossed into the United States between ports of entry and immigration officials arrested him several hours later while he hid in some brush.[266] That is, Mr. Corrales "enter[ed] . . . the United States at [a] time [and] place other than as designated by immigration officers."[267] He had

261. Years later, the United States Court of Appeals for the Ninth Circuit rejected the nondelegation challenge to the Non-Designated-Place Offense in *United States v. Melgar-Diaz*, 2 F.4th 1263 (9th Cir. 2021), a case litigated by one of the authors, Doug Keller.

262. Ironically, the defendant in the case in which the Ninth Circuit originally held that the Elude Offense was not a continuing offense had actually been mischarged, because he had crossed into the United States outside a designated entry point. United States v. Rincon-Jimenez, 595 F.2d 1192, 1193 (9th Cir. 1979). The Ninth Circuit, however, reversed his conviction on statute of limitations grounds, and the court never addressed whether the government had properly charged the defendant to begin with. *Id.*

263. 8 U.S.C. § 1325(a)(2).

264. *Rincon-Jimenez*, 595 F.2d at 1193–94 (explaining that the Elude Offense is not a "continuing one" because the crime is "consummated at the time an alien gains entry through an unlawful point and does not submit to [medical and physical] examinations").

265. 931 F.3d 944 (9th Cir. 2019). One of the authors, Doug Keller, litigated *Corrales-Vazquez*.

266. *Id.* at 946.

267. 8 U.S.C. § 1325(a)(1).

thus committed the Non-Designated-Place Offense, but the government did not charge him with that offense. Instead, following its new charging practice, the government charged him with the Elude Offense.[268]

Mr. Corrales had a bench trial and was convicted.[269] On appeal, the Trump administration defended the conviction, contending that the defendant had committed the Elude Offense, even if he had also committed the Non-Designated-Place Offense.

In an opinion authored by Judge Jay S. Bybee—a noted judicial conservative—the Ninth Circuit rejected the Trump administration's broad definition and limited the Elude Offense to its original meaning: crossing into the United States at a port of entry, where the examination and inspection process takes place, and eluding the examination and inspection.[270] To support its conclusion, the court pointed to the text of the Elude Offense. The court acknowledged that it could define the word "elude" broadly as "'evad[ing] compliance with or fulfilment of' an obligation," an interpretation consistent with the government's preferred reading of the statute.[271] However, the court explained that "not every 'word in a statute . . . extend[s] to the outer limits of its definitional possibilities'" and that the government's definition sat "uncomfortably with common usage."[272] "In 1929, as today," the court explained, "the verb 'elude' was more commonly used to mean 'avoid slyly, by artifice, stratagem, or dexterity,' or 'escape from in a covert manner.'"[273] The court explained that, given that the word "elude" suggests some slyness, it followed that the word "elude" generally "contemplates a risk of exposure to, and subsequent escape from, the object being eluded."[274] Thus, a noncitizen "eludes" an examination and inspection only if he or she crosses into the United States "at a time and place where the alien is at risk of undergoing those processes in the first place."[275] This suggested that a noncitizen could commit the Elude Offense only where the examination and inspection process was supposed to occur.[276]

This understanding of the Elude Offense also fits the structure of the Illegal Entry provision more generally. As discussed earlier, the Non-Designated-Place Offense criminalized improper entry *between* ports of entry, while the Elude Offense and the Misrepresentation Offense covered improper entries *at* ports of entry. This reading of the statute allowed it to "work[] as a seamless whole."[277] The Trump administration's reading of the statute—that a noncitizen eluded examination and inspection

268. *Corrales-Vazquez*, 931 F.3d at 946.
269. *Id.*
270. *Id.* at 948–53.
271. *Id.* at 948 (quoting 3 OXFORD ENGLISH DICTIONARY 97 (1st ed. 1933)).
272. *Id.* (quoting Abuelhawa v. United States, 556 U.S. 816, 820 (2009)).
273. *Id.* (quoting WEBSTER'S NEW INT'L DICTIONARY 713 (1st ed. 1930) and citing other dictionaries).
274. *Id.* at 949.
275. *Id.*
276. *See id.*
277. *Id.* at 950.

by crossing into the United States between ports of entry—"disrupt[ed]" the statutory scheme's "careful structure."[278]

The court added that the government's interpretation also violated a basic canon of interpretation: Congress does not draft statutes with surplusage.[279] The government's proposed broad interpretation of the Elude Offense meant there would have been no need for Congress to create the Non-Designated-Place Offense at all. Under the government's interpretation, *every* defendant who entered between ports of entry and thus committed the Non-Designated-Place Offense would have also necessarily committed the Elude Offense.[280] Indeed, the government had to concede that, under its broad view of the Elude Offense, "there is no set of facts that would have been criminal" under the Non-Designated-Place Offense that would not also constitute a violation of the Elude Offense.[281] Thus, a fundamental rule of statutory interpretation, that Congress does not create entirely "superfluous" provisions,[282] strongly suggested that the government had misread the statute.

Having vindicated the traditional understanding of the Elude Offense, the court vacated Mr. Corrales's conviction.[283] There was insufficient evidence to convict him of that offense. Indeed, given that he indisputably did not cross into the United States at a designated entry point, the evidence conclusively proved his factual innocence of the Elude Offense.

Following *Corrales-Vazquez*, the government vacated nearly 500 convictions for the Elude Offense then pending on appeal.[284] Nearly every other conviction obtained under Operation Streamline in the Southern District of California for the first year and a half of the program became subject to collateral attack because almost none of the defendants tried to sneak into the United States at a designated entry point.[285] While there are many decisions discussing the Non-Designated-Place Offense,[286]

278. *Id.*
279. *Id.* at 950–51.
280. *Id.*
281. *Id.* at 951.
282. *Id.* at 950.
283. *Id.* at 954.
284. Maya Srikrishnan, *Hundreds of Illegal Entry Convictions Will Be Overturned*, VOICE OF S.D. (Feb. 12, 2020), https://voiceofsandiego.org/2020/02/12/hundreds-of-illegal-entry-convictions-will-be-overturned/ [https://perma.cc/PD7D-WW5D]. Many defendants who pled guilty preserved whether they were guilty of the Elude Offense by challenging the factual basis. *See infra* Part IV.B. They then appealed their conviction and argued that there was an insufficient factual basis for their guilty plea. *See infra* Part IV.B.
285. To the authors' knowledge, only one defendant of the thousands charged with the Elude Offense during the first year and half of Operation Streamline in the Southern District of California was actually properly charged with the crime. In that case, the defendant snuck into the United States at the San Ysidro Port of Entry by dressing as a construction worker to blend in with construction crews. He was caught and charged with the Elude Offense.
286. *See, e.g.*, United States v. Melgar-Diaz, 2 F.4th 1263, 1266–70 (9th Cir. 2021) (addressing nondelegation and vagueness challenges to the Non-Designated-Place Offense); United States v. Aldana, 878 F.3d 877, 882–83 (9th Cir. 2017) (addressing the scope of the "designated time or place" element of the Non-Designated-Place Offense); United States v. Rizo-Rizo, 16 F.4th 1292, 1294–98 (9th Cir. 2021) (addressing appropriate mens rea for the

Corrales-Vazquez remains the only one to meaningfully discuss the Elude Offense.[287]

* * *

In sum, for nearly a century, there was a consensus that the three offenses that made up the Illegal Entry crime each addressed the act of improper entry and were thus "completed upon physical arrival in the United States."[288] Due to this consensus, "[p]rosecution" for any of the three offenses was "forbidden by the Constitution" in "any district other than that in which the illegal entry can be proved."[289] These were not offenses that criminalized the ongoing status of having entered without examination and inspection. Moreover, the three offenses—the Non-Designated-Place Offense, the Elude Offense, and the Misrepresentation Offense—each criminalized a particular form of improper entry.

III. THE IMPLAUSIBILITY OF THE OFFICE OF LEGAL COUNSEL'S NEW INTERPRETATION

This part returns to the 2025 OLC Memo that addresses whether the government can prosecute the Elude Offense "only in the district in which the alien entered the United States."[290] The memo concludes that a defendant continues to commit the Elude Offense until their apprehension.[291] This renders the Elude Offense a continuing offense that can be prosecuted in the district of apprehension, the district of entry, and anywhere between.[292] It gives the government significant power to obtain criminal search warrants and prosecute noncitizens for their undocumented status in the interior of the country.

As explained below, the Elude Offense is not a continuing offense. Instead, it criminalizes a certain type of improper entry into the United States and nothing more. The OLC's contrary view conflicts with settled principles of statutory interpretation. And the OLC never engages with most of the evidence that undermines its position.

Non-Designated-Place Offense); United States v. Perez-Velasquez, 16 F.4th 729, 731–32 (10th Cir. 2021) (addressing the scope of the "enter" element in the Non-Designated-Place Offense).

