I. Immigration and the Constitution

A. Federal Sources of Immigration Power

1. Constitutional Powers:
   - The SC has upheld all manner of federal statutes regulating immigration – States cannot pass legislation directly impinging on this area of federal domination.
   - Constitutional sources of Congress’ power to legislate immigration include:
     a. Naturalization Clause: Article I, §8, clause 4: Congress has the power to establish a “uniform Rule of Naturalization.”
        - This clause does not expressly provide the federal government power to deny admission or remove aliens, it really pertains to citizenship. The SC eventually found the federal government’s plenary power over immigration to be a sovereign power.
        - One could argue that immigration control falls within the naturalization clause via the necessary and proper clause. Also you could argue that lawful admission is required for naturalization, thus Congress could specify the conditions for admission.
     b. Commerce Clause: Article I, §8, clause 3: Congress has the power “to regulate commerce with foreign nations, and among the several states.”
        - In the Passenger Cases, the SC struck down state taxes or bonds on arriving NCs. The Court found that the arrival of foreigners constituted commerce because they bring wealth and labor, helping to develop railroads, mine minerals and work in agriculture.
        - Moreover, the Commerce clause permit Congress to regulate activities that have a “substantial effect” on interstate commerce. (Wickard v Filburn)
     c. Migration and Importation Clause: Article I, §9, clause 1: “The migration or importation of such persons as any of the States now existing shall think proper to permit, shall not be prohibited by the Congress prior to 1808.”
        - Maybe you could argue that after 1808 Congress would have power over migration and importation. This clause, however, was probably intended to bar attempts to stop the slave trade pre-1808.
     d. War Power: Article I, §8, clause 11: Congress has the power to declare war.
        - War power authorizes the exclusion and expulsion of enemy aliens. Maybe you could also say that regulating immigration is a necessary and proper way to prevent war.
     f. Implied Sovereign Powers: The federal government is the national government and therefore the keeper of the inherent sovereign power to regulate international affairs.
        - Foreign Affairs Power: This is a constitutionally implied power of the executive over foreign affairs. Maybe the executive, with power over foreign affairs, can authorize federal control over immigration. In the Chinese Exclusion Case, Justice Field stated that the Foreign Affairs Power is the foundation for all federal control over immigration.
        - The Chinese Exclusion Case: It is an inherent sovereign power of the federal government to exclude certain aliens.
        - Fong Yue Ting: The power to deport an alien is also an implied sovereign power that is absolute and unqualified.

2. International Law
   - As a matter of international law, every country has the power to exclude NC’s.
   - But there are important qualifications to this power, i.e. can’t exclude a refugee if doing so would have the effect of returning him to a country where he is subject to persecution.
   - The power to regulate immigration is essential to a nation’s self-preservation. A sovereign nation must have control over its own territory.

3. States’ Role in Immigration
   - The federal government may exclude aliens, states may not.
   - Some courts have held that the constitution prohibits state regulation of immigration. Other courts have held that to the extent a state immigration regulation is in the same sphere as a federal regulation, the federal law preempts.
   - States can, however, put limitations on the rights of NC’s. Such limitations are seen as “coming and going” limitations, not immigration legislations.
     - For example, they may restrict their right to obtain a driver’s license or access to welfare.

4. Judicial Review of Immigration Statutes:
- Marbury v. Madison seems to say that federal courts have the power to declare an immigration statute unconstitutional.
- However, in the Chinese Exclusion Case, the SC stated “its (Congress’) determination is conclusive upon the judiciary.” This seems to indicate that it is not up to the courts to decide the constitutionality of an act of Congress dealing with immigration.
  - Maybe this is because it is a privilege and not a right to be in the US, so Congress has the right to terminate that privilege; or
  - Maybe as a matter of international law, states are sovereign; or
  - Maybe this is a political question
- If Congress were to say that no atheists will be admitted, the Court would be allowed to review such a statute, unless there was an individualized application.