287. The only other two published cases to discuss the Elude Offense also came from the Ninth Circuit. First, in *United States v. Oscar*, 496 F.2d 492, 494 (9th Cir. 1974), the Ninth Circuit held that a defendant who goes through the examination and inspection process at the port of entry has not eluded examination, even if they made misrepresentations during the process. Second, as mentioned already, the Ninth Circuit held that the Elude Offense was not a continuing one in *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1193–94 (9th Cir. 1979).

288. Letter from S.A. Andretta, *supra* note 188.

289. *Id.*

290. 2025 OLC Op., *supra* note 9, at 1.

291. *Id.* at 6.

292. *Id.* at 2.

A. The Elude Offense is Not a Continuing Offense

We begin with the affirmative case for why the Elude Offense is not a continuing offense. The Elude Offense criminalizes a certain type of improper entry—sneaking into the United States at a port of entry without going through the required examination and inspection process. Accordingly, the only district in which the offense occurs, and thus the only district in which it can be prosecuted, is the district of the improper entry. This conclusion finds support in statutory text and structure, legislative history, the executive branch's own historical understanding of the crime, precedent, and various canons of construction.

1. The Longstanding Executive and Judicial Branch Consensus

Before evaluating the scope of the Elude Offense, it is worth resituating the OLC's claim about the crime—that it criminalizes the ongoing status of undocumented presence rather than just the bare act of improper entry—in historical context. This context helps emphasize the novelty of the OLC's claim. The context also has practical and legal relevance when considering the plausibility of its claim.

Before the 2025 OLC Memo, many executive branch officials—including high-ranking officials—understood Illegal Entry (including the Elude Offense) as an entry-focused crime that could only be prosecuted in the district of entry. As already described, various DOJ officials concluded no later than 1952 that the entire Illegal Entry crime, including the Elude Offense, could only be prosecuted in the district of entry.[293] The INS commissioner accepted this view by 1953.[294] So too did the INS general counsel.[295] The first U.S. Attorneys' Manual memorialized this view.[296] Later, in 1978, the OLC treated the Elude Offense as a noncontinuous offense, echoing a district court decision.[297] On the other hand, it does not appear that *any* high-ranking executive branch official concluded that the Elude Offense criminalized the ongoing status of undocumented presence before the OLC in 2025.

The views of the executive branch do not bind courts. That said, courts "exercising independent judgment often" give "due respect to Executive Branch interpretations of federal statutes," "especially . . . when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time."[298] Thus, the executive branch's longstanding views on the Illegal Entry provision deserve consideration, especially because its views were not self-serving

293. *See supra* notes 177–208 and accompanying text.
294. *See supra* note 199 and accompanying text.
295. *See supra* note 200 and accompanying text.
296. U.S. Dep't of Just., U.S. Att'ys' Manual 77 (1953).
297. 1978 OLC Op., *supra* note 10, at 110−11.
298. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2248 (2024).

and many of them were articulated around the time Congress recodified Illegal Entry into its current home at 8 U.S.C. § 1325.

Setting aside the legal significance of the executive branch's views, they certainly have some practical significance. If the Elude Offense is actually a continuing offense that criminalizes an ongoing status, it is hard to believe that so many executive branch officials overlooked this for so long, especially when it would have been in their interest to more broadly define the crime. A novel interpretation of a nearly century-old statute is typically not the correct one.

In its 2025 memo, the OLC ignores the prior views of the executive branch, other than to reference its own 1978 Memo, which it dismisses as resting on nothing but an "assumption" that the Elude Offense is not a continuing offense.[299] It thus never justifies its decision to depart from the executive branch's long-held interpretation. The OLC's position, then, is that it has uncovered a secret meaning to the Elude Offense—a meaning that happens to support the president's efforts to prosecute large numbers of immigrants—that everyone else overlooked for decades. That position should draw skepticism.

A court addressing the Elude Offense's scope will also need to grapple with the Supreme Court's historical view of the crime. The Supreme Court affirmed in *Cores* that the "crimes of illegal entry set out in" § 1325 and § 1326 are "not continuing ones, as 'entry' is limited to a particular locality and hardly suggests continuity."[300] While this statement and the discussion that followed are dicta, the lower federal courts must give Supreme Court dicta significant weight, especially when—as is the case here—it is reasoned dicta that is part of a sustained discussion.[301]

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299. 2025 OLC Op., *supra* note 9, at 5. OLC's claim in its 2025 memo that its 1978 memo merely assumed without deciding that the Elude Offense is not a continuing one is not well founded. While its 1978 memo does not provide independent analysis, it begins by explaining that a district court had held that the Elude Offense is not a continuing offense. *See* 1978 OLC Op., *supra* note 10, at 110−11. From there, the memo concludes that the Elude Offense cannot be lawfully prosecuted outside the district of entry. *Id*. The memo then recommends that the U.S. Attorneys' Manual be amended to require that the Elude Offense "be prosecuted in the district where the inspection station to which the alien was to have reported on entering the United States is located." *Id.* at 112. If the OLC's 1978 memo had merely assumed without deciding that the Elude Offense was not a continuing offense, it would not make sense to recommend that the U.S. Attorneys' Manual be amended. It is true that the OLC's 1978 memo does not explicitly justify the conclusion that the Elude Offense is not a continuing offense. The lack of justification is what led the OLC in 2025 to conclude that it had not actually considered whether the Elude Offense was a continuing offense. 2025 OLC Op., *supra* note 9, at 5. The 1978 OLC Memo did not rest on a thoughtless assumption that the Elude Offense was not a continuing offense. It rested on a proposition that the executive branch had long accepted. Indeed, by not disclosing the significant historical record on the issue, OLC masks the radicalness of its position. Before its 2025 memo, no one—at least no high-ranking official—had concluded that the Elude Offense was a continuing offense.

300. United States v. Cores, 356 U.S. 405, 408 n.6 (1958).

301. *See*, *e.g.*, McCoy v. Mass. Inst. Tech., 950 F.2d 13, 19 (1st Cir. 1991) ("We think that federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings."); Coeur D'Alene Tribe of Idaho v. Hammond,

The 2025 OLC Memo acknowledges *Cores* but tries to downplay the decision by pointing out that it did not specifically reference the Elude Offense (located at the time in § 1325(2)).[302] According to the OLC, when *Cores* referenced "entry" and "illegal entry," it was referring only to the Non-Designated-Place Offense (located at the time in § 1325(1)) because it includes an element of "enter."[303]

Cores, however, cited § 1325 generally, not the specific subsection for the Non-Designated-Place Offense.[304] The Court used a common shorthand, "illegal entry," that refers to the Non-Designated-Place Offense, the Elude Offense, and the Misrepresentation Offense individually and collectively. Many courts, in fact, have referred to the Elude Offense as "illegal entry."[305] And, of course, each of the crimes requires the government to prove an improper entry. With the Elude Offense, for example, the government cannot prove that a defendant eluded examination and inspection without proving that the defendant crossed into the United States and effectuated an improper entry. Thus, it is entirely natural to refer to the offenses in § 1325 individually and collectively as "illegal entry."

In short, while neither *Cores*'s dicta nor the executive branch's own long-accepted view of Illegal Entry binds any court, they should compel any court now addressing the issue to start from a presumption that the Elude Offense is not a continuing offense. It is possible that both the Supreme Court and numerous executive branch officials missed that the Elude Offense actually criminalizes the ongoing status of undocumented presence. But it seems unlikely.

2. The Presumption Against Continuing Offenses

The presumption that the Elude Offense is not a continuing offense also finds support in the more general principle, recognized by the Supreme Court, that "the doctrine of continuing offenses should be applied in only

384 F.3d 674, 683 (9th Cir. 2004) ("[W]e give great weight to dicta of the Supreme Court."); NLRB v. Bluefield Hosp. Co., LLC, 821 F.3d 534, 541 n.6 (4th Cir. 2016) ("We give great weight to Supreme Court dicta."); Fortin v. Comm'r of Soc. Sec., 112 F.4th 411, 423 (6th Cir. 2024) ("[W]e give Supreme Court dicta great weight."); Littlejohn v. Sch. Bd., 132 F.4th 1232, 1241–42 (11th Cir. 2025) (providing "substantial weight" to reasoned Supreme Court dicta); United States v. Caro, 260 F.3d 1209, 1210 (10th Cir. 2001) (giving "great weight to the dicta of the Supreme Court").

302. 2025 OLC Op., *supra* note 9, at 14–15.

303. *Id.*

304. *Cores*, 356 U.S. at 408 n.6 (citing 8 U.S.C. § 1325).

305. *See*, *e.g.*, United States v. Herrera-Perez, No. 18-mj-22672, 2025 WL 762701, at *1 (S.D. Cal. Mar. 11, 2025) ("Herrera was arrested and charged with illegal entry in violation of 8 U.S.C. § 1325(a)(2)."); United States v. Patel, No. 23-CR-30076, 2025 WL 80388, at *1 (S.D. Ill. Jan. 13, 2025) (noting that the defendant had been charged with "one count of illegal entry in violation of 8 U.S.C. §§ 1325(a)(2) and 1329"); United States v. Chavez-Diaz, 949 F.3d 1202, 1204 (9th Cir. 2020) (stating that the defendant had been "charged with misdemeanor illegal entry in violation of 8 U.S.C. § 1325(a)(2)"); United States v. Carpio-Leon, 701 F.3d 974, 975 (4th Cir. 2012) (explaining that the defendant had been charged with "illegal entry into the United States, in violation of 8 U.S.C. § 1325(a)(2)").

limited circumstances."[306] This, too, suggests that when a court begins to resolve whether the Elude Offense criminalizes post-entry conduct, it should start from a presumption that the offense is committed and completed at the point of the improper entry.

The 2025 OLC Memo references this presumption but suggests that it only has currency when deciding whether an offense is a continuing one for purposes of the statute of limitations, not venue.[307] In support, the OLC notes that some courts have held that the continuing offense analysis differs in the venue context versus the statute of limitations context.[308]

Even if that is generally true, it does not help the OLC here. The Supreme Court has held that statutes of limitations start to run when the crime is "complete."[309] Under the OLC's view, a defendant who improperly enters the United States by eluding examination and inspection does not exclusively commit the crime at the moment of entry. Instead, the crime continues "until they are caught."[310] Thus, under the government's view, the Elude Offense is a continuing one for purposes of the statute of limitations. In fact, federal prosecutors now charge the Elude Offense as though it did not have a statute of limitations. Using the OLC's interpretation, they have charged people—like Mr. Franco-Sandoval, discussed in this Article's introduction—who allegedly improperly entered the country decades before their arrest.[311] The OLC's interpretation thus triggers the presumption against continuing offenses, even if that presumption is limited to the statute of limitations context.

3. Statutory Text, Statutory Structure, and Legislative History

Statutory text, structure, and legislative history also support the conclusion that the Elude Offense criminalizes the act of improper entry. Given that the Elude Offense involves a discrete act that occurs in the district of entry,[312] venue is constitutionally appropriate in that district and nowhere else.

When interpreting a statute, the Supreme Court has instructed that courts should "begin . . . with the statutory text."[313] So that's where we will

306. Toussie v. United States, 397 U.S. 112, 115 (1970).
307. 2025 OLC Op., *supra* note 9, at 15.
308. *Id.* (citing United States v. Reitmeyer, 356 F.3d 1313, 1323 (10th Cir. 2004)). Even circuits that have held that the continuing offense analysis in the venue and statute of limitations context is not identical—for example, the United States Court of Appeals for the Tenth Circuit in *Reitmeyer*, 356 F.3d at 1313—have also held that the "two concepts are clearly related." United States v. Dunne, 324 F.3d 1158, 1166 (10th Cir. 2003).
309. *Toussie*, 397 U.S. at 115 (quoting Pendergast v. United States, 317 U.S. 412, 418 (1943)).
310. 2025 OLC Op., *supra* note 9, at 6.
311. *See, e.g.*, Misdemeanor Information, *supra* note 1, at 1–2.
312. United States v. Anderson, 328 U.S. 699, 703 (1946).
313. Maslenjak v. United States, 582 U.S. 335, 341 (2017).

begin. As a reminder, the Elude Offense makes it a crime for a noncitizen to "elude[] examination or inspection by immigration officers."[314]

First, the verb "elude." As *Corrales-Vazquez* explained, "[i]n 1929, as today, the verb 'elude'" typically means "avoid slyly, by artifice, stratagem, or dexterity," or "escape from in a covert manner."[315] And because there is a flavor of avoiding something by cunning, the verb "elude . . . generally contemplates a risk of exposure to, and subsequent escape from, the object being eluded,"[316] a definition that the 2025 OLC Memo cites approvingly.[317] To use a football analogy, a wide receiver "eludes" a tackle by slipping by the outstretched arms of the defender; it is somewhat less natural to say that the wide receiver eludes the defenders when running up the field uncovered. In the immigration context, the object being eluded is the "examination or inspection by immigration officers,"[318] a process that should occur at a designated entry point and "at the time of entry, a fixed point in time."[319]

Putting this together, the Elude Offense criminalizes sneaking into the United States at an open designated entry point without going through the required examination and inspection process.[320] Once the noncitizen sneaks past this process that occurred at a "fixed point in time,"[321] the offense is complete. The noncitizen has eluded the examination and inspection because the improper entry has occurred. There are no more "acts constituting" the offense,[322] and venue is thus only proper in the district where entry occurred.

Indeed, consider the example of a noncitizen who crosses into the United States at a port of entry in Texas by hiding in someone's car trunk and then later settles in Utah. In that situation, it would not be natural to say that the noncitizen is eluding border officials in Utah. He or she *eluded* them at the border.

Furthermore, interpreting the Elude Offense as criminalizing a noncitizen's improper entry at a designated entry point creates, in the words of the Ninth Circuit, a "seamless" statutory framework when considered alongside the other entry-related crimes in § 1325.[323] Each offense criminalizes a particular type of improper entry. The Non-Designated-Place Offense makes it a crime to improperly enter the United States by crossing into the country outside of a designated entry

314. 8 U.S.C. § 1325(a)(2).

315. United States v. Corrales-Vazquez, 931 F.3d 944, 948 (9th Cir. 2019) (quoting WEBSTER'S NEW INT'L DICTIONARY 713 (1st ed. 1930)).

316. *Id.* at 949.

317. 2025 OLC Op., *supra* note 9, at 6 n.3.

318. 8 U.S.C. § 1325(a)(2).

319. *Corrales-Vazquez*, 931 F.3d at 953 (quoting United States v. Rincon-Jimenez, 595 F.2d 1192, 1193–94 (9th Cir. 1979)).

320. *Id*.

321. *Id.* at 953 (quoting *Rincon-Jimenez*, 595 F.2d at 1193–94).

322. United States v. Anderson, 328 U.S. 699, 703 (1946).

323. *Corrales-Vazquez*, 931 F.3d at 950.

point.[324] The Misrepresentation Offense makes it a crime to improperly enter the United States at a designated entry point by lying to immigration officials.[325] The Elude Offense makes it a crime to improperly enter the United States in the only other way that one can: by eluding immigration officials conducting the required examination and inspection at the port of entry.[326]

Interpreting the Elude Offense in this way also ensures that the entire Illegal Entry statute has legal effect—that none of it is surplusage.[327] If a noncitizen could commit the Elude Offense simply by entering the United States anywhere without undergoing an examination and inspection, the completed Non-Designated-Place Offense would be superfluous.[328] It does not make sense that Congress would make the Elude Offense so broad that it would swallow the Non-Designated-Place Offense.

Considering the Elude Offense in the context of its statutory neighbors provides additional confirmation that it is not a continuing offense. As the OLC seems to concede, Congress did not intend for the Non-Designated-Place Offense or the Misrepresentation Offense to be continuing offenses.[329] Thus, if a noncitizen sneaks into the United States outside a designated entry point, or if a noncitizen sneaks into the United States by lying to immigration officials at a designated entry point, their offense would terminate at the moment of the improper entry. Why, then, would Congress want sneaking into the United States at a port of entry through cunning to be a continuous offense? Take the example of a noncitizen who entered the United States in Texas and was then apprehended in Utah. It is hard to imagine why Congress would have wanted that individual to face liability in Utah if they snuck into the country by stealthily crossing at a port of entry, but not if they either lied to an inspection agent or crossed between ports of entry.

Legislative history confirms that the Elude Offense is an entry-focused crime, not a crime concerning an ongoing status.[330] Congress created the crime to regulate noncitizens seeking to "enter the United States surreptitiously,"[331] and it enacted a regime "broad enough to cover entry in any manner."[332] These crimes were focused on improper entry at the border, not undocumented presence in the interior of the country. Moreover, the legislative history of Congress's choice of the word "elude"

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324. 8 U.S.C. § 1325(a)(1).
325. *Id.* § 1325(a)(3).
326. *Id.* § 1325(a)(2).
327. *See Corrales-Vazquez*, 931 F.3d at 950−52.
328. In 1990, Congress added attempt liability to the Non-Designated-Place Offense. Immigration Act of 1990, Pub. L. No. 101-649, § 543(b)(2), 104 Stat. 4978, 5059. Technically, only the completed offense would be surplusage under OLC's interpretation in the current version of the statute. *See Corrales-Vazquez*, 931 F.3d at 951–52.
329. *See* 2025 OLC Op., *supra* note 9, at 13−14.
330. Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist., 467 U.S. 380, 396 (1984).
331. H.R. REP. NO. 70-2418, at 8 (1929).
332. *Id.* at 4.

confirms that it had nothing to do with creating an ongoing offense.[333] Congress simply borrowed the word from a similar Canadian statute that had worked "satisfactorily" in Canada, a word that would ensure that otherwise innocent conduct at the port of entry was not criminalized.[334]

More generally, the Congress that enacted the Illegal Entry and Illegal Reentry offenses had serious concerns about the interior enforcement of immigration law. As discussed, during the 1920s—including in 1929—Congress consistently rejected proposals that would have allowed border patrol to make warrantless arrests of noncitizens in the country's interior.[335] It is hard to imagine that the same Congress that wanted to limit border patrol's arrest authority in the interior would have created a continuing immigration crime that would allow for the arrest of noncitizens in the interior. Finally, even if a court still doubted whether the Elude Offense is a continuing one, the rule of lenity would be a tie breaker.[336]

Accordingly, text, statutory structure, and legislative history all help confirm what *Cores* said and what the executive branch has long claimed: each of these Illegal Entry crimes, including the Elude Offense, is not a continuing offense.[337] They are entry-focused crimes that must be prosecuted in the district of the improper entry.