5. Cases:
- Curtiss-Wright: The SC distinguished between powers delegated to the federal government in the Constitution, and inherent sovereign powers. Inherent sovereign powers were transferred from Great Britain to the US when independence was declared. These powers were vested in the national government even before the Constitution was written, and these powers exist without a constitutional grant. This power is “plenary and unqualified.”

- Chae Chan Ping (The Chinese Exclusion Case): Chae worked in CA as a laborer. He left to visit China, bringing with him a certificate stating he was able to return. When he returned Congress had passed a law prohibiting the return of Chinese workers like Chae. Chae argues there was no constitutional authority given to Congress to pass a law regulating immigration.
  The SC upheld the law as a constitutional exercise of the inherent power of a sovereign state to exclude NCs. The Court noted: “The US government has jurisdiction over its own territory. This is an incident of every independent nation. It is part of a nation’s independence. If it (the nation) could not exclude aliens, it would be to that extent subject to the control of another power.” It is the role of the federal government to oversee matters of national concern, while it is the province of states to govern local matters. The inherent sovereign power to regulate immigration thus clearly rests in the federal government.

B. Limits to Federal Immigration Power:

1. Procedural Due Process
- Amendment V: “No person shall… be deprived of life, liberty, or property without due process of law.”
  - This amendment applies to any “person.” The question is when will an interest be regarded as “life, liberty or property” and when a person is deprived of such an interest, what process is due?

2. Procedural Due Process
- Procedural Due Process applies in 2 Cases:
  a. Deportation Cases
  b. Exclusion cases where an LPR is not gone for too long
- But for an initial entrant, procedural due process does not apply.

3. Substantive Due Process
- Certain substantive liberties cannot be taken away.
  - Harisiades: 1952: Three aliens who were LPRs and members of the US Communist party were subject to deportation proceedings. The aliens made a 1st Amendment freedom of association claim. The SC rejected their argument, stating they were not allowed to advocate lawless activity. Notably, the Court treated this as a garden variety 1st Amendment case, which implies that the 1st Amendment applies to NCs.
  - Fiallo: 1977: SC said there is a judicial responsibility to review for constitutionality, but as long as there is some rational basis, the immigration law is fine.

4. Due Process Cases:
  - Ekiu: When it comes to due process of an alien subject to exclusion, there is no due process.
  - Fong Yue Ting: There is no due process for aliens in exclusion or deportation.
  - Shaughnessy: “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.
  - Yamataya: Procedural due process does apply in deportation cases.
- **Mezei**: Mezei was an LPR who went to Hungary for about 19 months. When he returned to NY the US refused to let him in, refused to grant a hearing, and refused to tell him on what grounds he was being excluded and detained.

NC’s excluded at US borders are not entitled to procedural due process. But Mezei was gone for 19 months behind the iron curtain. In *Plascencia*, the Court said that an LPR who leaves temporarily and then returns will be entitled to procedural due process as long as the LPR is not gone for too long.

The practical effect of denying Mezei admission was potentially a lifetime of detention. The Court said that the detention did not trigger due process rights.

- **Zadvydas**: INS Statute says there is a 90 day removal period once a final order of removal is grant. However, if an alien is found inadmissible, deportable on criminal grounds, or is likely to flee or pose a danger to the community, the Attorney General may detain the person beyond the normal 90 day period. The question here was whether there was a limit or if the detention could last indefinitely.

The Court linked detainment beyond the removal period to the objective of removal. Once removal is no longer likely, you can no longer detain the individual. The majority distinguished this result from the Mezei case, where indefinite detention was permitted, because here the alien is deportable, not inadmissible.

The dissent wrote a radical dissent to illustrate the potentially crazy results of the opinion. Lawyers, however, have used this hold that Zadvydas also applies to inadmissible claims. This was a statutory interpretation case, but it was also a constitutional case because it raised 5th Amendment Due Process, freedom from detention concerns. 5th Amendment Due Process and 14th Amendment Equal Protection apply to all “persons” so that includes NCs.