B. Considering the OLC's Arguments

Now we will consider the arguments that the 2025 OLC Memo makes in favor of its new interpretation. There are three: a textual argument concerning the meaning of "eludes" and two structural arguments based on other statutory provisions.

1. The Word "Eludes"

The OLC first tries to establish that the Elude Offense is a continuing one by relying on a "plain English" argument.[338] Though it agrees with the previously discussed definition of "eludes"—including that the word "generally contemplates a risk of exposure to, and subsequent escape from, the object being eluded"[339]—the OLC argues that the Elude Offense is a continuing one because "a person eludes authorities until they are caught, which suggests that the offense continues in the meantime."[340] In support, the OLC draws an analogy to the crime of escape, which is considered a "continuing offense," at least for purposes of applying the affirmative

333. *See Proposed Deportation Legislation*, *supra* note 22, at 9.
334. *Id.*
335. *See* Nash, *supra* note 20, at 1337–40.
336. *See* Shular v. United States, 140 S. Ct. 779, 787 (2020) (stating that the rule of lenity applies when statutory ambiguity remains after applying traditional tools of interpretation).
337. United States v. Cores, 356 U.S. 405, 408 n.6 (1958).
338. 2025 OLC Op., *supra* note 9, at 6.
339. *Id.* at 6–7 n.3.
340. *Id.* at 6.

defenses of duress and necessity.[341] While this interpretation is conceivable, we think reading the Elude Offense as noncontinuing is a much better fit with the text.

Admittedly, it is linguistically possible to say that one eludes authorities until they are caught, including that an escaped prisoner eludes authorities until apprehension. But, as *Corrales-Vazquez* pointed out, "not every 'word in a statute . . . extend[s] to the outer limits of its definitional possibilities.'"[342] As the Supreme Court has put it: "[A] statute's meaning does not always turn solely on the broadest imaginable definitions of its component words."[343] Here, there are good reasons to think that Congress did not intend the broadest possible interpretation of the word "eludes." It is more likely, for the reasons already discussed, that Congress intended "eludes" to refer to the completed act of improper entry.[344]

Further, the OLC's analogy of the Elude Offense to the crime of escape is inapt. When a noncitizen slips into the country, at a port of entry or otherwise, they are not *escaping*. Instead, they are *sneaking in*. And by sneaking into the country, they are not checking into the United States at a designated entry point, the place where they are legally obligated to do so.

The better analogy is to someone who fails to report to prison, rather than to someone who breaks out of prison. For over one hundred years, the Supreme Court has held that when a defendant fails to perform a "legally required act," the appropriate venue is where they were supposed to perform the legal obligation, rather than where they were found.[345] Based on this principle, when a defendant fails to report to prison, or when a defendant is furloughed from prison and fails to return—a crime under 18 U.S.C. § 4082—the proper venue is where the prisoner was supposed to report.[346] The U.S. Attorneys' Manual confirms this settled principle:

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341. The OLC cites *United States v. Bailey*, 444 U.S. 394 (1980), which addressed whether a prisoner who escapes from custody can claim duress or necessity when they do not promptly turn themselves in. 2025 OLC Op., *supra* note 9, at 6. In *Bailey*, the Court held that a defendant is liable for escaping from custody and then not returning. 444 U.S. at 412–13. Given that the statute criminalized the act of not returning, the defendant would need to prove that, even post-escape, the defense of necessity and duress prevented him from returning to custody. *Id.* In that sense, the Court stated that the crime of escape in 18 U.S.C. § 751 was a "continuing offense." *Id.* at 413. The Court, however, did not address where venue was appropriate for an escape charge.

342. United States v. Corrales-Vazquez, 931 F.3d 944, 948 (9th Cir. 2019) (quoting Abuelhawa v. United States, 556 U.S. 816, 820 (2009)).

343. Dubin v. United States, 143 S. Ct. 1557, 1566 (2023) (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1631 (2018)).

344. This point remains true even if the Elude Offense could occur anywhere along the border.

345. Johnston v. United States, 351 U.S. 215, 220 (1956) (reciting the "general rule" based on cases from 1908, 1916, and 1919 "that where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime").

346. *See, e.g.*, Zerilli v. United States, 706 F.2d 877, 878 (8th Cir. 1983) (explaining that when a statute criminalizes the failure to do a particular act, such as report to an institution, proper venue is where the act was supposed to have taken place rather than where the defendant was when the failure to act occurred); United States v. Rasheed, 981 F.3d 187, 193−94 (2d Cir. 2020) (listing numerous decisions in which a court has concluded that, in

"[A]n inmate released to report to another institution and who fails to report as ordered must be prosecuted for that failure in the district in which he/she was to have reported."[347]

Applying this venue principle to the Elude Offense confirms that it must be prosecuted in the district of the improper entry. The Elude Offense criminalizes the failure of a noncitizen to perform a "legally required act"[348]—that is, to undergo the examination and inspection process at the border. Thus, venue is constitutionally proper in the district of the improper entry, not the district of the defendant's apprehension.

The OLC's attempt to interpret the word "elude" broadly creates another difficulty. It requires applying the word "elude" in situations where the immigrant is no longer eluding any immigration official. Noncitizens who snuck into the United States would be deemed to be eluding immigration officials who were nowhere near them and had no idea the immigrant was even in the country.

In response to this point, the OLC notes that there are ports of entry in places away from the border, like in Omaha, Nebraska.[349] The OLC suggests that a noncitizen could continue to elude examination and inspection in the interior of the country by avoiding these ports of entry.[350] What the OLC appears to have missed, however, is that ports of entry in the interior are invariably airports.[351] Thus, the OLC is claiming that when a noncitizen sneaks into the United States and moves to Nebraska, they are committing the Elude Offense because they are avoiding immigration officials at the international arrivals hall of the Omaha airport. That does not quite make sense.

2. The 8 U.S.C. § 1225 Immigration Inspection Provision

The OLC also appeals to general statutory "context."[352] In addressing statutory context, however, the OLC does not mean the rest of 8 U.S.C.

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cases involving the failure to report to prison, "venue is proper in the district of the receiving facility to which a defendant was obligated (and failed) to report.").

347. U.S. Dep't of Just., Crim. Res. Manual § 1812 (1997), https://www.justice.gov/archives/jm/criminal-resource-manual-1812-venue-furlough-and-walkaway-cases (on file with the *Fordham Law Review*) (citing United States v. Wray, 608 F.2d 722, 725 (8th Cir. 1979); United States v. Dyson, 469 F.2d 735, 737 (5th Cir. 1972); United States v. Clark, 468 F.2d 708, 713 (3d Cir. 1972); United States v. Daniels, 429 F.2d 1273, 1274 (6th Cir. 1970); United States v. Scott, 424 F.2d 285 (4th Cir. 1970); Pitt v. United States, 378 F.2d 608, 610 (8th Cir. 1967); United States v. Neill, 248 F.2d 383, 384 (7th Cir. 1957); United States v. Turner, 244 F.2d 404, 406 (2d Cir. 1957); Jones v. Pescor, 169 F.2d 853, 855 (8th Cir. 1948)).

348. *Johnston*, 351 U.S. at 220.

349. 2025 OLC Op., *supra* note 9, at 9 (citing 8 C.F.R. § 100.4(a)).

350. *See id.*

351. For example, the regulation deeming Billings and Des Moines as ports of entry expressly notes that this is a reference to the "Billings Airport" and the "Des Moines International Airport." 8 C.F.R. § 100.4(a).

352. 2025 OLC Op., *supra* note 9, at 7.

§ 1325. Indeed, the OLC never tries to situate the Elude Offense in the context of the other crimes in the same statute. And the OLC makes no attempt to square its view that Congress wanted to create an ongoing, continuous immigration crime in 1929 with Congress's contemporaneous passage of legislation restricting immigration enforcement in the country's interior. Instead, the OLC points to an entirely different statute, 8 U.S.C. § 1225, which discusses civil immigration inspections.[353] According to the OLC, reading § 1225 and § 1325 in conjunction establishes that the Elude Offense is a continuing offense.

To properly understand the OLC's argument, some background is required. Before 1996, there were two types of removal proceedings: (1) deportation proceedings and (2) exclusion proceedings.[354] Deportation proceedings were for noncitizens "already physically but not lawfully in the United States."[355] Thus, if a noncitizen who snuck into the United States was apprehended, they would be put into deportation proceedings because they were already physically in the country. On the other hand, exclusion proceedings were for noncitizens stopped "outside the United States seeking admission."[356] Noncitizens going through deportation proceedings had more procedural and substantive rights than those going through exclusion proceedings.[357] This created an "anomaly" in which people who tried to lawfully enter the country—by following the official process at a port of entry—were in a worse position than people who successfully snuck into the United States.[358]

In 1996, Congress sought to eliminate this "entry doctrine anomaly."[359] Congress wanted noncitizens stopped at the border and noncitizens who snuck into the country to be treated the same. To achieve this, Congress amended 8 U.S.C. § 1225. The statute was first amended to provide that a noncitizen "in the United States who has not been admitted or who arrives in the United States"—including a noncitizen who enters the United States outside a "designated port of arrival . . . shall be deemed for purposes of this chapter an applicant for admission."[360] Thus, a noncitizen showing up at the port of entry and a noncitizen who snuck into the United States without being examined and inspected would both be applicants for admission. Congress then required that all "applicants for admission . . . shall be inspected by immigration officers."[361] Putting this all together, when immigration officials come across a noncitizen who has not been inspected before, they must conduct an immigration inspection.

353. 8 U.S.C. § 1225.
354. Hose v. Immigr. & Naturalization Serv., 180 F.3d 992, 994 (9th Cir. 1999) (en banc).
355. Torres v. Barr, 976 F.3d 918, 927 (9th Cir. 2020) (en banc) (internal brackets removed).
356. *Id.* (emphasis removed).
357. *Id.* at 927–28.
358. *Id.* at 928.
359. *Id.* (ellipses removed).
360. 8 U.S.C. § 1225(a)(1).
361. *Id.* § 1225(a)(3).

As a result, even when a noncitizen does not go through the lawful inspection process at the designated entry point, an immigration official must still conduct an inspection when encountering the noncitizen.

Now, let us return to the 2025 OLC Memo. According to the OLC, "[i]f immigration officers have an ongoing duty to inspect noncitizen applicants for admission under § 1225, it stands to reason that an illegal alien may continuously elude inspection, even after the specific moment at which he enters the country."[362] The OLC thus suggests that § 1225, when read in conjunction with § 1325, compels the conclusion that the Elude Offense is actually an ongoing offense.[363]

Under this argument, Congress apparently altered the scope of § 1325 when it amended a different statute, 8 U.S.C. § 1225, in 1996. This process—"[a]mendment by implication"—is generally disfavored.[364] If Congress wants to alter the meaning of one statute, it typically amends that statute directly rather than doing it in this "roundabout way."[365] Thus, courts are skeptical of amendment by implication arguments. The Supreme Court will infer an amendment by implication only when there is a "'positive repugnancy' between the provisions of the preexisting and newly enacted statutes, as well as language manifesting Congress's 'considered determination' of the ostensible change."[366]

That standard is not satisfied here. There is no "positive repugnancy,"[367] and there is no language indicating that Congress intended to alter the scope of § 1325 when it amended § 1225. Indeed, this seems like a classic example of why courts disfavor amendments by implication. Congress amended § 1225 to deal with a specific problem—the entry doctrine anomaly—without considering or suggesting that it wanted to alter the meaning of a criminal provision located in another part of Title 8. Requiring immigration officials to conduct a belated inspection of post-entry noncitizens had nothing to do with the lawful entry process set out in § 1325. There is no reason to infer that Congress overruled the consensus view on the Elude Offense by transforming it into a continuing offense through the amendment of a different statute.

Another shortcoming of the OLC's argument stems from its conflation of noncitizens' entry-related obligations with immigration officers' inspection duties. In § 1225, Congress placed on "immigration officers" the administrative duty to inspect any noncitizen encountered who has not been

362. 2025 OLC Op., *supra* note 9, at 7.

363. *See id.*

364. United States v. Welden, 377 U.S. 95, 102 n.12 (1964).

365. Ass'n for Cmty. Affiliated Plans v. U.S. Dep't of Treasury, 966 F.3d 782, 788 (D.C. Cir. 2020).

366. U.S. Ass'n of Reptile Keepers, Inc. v. Zinke, 852 F.3d 1131, 1141 (D.C. Cir. 2017) (quoting Blanchette v. Conn. Gen. Ins. Corp., 419 U.S. 102, 134 (1974)).

367. *Blanchette*, 419 U.S. at 134.

inspected before.[368] In § 1325, by contrast, Congress placed on noncitizens the obligation to enter the United States at an open port of entry, submit to an examination and inspection, and answer all questions truthfully.[369] When a noncitizen fails to discharge this obligation, they have committed a crime under § 1325.[370] Nothing they do after they enter the United States is relevant; they cannot retroactively comply with this already violated obligation, even if an immigration officer later complies with *their* administrative duty to conduct an inspection. Put differently, the noncitizen who sneaks into the United States and is later inspected by an immigration official has not "fulfill[ed] the[ir] statutory duty to submit to an inspection," as the OLC suggests in its memorandum.[371] While the immigration officer has complied with their duty under § 1225 to conduct a post-entry inspection, the noncitizen has already violated their statutory obligation under § 1325 to submit to an examination and inspection at entry.[372]

In short, there is no reason to think that Congress intended to incorporate post-entry inspections into the scope of the Elude Offense when it amended § 1225 in 1996. The "examination or inspection" referenced in § 1325 is the process that occurs at the port of entry.

3. Constitutional Avoidance and the 8 U.S.C. § 1329 Venue Provision

The OLC also suggests that the constitutional avoidance canon supports its interpretation.[373] According to the OLC, if the Elude Offense is not a continuing offense, that "would render the venue provision applicable to § 1325 entirely unconstitutional."[374] In other words, because 8 U.S.C. § 1329 permits the government to prosecute a defendant in the district in which they were "apprehended," failing to interpret the Elude Offense to continue until the defendant's apprehension will render a portion of § 1329 unconstitutional.[375] The OLC argues, then, that the constitutional avoidance canon supports its claim that courts should interpret the Elude Offense as continuing to save the constitutionality of § 1329.[376] Its

368. 8 U.S.C. § 1225(a)(3); *see also* Al Otro Lado v. Wolf, 952 F.3d 999, 1010 (9th Cir. 2020) (explaining that, under 8 U.S.C. § 1225(a)(3), "immigration officers have a duty to inspect").

369. 8 U.S.C. § 1325(a).

370. *Id.*

371. 2025 OLC Op., *supra* note 9, at 9.

372. The Ninth Circuit made a similar point in *Corrales-Vazquez*: "[I]nspections occurring *after*" entry under 8 U.S.C. § 1225(a)(3) would "not fall within the 'inspection' contemplated in § 1325(a)(2)." 931 F.3d 944, 948 n.4 (9th Cir. 2019).

373. 2025 OLC Op., *supra* note 9, at 10−11. The constitutional avoidance canon instructs a court to read statutes to "avoid" confronting a constitutional issue. *See* Clark v. Martinez, 543 U.S. 371, 381 (2005).

374. 2025 OLC Op., *supra* note 9, at 10−11.

375. *Id.*

376. *Id.*

interpretation will allow courts to "avoid" confronting a constitutional issue, the work the constitutional avoidance canon purports to do.[377]

The constitutional avoidance canon has no application here. Regardless of how courts interpret the Elude Offense, there will be constitutional and unconstitutional applications of § 1329. Even if the OLC is correct and the Elude Offense is a continuing offense, there will still be many unconstitutional applications of § 1329. For example, § 1329 authorizes the government to prosecute a defendant for the Non-Designated-Place Offense in the district of "apprehen[sion]" under Clause 2,[378] even if the defendant did not enter in that district. That application would violate the constitutional requirement that prosecution must happen in the state and district where the crime occurred.[379] For this reason, neither competing interpretation of the Elude Offense will allow a court to "avoid" the constitutional issue, and the constitutional avoidance canon cannot do its job.[380]

In addition, the constitutional avoidance canon can be invoked only to resolve "competing *plausible* interpretations of a statutory text."[381] For all the reasons we have discussed, the OLC's interpretation is not a plausible one when text, history, structure, and precedent are considered.

The OLC's reliance on the constitutional avoidance canon also runs into another problem, a problem that the OLC—to its credit—flags.[382] The Supreme Court has explained that it has never before "invoked the canon to *expand* the reach of a criminal statute in order to save it."[383] Here, the OLC is suggesting that the constitutional avoidance canon be invoked to expand a criminal statute to save a related venue provision.[384] Basic due process principles counsel against using avoidance to broaden criminal liability where a statute is ambiguous.[385] The OLC suggests that its interpretation of the Elude Offense is not really expanding the crime because it is not arguing that the offense reaches conduct that it was not "previously understood . . . to reach."[386] But this simply is not true. The OLC is arguing that the Elude Offense should cover post-entry conduct—conduct not criminalized by the competing interpretation. Under the OLC's reading, a defendant could be prosecuted in interior states like Utah for

377. *Clark*, 543 U.S. at 381.