Scalia in his dissent says the plaintiffs are claiming a constitutional right to supervised release in the US, and the majority is holding that have a constitutional right. But it this really what is happening? Scalia also says Congress is capable of passing a statute saying if you commit crime X you can be sentenced to life imprisonment. Why can’t you impose a law saying indefinite detention? It would be a close call whether Congress could pass such a statute.

- **Demore v. Kim**: Court held that mandatory detention is constitutional.

### II. Immigrant Visas Generally

#### A. Generally
- Immigrants are people who intend to remain in the US.

1. **LPRs Generally**
   - Lawfully admitted immigrants are known as LPRs. They receive green cards. Admission standards are much higher for LPRs than non-immigrants.
   - LPRs may remain in the US permanently as long as they refrain from deportable misconduct.
   - LPRs can work, and can become US citizens after an initial qualifying period (5 years).
   - To qualify for admission, an immigrant must affirmatively fit within one of the various admission categories established by Congress. Only those with certain positive credentials are eligible.

2. **Quotas**
   - A quota is the maximum number of immigrants that can come in.
   - Certain Groups are Exempt from Quotas. These groups include:
     i. Immediate relatives;
     ii. LPRs returning from temporary visits abroad;
     iii. Kids born to LPRs temporarily abroad;
     iv. People who receive certain permanent forms of discretion relief from removal;
     v. People fleeing persecution (but they are subject to numerical limitations of their own.);
     vi. Parolees;
     vii. Special ad hoc groups that congress admits on a non-quota basis.
   - If you aren’t exempt from the quota, you will need to come under one of three programs:
     i. Family Sponsored;
     ii. Employment Based;
     iii. Diversity.

3. **Accompanying (Following) to Join**: INA 203(d)
- A spouse or child who is accompanying or following to join an immigrant who is within any of the three broad programs is entitled to the same preference status and to the same place in line as the principal immigrant.
- INA 203(d), however DOES NOT APPLY to IMMEDIATE RELATIVES.
- To apply, the spouse or child must be acquired before the principal immigrant’s admission as an LPR.
- If the child is a product of a marriage that took place before the principal immigrant’s admission as an LPR, the child is treated as having satisfied this condition.
- A spouse or child will be regarded as “accompanying” the principal immigrant until 6 months after the issuance of the principal immigrant’s visa.
- There is no analogous time limit on a spouse or child “following” to join.
- Some INA provisions recognize accompanying spouses and children, but not those following to join.

4. Priority Dates and Per Country Limits
- The clock starts when the applicant files the first relevant document.
- Immigrants at the front of the line are processed monthly. They advance until their priority date becomes current.
- There are per country limits. INA 202(e) requires proration in the very year in which the per country limit is reached.
- For example: If in a particular year the worldwide family sponsored ceiling turns out to be twice as great as the worldwide employment based ceiling, then within a particular oversubscribed country, family sponsored applicants will receive twice as many visas as employment based applicants do.
- In addition, within one program (i.e. family sponsored), the visas for an oversubscribed country are allocated among the preference categories in the same proportions that apply worldwide for that year.
- For example: If the ceiling for family sponsored 3rd preference turns out to be 10% of the total worldwide family sponsored ceiling, then within a given oversubscribed country, 10% of family sponsored visas would go to 3rd preference applicants.

III. Immediate Relatives 201(b)(2)(A)(i)
A. Generally
- Immediate relatives are exempt from the quotas and can come in with a wait only for administrative purposes. Immediate Relatives include:
  i. Spouses of US citizens;
  ii. Children (unmarried, under 21) of US citizens; (Child is defined in 101(b)(1))
  iii. Parents over age 21 of US citizens.
- The number of visas provided to immediate relatives in any given year is not deducted from the supply available during the next year to other family members of US citizens and LPRs.