378. As a reminder, under 8 U.S.C. § 1329, the government may bring a prosecution for 8 U.S.C. § 1325 and § 1326 "at any place in the United States [1] at which the violation may occur or [2] at which the person charged with such violation . . . may be apprehended."

379. Moreover, no matter how the Elude Offense is interpreted, the government could constitutionally prosecute a defendant for the Elude Offense in the district of apprehension if they committed the offense in a U.S. territory.

380. *Clark*, 543 U.S. at 381 (emphasis removed).

381. *Id.* (emphasis added).

382. 2025 OLC Op., *supra* note 9, at 11−12.

383. United States v. Davis, 139 S. Ct. 2319, 2323 (2019).

384. 2025 OLC Op., *supra* note 9, at 11−12.

385. *Cf.* Johnson v. United States, 576 U.S. 591, 595 (2015) ("[T]he Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes.").

386. 2025 OLC Op., *supra* note 9, at 11−12 (quoting *Davis*, 139 S. Ct. at 2332).

"eluding examination" within those states. That expands the statute's reach.

Finally, § 1329 actually supports an inference that Congress did not intend the Elude Offense to be a continuing one. If the Elude Offense were a continuing offense, Congress never would have needed to add a special venue provision that permitted prosecution for § 1325 in the district of "apprehension."[387] Under the OLC's view, after all, a noncitizen is continually committing acts of eluding until the moment of apprehension. If that were so, venue would be appropriate in the district of apprehension under normal venue principles: that is, in the district where the offense is committed.

* * *

In short, the OLC's claim that the Elude Offense is a continuing one is not well founded. The available evidence supports the historical consensus that the Elude Offense, like all the Illegal Entry offenses, is an entry-focused crime that can only be prosecuted in the district of entry.

IV. THE RULE-OF-LAW PROBLEM

This Article has shown that the Trump administration, through the OLC, is trying to transform the Elude Offense into the new crime of undocumented presence. How do immigrants charged with this crime challenge the government's interpretation? Unfortunately, it's complicated.

In practice, there are few judicial checks on prosecutors' power to bring these cases. The system's ambient lawlessness creates functional deference to prosecutors' charging decisions. This means that the government can fabricate a crime, pressure defendants into pleading guilty, and then avoid meaningful judicial review. A case going to trial, while possible, is a rare event. We explore this issue and offer a potential solution: pleading guilty and appealing.

A. The Problem Explained

Imagine an immigrant from Mexico charged in federal court in Oklahoma with the Elude Offense. This immigrant crossed into the United States fifteen years ago in Texas by wading through the Rio Grande. The immigrant eventually moved to Oklahoma, and ICE arrested them at their place of employment during an immigration sweep. Based on the discussion above, legal problems with the government's case abound:

(1) The immigrant did not commit the Elude Offense because they did not sneak into the United States *at* a designated entry point, let alone elude an examination and inspection there.[388]

(2) Venue is not proper in Oklahoma because the improper entry did not occur there.[389]

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387. 8 U.S.C. § 1329.
388. *See supra* Part III.
389. 8 U.S.C. § 1329.

(3) The government did not bring charges within the statute of limitations because the improper entry happened more than five years ago.[390]

How does the defendant raise these challenges? As a theoretical matter, there are many options. Before trial, they could move to dismiss the charging document on venue or statute of limitations grounds, assuming those defenses were apparent from the face of the charging document.[391] The defendant could also have a bench trial—as noted, Congress eliminated a defendant's jury trial right in Illegal Entry cases by lowering the maximum penalty to six months[392]—where they could raise those same defenses to a judge sitting as a factfinder.[393] Likewise, at a bench trial, the defendant could challenge the government's reading of the Elude Offense by arguing that the prosecutor must prove that they eluded examination or inspection at a designated entry point.

There is, however, a practical problem with raising these challenges: Each will ordinarily require the defendant to spend extra time in custody.[394] As a result, to contest the government's novel—and, as this Article argues, baseless—interpretation of the Elude Offense, the defendant must pay for the chance with their liberty as the currency. Let's walk through why.

Typically, judges order Illegal Entry defendants detained or impose an unaffordable bond.[395] As a practical matter, then, these individuals remain in custody as long as their criminal cases are pending. This is particularly

390. *See* United States v. Rincon-Jimenez, 595 F.2d 1192, 1194 (9th Cir. 1979) (holding that the five-year statute of limitations applies to Elude Offense under 18 U.S.C. § 3282).

391. On its face, the charging document will sometimes establish that venue is improper. When the defendant does not need to develop facts at trial to establish that venue is improper, the defendant must file a motion to dismiss or risk waiving the issue. *See* United States v. Knox, 540 F.3d 708, 713–14 (7th Cir. 2008); *see also* FED. R. CRIM. P. 12(b)(3) (providing that a defendant "must" raise by "pretrial motion" a challenge to "improper venue" when the issue is "reasonably available" before trial). Similarly, a defendant can file a motion to dismiss on statute of limitations grounds when the alleged defect appears on the face of the charging document. *See, e.g.*, United States v. Kemp & Assocs., Inc., 907 F.3d 1264, 1270 (10th Cir. 2018) (explaining that a motion to dismiss allows a court to determine whether the charging document "on its face" establishes a statute of limitations defense).

392. *See supra* Part II.C.1.

393. *See, e.g.*, United States v. MacEwan, 445 F.3d 237, 240−41 (3d Cir. 2006) (discussing a defendant who had a bench trial in which he raised a statute of limitations defense); United States v. Gonzalez, 683 F.3d 1221, 1224 (9th Cir. 2012) (discussing a defendant who had a bench trial in which he challenged venue); United States v. Gunera, 479 F.3d 373, 376 (5th Cir. 2007) (discussing a defendant who had a bench trial in which he raised a statute of limitations defense); United States v. Murphy, 117 F.3d 137, 139 (4th Cir. 1997) (discussing a defendant who had a bench trial in which he challenged venue).

394. This may not be so if the defendant is either released on bond or held on more serious criminal charges that carry a longer sentence. Those are situations where fighting the charges is a lot more feasible.

395. *See* Fish, *supra* note 29, at 1899–1900, 1911 (noting that in four of the five border districts, Illegal Entry defendants are almost never granted bond). In instances where the defendant does post bond, the government normally sends them into immigration custody to deport them rather than pursuing the criminal case. *See id.* at 1911–12 (describing practice of deporting Illegal Entry defendants who post bond and dismissing their cases). At this point, the criminal case cannot continue, and the defendant cannot challenge whether they were lawfully charged.

hard for those charged with Illegal Entry. These defendants typically have not been in custody before, and the time in jail is thus especially painful for them.[396]

Given the trivial nature of the misdemeanor offense at issue, and the fact that the defendants usually have no prior criminal convictions and few to no prior deportations, federal prosecutors ordinarily extend a plea offer that provides no additional jail time.[397] This is called a "time served" sentence. Moreover, even defendants who plead guilty without a plea offer will generally receive a time served sentence from the judge.[398] After all, the statutory maximum penalty is only six months,[399] and most (though not all) judges rightfully view these offenses as insignificant crimes committed by sympathetic defendants.[400] Thus, by pleading guilty, an individual charged with Illegal Entry can expect their release from custody almost immediately.

For an Illegal Entry defendant to challenge their charge in the ways described above, they will need to reject the possibility of immediate release. They will have to remain in custody for an extended period. Motions practice can take months, especially if there is a lengthy briefing schedule. Similarly, it can take months to get to trial. Therefore, the challenges discussed above can only feasibly be raised if the defendant is released on bond, in custody on a more serious case, or willing to spend extra time in custody.[401]

Defendants understandably do not want to volunteer to sit in jail longer than they have to, even if the alternative is admitting to a nonexistent crime.[402] Indeed, a defining feature of Illegal Entry prosecutions is the overwhelming pressure defendants feel to plead guilty quickly.[403] This pressure produces a nearly perfect guilty plea rate.[404] It has helped federal prosecutors and judges construct extremely efficient court proceedings in Illegal Entry cases. As discussed above, from 2005 to 2020, most of these cases were processed through Operation Streamline.[405] That system

396. *See id.* at 1938 ("Nearly all of them have clean records—few or no past criminal convictions or deportation orders.").

397. *See id.* at 1908, 1911, 1935.

398. *See id.* at 1914–15.

399. 8 U.S.C. § 1325(a).

400. *See* Fish, *supra* note 29, at 1914–15.

401. If a defendant charged with illegal entry under the OLC's theory is in custody on a more serious case, they may be able to litigate the issues raised in this Article simply because the potential additional custody time on an immigration-related misdemeanor is negligible.

402. With some crimes, a defendant might not want to plead guilty despite being in custody with a time served offer because of a collateral consequence of the conviction. For example, a noncitizen with lawful immigration status might not want to plead guilty to a crime if it would result in their removal, even if the guilty plea would allow them to immediately leave custody. But convictions for the Elude Offense—or any of the Illegal Entry crimes—do not generally have collateral consequences like those.

403. *See* Fish, *supra* note 29, at 1932–38.

404. *See id.* at 1935–38.

405. *See supra* note 244 and accompanying text.

involved dozens of defendants pleading guilty in mass plea hearings at their first court appearances.

The resulting dynamic produces systemic lawlessness. Even if the OLC has fabricated the crime of undocumented presence, the government will have a well-established strategy to avoid meaningful judicial review of its interpretation. It will arrest people for the nonexistent crime, offer a time served sentence, and watch the guilty pleas roll in. It can then tout its convictions as proof that its novel interpretation is correct. The government could even, in theory, use this strategy in the Ninth Circuit, the lone circuit to have addressed the scope of the Elude Offense.[406] If defendants cannot raise legal arguments because of pressure to plead guilty quickly, even on-point precedent is rendered ineffectual.

B. A Possible Solution: Plead and Appeal

There is at least one potential solution to this vexed rule-of-law problem: defendants can promptly plead guilty but then raise a legal challenge through an appeal of their guilty plea.[407] This, in theory, allows a defendant to have it both ways: They get out of jail quickly and they can challenge the legality of the government's actions. If they succeed on appeal, they can get their conviction overturned and set good precedent for others. If they lose on appeal, they are in the same position they would have been had they not appealed. The complication, however, is crafting a challenge that both gets at the contested legal issue and is the type of claim that can survive a guilty plea.

What kind of claim survives a guilty plea? A defendant's guilty plea extinguishes some, but not all, claims. While federal courts have occasionally claimed that a guilty plea "waive[s] all nonjurisdictional defects,"[408] that has never been the case. As the Supreme Court affirmed in 2018, many nonjurisdictional defects survive a guilty plea.[409]

Some claims survive because they are not inconsistent with the defendant's confession of guilt. For example, a defendant's guilty plea does not waive a claim that the charged crime violates the Constitution.[410]

406. The Ninth Circuit has already held that the Elude Offense is not a continuing offense, United States v. Rincon-Jimenez, 595 F.2d 1192, 1193 (9th Cir. 1979), and that the offense requires the government to prove that the defendant snuck into the country after slipping by immigration officials at a designated entry point. United States v. Corrales-Vazquez, 931 F.3d 944, 953 (9th Cir. 2019).

407. As noted above, challenges could also feasibly be raised by defendants released on bond, defendants in custody on more serious crimes, and defendants willing to spend additional time in custody.

408. United States v. Petrangelo, 599 F.2d 261, 262 (8th Cir. 1979); *accord* United States v. Lopez-Armenta, 400 F.3d 1173, 1175 (9th Cir. 2005); Allen v. Campbell, 456 F.2d 912, 912 (5th Cir. 1972).

409. *See* Class v. United States, 138 S. Ct. 798, 803–07 (2018) (discussing some of the claims that survive a guilty plea, including constitutional challenges to the statute of conviction).

410. *Id.* at 801.

The admission that a defendant violated a particular statute can be consistent with the claim that the statute itself is unconstitutional.[411]

Another group of claims involves attacks on the integrity of the guilty plea. If a guilty plea is invalid because, for example, it is not knowing, voluntary, and intelligent—as due process requires—the plea cannot insulate itself from attack.[412]

One claim that attacks the integrity of the plea—and thus can be raised on appeal following a guilty plea—involves challenges under Rule 11 of the Federal Rules of Criminal Procedure, the rule governing the guilty plea process in federal court.[413] The purpose of Rule 11 is to help the district judge make the constitutionally required determination that a defendant's guilty plea complies with due process.[414] A key part of the Rule 11 procedure is the requirement that the judge evaluate whether there is a "factual basis" for the plea.[415] A factual basis reflects the actual facts of what the defendant did, and the judge must determine whether those facts establish that the defendant committed the charged crime.[416] If the judge determines that the plea has a sufficient factual basis and accepts the plea, a defendant can challenge on appeal whether that factual basis was actually sufficient.[417] By raising that argument on appeal, the defendant is attacking the validity of the plea itself.[418]

The survival of a factual basis claim provides a hook to try to litigate the scope of the Elude Offense without the defendant spending more time in custody. To begin with, it is important to highlight that this is not a venue challenge. Indeed, at least some courts have held that a guilty plea waives

411. *Id.* at 805.

412. *See, e.g.*, Wilson v. McGinnis, 413 F.3d 196, 199 (2d Cir. 2005) ("It is a settled principle of federal constitutional law that a guilty plea violates due process and is therefore invalid if not entered voluntarily and intelligently.") (citing Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242−43 (1969)).

413. *See* FED. R. CRIM. P. 11.

414. *See* McCarthy v. United States, 394 U.S. 459, 465 (1969).

415. FED. R. CRIM. P. 11(b)(3).

416. *See* United States v. Hildenbrand, 527 F.3d 466, 474–75 (5th Cir. 2008) (holding that a court can determine whether there is a sufficient factual basis for a plea by comparing "the conduct to which the defendant admits" with "the elements of the offense charged"); United States v. Maher, 108 F.3d 1513, 1524 (2d Cir. 1997) (stating that a trial court, under Rule 11, must "assure itself simply that the conduct to which the defendant admits is in fact an offense under the statutory provision under which he is pleading guilty").

417. *See*, *e.g.*, United States v. Pitts, 997 F.3d 688, 697–98 (6th Cir. 2021) (addressing challenge to guilty plea's factual basis under Rule 11 after the defendant pled guilty); United States v. Bain, 925 F.3d 1172, 1177–78 (9th Cir. 2019) (same); United States v. Carillo, 860 F.3d 1293, 1305–07 (10th Cir. 2017) (same); United States v. Mastrapa, 509 F.3d 652, 657 (4th Cir. 2007) (same); Montgomery v. United States, 853 F.2d 83, 85 (2d Cir. 1988) (same). For additional examples of cases in which the defendant appealed the factual sufficiency of the guilty plea, see *infra* note 431.

418. *See* Bousley v. United States, 523 U.S. 614, 619, 622 (1998). In *Bousley*, the Court agreed with the defendant that, if he pled guilty to a crime in which there was an insufficient factual basis, the defendant's guilty plea would violate due process because it was "not intelligent" when the district court failed to inform the defendant of this fact. *Id.* at 622. Thus, obtaining a guilty plea that lacks a factual basis not only violates Rule 11, but it also violates due process.

any objection to venue.[419] Instead, this challenge would go to the Elude Offense's substantive scope. The OLC's argument that the Elude Offense can be charged in interior states hinges on its view of what conduct the crime covers. The OLC argues that the offense covers improper entries all along the border—including improper entries between designated entry points—and covers conduct that occurs beyond the border.[420] This broad interpretation is what would be at issue in any challenge involving the factual basis for a plea.

As far as the mechanics of preserving this challenge, at the guilty plea hearing, the defendant would need to offer a truthful factual basis that satisfies the OLC's view of the crime, but that does not satisfy the historical (and, as this Article has argued, correct) view of the crime. The defendant would then need to ask the judge to resolve whether the proffered facts establish an offense. The defense lawyer might offer a factual basis that looks something like this:

> Your Honor, my client admits that they entered the United States outside a designated entry point without submitting to an immigration examination and inspection. They later moved to this district without submitting to an examination and inspection either. While we do not believe these facts establish a violation of the crime charged, the government disagrees. We would like the court to resolve that issue to determine whether my client's conduct establishes a violation of the charged offense.[421]

Under the OLC's view, those facts establish a violation of the Elude Offense because the defendant entered the United States without submitting to an inspection and has been continually eluding an inspection since then. Under the historical view, by contrast, the defendant is factually innocent of the Elude Offense because the defendant entered between designated entry points, and there is no proof that they eluded examination and inspection at entry.

If the court sides with the government and holds that the proffered factual basis is sufficient, the defendant's challenge to the scope of the Elude Offense has been preserved. The defendant can then raise the challenge on appeal.[422] If the defendant wins on appeal, the court will vacate the defendant's conviction, and the court will set precedent that could help others.[423] If the defendant loses on appeal, the defendant will be no worse off than if they had not raised the challenge.

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419. *See, e.g.*, United States v. Obak, 884 F.3d 934, 937 (9th Cir. 2018).

420. 2025 OLC Op., *supra* note 9, at 8.

421. In some districts, judges expect the government to provide the factual basis that the defendant is agreeing to. In those districts, the defense attorney might need to clarify which facts the defendant is admitting to and then ask for a ruling about whether the proffered basis establishes a violation of the statute.

422. If the bench trial is before the magistrate judge, the initial appeal will be to the district court, not the court of appeals. FED. R. CRIM. P. 58(g)(2)(B).

423. In addition to resolving whether the trial court erred by accepting the defendant's guilty plea, the appellate court would also need to determine whether the government could establish that the error was "harmless"—that is, whether the error did not "affect" the

If the court sides with the defendant, on the other hand, the court will need to reject the defendant's guilty plea.[424] Moreover, the necessary consequence of the court's ruling will be that the defendant is factually innocent of the charged crime. As the Supreme Court has explained in discussing guilty pleas: "[I]f the facts alleged and admitted do not constitute a crime . . . , the defendant is entitled to be discharged."[425] The government, of course, cannot lawfully detain a defendant based on a criminal charge of which the defendant is factually innocent.[426] The court, then, should at least order the defendant released from custody. Additionally, the same reasoning would establish that the court lacked venue over the charge, and so the court could order the case dismissed on that basis too.[427]

Of course, one possibility is that the court might not rule on the sufficiency of the factual basis without briefing. If that happens, the client's release would be delayed, creating the very problem that the plead-and-appeal strategy was intended to avoid. If the court does ask for briefing, the defendant could withdraw the objection and ask to proceed with the guilty plea. At that point, most judges would likely accept the guilty plea.[428] Still, a judge might conceivably refuse the plea based on the withdrawn objection. The defense lawyer would thus need to use their judgment about whether a judge is likely to demand briefing and refuse the guilty plea, and properly advise their client based on the possible risk.

Lawyers used this plead-and-appeal process with enormous success as part of the resistance to Operation Streamline within the Southern District of California. Hundreds of defendants promptly pled guilty and then appealed their convictions.[429] When Mr. Corrales won his appeal, about 500 defendants had their convictions vacated because they had raised the same argument in the form of a Rule 11 challenge following a guilty plea.[430] Accordingly, this plead-and-appeal process can allow immigrants

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defendant's "substantial rights." FED. R. CRIM. P. 11(h). The government could not meet its burden because the defendant would have pled guilty despite being factually innocent of the crime charged. When an error leads a factually innocent defendant to plead guilty, the error indisputably affects substantial rights.

424. United States v. Carillo, 860 F.3d 1293, 1301 (10th Cir. 2017) (holding that a court "must reject a defendant's plea if it lacks a factual basis").

425. Class v. United States, 138 S. Ct. 798, 804 (2018) (quoting Commonwealth v. Hinds, 101 Mass. 209, 210 (1869)).

426. The defendant's lawyer could also orally move to dismiss the case for lack of proper venue or based on a statute of limitations defense.

427. *See supra* notes 131–34 and accompanying text.

428. The judge would likely reason that if the defendant wants to plead guilty today and withdraw the objection, they will also want to do so at the next court appearance. Therefore, there is no good justification for delaying the plea as taking it now will clear a case off the calendar.

429. *See* Fish, *supra* note 29, at 1915–17 (describing the strategy of appealing guilty pleas).

430. While Mr. Corrales took his case to trial and appealed, nearly all the approximately 500 convictions that were reversed due to the Ninth Circuit's opinion were the product of guilty pleas. *See id.* at 1916–17.

to both challenge the government's novel use of the Elude Offense and avoid spending extra time in jail.

What if the defendant wants to sign a plea agreement, which typically includes an appellate waiver? Does that prevent the defendant from using this process? No. Even if the defendant signs a plea agreement, the integrity of the plea agreement itself is wrapped up in the integrity of the Rule 11 process. When a court fails to obtain a sufficient factual basis for the plea, both the plea and the plea agreement—including the appellate waiver—are invalid.[431] In other words, the guilty plea, the plea agreement, and the appellate waiver all depend on the integrity of the guilty plea. If the guilty plea is undermined, everything that rests on it is undermined as well. For this reason, a plea agreement with an appellate waiver will not prevent a defendant from challenging the factual basis of the guilty plea on appeal.

That said, as a practical matter, plea agreements in these cases are often worthless.[432] Unless the defendant can be charged with a more serious crime, the only thing they are bargaining for is a government sentencing recommendation. In many other kinds of cases, that has significant value.[433] But most judges will likely not want to give Illegal Entry defendants more than a time served sentence anyway.[434] Thus, a government sentencing recommendation often does not really amount to anything in this context. If the defendant is not obtaining anything of value by signing the plea agreement, it makes no sense for the defendant to sign. They should simply plead guilty without an agreement and preserve their appellate rights.

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431. *See, e.g.*, United States v. Aybar-Peguero, 72 F.4th 478, 482 n.1 (2d Cir. 2023) (addressing a challenge to a guilty plea's factual basis despite an appellate waiver because an "appeal waiver does not bar an appeal that . . . 'challenges the process leading to the plea'" (quoting United States v. Lloyd, 901 F.3d 111, 118 (2d Cir. 2018))); *see also* United States v. McCoy, 895 F.3d 358, 363–64 (4th Cir. 2018) (addressing a challenge to a guilty plea's factual basis despite an appellate waiver because the challenge goes to whether the plea itself is "knowing" and "voluntary"); United States v. Torres-Vazquez, 731 F.3d 41, 44 (1st Cir. 2013) (addressing a challenge to a guilty plea's factual basis despite an appellate waiver because the challenge was to "the validity of the plea itself," rendering the appellate waiver without "force"); United States v. Puentes-Hurtado, 794 F.3d 1278, 1284, 1286 (11th Cir. 2015) (addressing a challenge to a guilty plea's factual basis despite an appellate waiver because the challenge went to whether the plea itself was voluntary or intelligent); United States v. Hildenbrand, 527 F.3d 466, 474 (5th Cir. 2008) (addressing a challenge to a guilty plea's factual basis despite an appellate waiver because "[e]ven valid waivers do not bar a claim that the factual basis is insufficient to support the plea").

432. The one major exception is if the defendant has a prior deportation order. If so, they can be charged with felony Illegal Reentry under 8 U.S.C. § 1326. A prosecutor can thus offer a plea agreement for a misdemeanor Illegal Entry charge and threaten that, if it is refused, they will charge felony Illegal Reentry. This is a common practice, and the plea agreement is valuable in such cases.

433. *See* United States v. Whitney, 673 F.3d 965, 973 (9th Cir. 2012) (acknowledging the "importance of the government's sentencing recommendation as a bargained-for benefit to the defendant"); United States v. Camarillo-Tello, 236 F.3d 1024, 1028 (9th Cir. 2001) (recognizing that defendants often plead guilty solely to obtain a sentencing recommendation from the government).

434. *See* Fish, *supra* note 29, at 1914–15.

One final point: If the defendant's lawyer fails to raise the factual sufficiency issue in the trial court, the defendant can still appeal the issue, but it will be reviewed under the deferential "plain error" standard.[435] That will make the appeal harder to win. Still, given the strength of the argument, and given that the claim is really one of actual innocence, the plain error standard is unlikely to be the difference between winning and losing on appeal.[436] Some appellate courts, however, might view it differently, and the lawyer should raise an objection if possible.

CONCLUSION

A defining feature of the second Trump administration has been its embrace of lawlessness in immigration enforcement. It has arrested, incarcerated, and deported immigrants without regard for the law's requirements. Now its lawlessness has crept into the federal criminal justice system. To prosecute more immigrants, the OLC has adopted the position that undocumented presence is a crime. And the DOJ has been successfully convicting immigrants of that crime. As this Article has shown, however, there is no such crime. The OLC's reasoning is erroneous and its interpretation is wrong. Yet, because of the federal criminal justice system's built-in rule-of-law deficit, dozens of defendants have already pled guilty to this nonexistent crime. The government should stop bringing these charges. Under current law, undocumented immigrants can only be prosecuted for entering the United States illicitly or for returning after a deportation order. They cannot be prosecuted simply for living in this country.

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435. *See, e.g.*, *Aybar-Peguero*, 72 F.4th at 483–84 (evaluating a challenge to the factual basis of a plea under the plain error standard when the defendant raised it for the first time on appeal).

436. A defendant can obtain relief under plain error review by proving that there was (1) an "error," (2) the error was "plain," (3) the error affected the defendant's "substantial rights," and (4) the "error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" Greer v. United States, 141 S. Ct. 2090, 2096–97 (2021) (quoting Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904–05 (2018)). Here, for the reasons described, if a court adopted the OLC's interpretation of the Elude Offense, it would not only be an error, it would be an obvious one, given the weakness of the OLC's argument. Indeed, as described above, the OLC does not really grapple with many of the most obvious responses to its novel argument. Defendants could also show that their "substantial rights" were violated because, under the correct interpretation of the Elude Offense, they would have been factually innocent of the charge. *See id*. Not only would there be a "reasonable probability" that the defendant would be acquitted at trial, but it is also a certainty. *Id.* at 2096 (quoting *Rosales-Mireles*, 138 S. Ct. at 1904–05). Finally, the conviction of a factually innocent defendant would have a "serious effect on the fairness, integrity [and] public reputation of judicial proceedings." *Id.* at 2096–97 (quoting *Rosales-Mireles*, 138 S. Ct. at 1904–05).