B. Family Sponsored Program
1. Generally
- Family Sponsored: Consists generally of immigrants who have certain family members in the US. The specified relationships are not close enough to warrant immigration preference.
- Total Worldwide Annual Limit: 480,000 - # of Immediate Relatives (and kids born to LPRs temporarily abroad) admitted in the preceding year + Any Employment Based Visas Available in the Preceding Year but not Used.
- The ceiling must always be at least 226,000

2. Family Sponsored Preferences
- The Family Sponsored Program is subdivided into four “preference categories” in INA 203(a).
- The preference provisions serve to:
  a. Describe the different groups of people who qualify as family sponsored immigrants; and
  b. Set numerical sub-ceilings for each of the four groups.
- Here are the four preferences:
  i. Unmarried Sons and Daughters of US Citizens:
    - Subceiling: 23,400 + Visas that Preference 4 Does not Need.
  ii. Spouses and the Unmarried Sons and Daughters of LPRs:
    - Subceiling: 114,200 + Visas that Preference 1 Does not Need + Amount by Which the Total Worldwide Family Sponsored Ceiling Exceeds 226,000.
    - This preference has been split into two subgroups because of really long waits:
      - 2A: Spouses and Children (unmarried, under 21) of LPRs
Those in 2A get a higher priority. At least 77% of worldwide preference 2 visas must be set aside for the 2As. And 75% of the 2A floor is exempt from per-country limits. This shortens many of the waiting periods, but the waits are still several years long.

- 2B: All other second preference immigrants (i.e. Over age 21, unmarried Sons of LPRs)

   iii. Married Sons and Daughters of US Citizens:
      - Subceiling: 23,400 + Any Visas that Preferences 1 and 2 Do Not Need.

   iv. Siblings Over Age 21 of US Citizens:
      - Subceiling: 65,000 + Any Visas Preferences 1, 2, and 3 Do Not Need.

C. Aging Out
- Wait time is often years for applicants within the family sponsored programs. This can result in applicants “aging out.” For example, the “child” might become 21 and no longer be eligible as a child.
   - The creation of the 2A category was in part a response to the aging out problem.
   - In addition, Congress created V visas. Beneficiaries of 2A visa petitions filed on or before 12/21/00 may enter the US as non-immigrants once their waiting times exceed three years, and they may work. V status continues until LPR status is attained or the application denied. INA 101(a)(15)(V) and INA 214(o)(1)(A).
   - Congress also created the Child Status Protection Act because it did not think it was fair to count the administrative processing time against the applicants.
      - The statute DOES NOT freeze the beneficiary’s age while waiting for the priority date to become current, but it ensures the person is not disadvantaged by administrative delays.
      - Under section 2, the beneficiary’s age is frozen as of the date the petition is filed for the child of US citizens. As long as the beneficiary is under 21 when the petition is filed, he will be treated as a child when the application becomes current.
      - Under Section 3, children of LPRs who are 2A or following or accompanying to join use their age when their petition becomes current, reduced by the amount of time the visa petition was pending.

D. Fraudulent Marriage:
1. Generally
   - A marriage must be formally valid under the law of the jurisdiction under which it was contracted.
   - Immigration law probably wouldn’t recognize same sex marriages given the Defense of Marriages Act.
   - Immigration law does not recognize fraudulent marriages. Under Adams, a marriage must be:
      i. Legally valid in the jurisdiction where it was celebrated; and
      ii. Factually valid
   - Two types of sham marriages:
      i. Bilateral Sham marriages where both spouses marry solely to facilitate immigration, usually this involves the foreigner paying the citizen or LPR;
      ii. Unilateral Fraud marriages occur when the immigrant spouse deceives the citizen or LPR as to his feelings and intentions.

2. IMFA (Immigration Marriage Fraud Act) INA 216
   - Under IMFA, whenever an NC receives LPR status as an immediate relative, family sponsored second preference immigrant, or as the fiancé of a US citizen, by virtue of a marriage that is less than 2 years old, the resulting permanent residence will be subject to certain conditions. INA 216(a)(1); 216(g)(1)
      - If at any time during the 1st 2 years of permanent residence the AG finds that the marriage was for immigration purposes or that the marriage has been annulled, or that a fee was given to file the petition, the AG must terminate the LPR status. 216(b)(1).
      - The conditional resident and his spouse have an affirmative duty to petition jointly the INS for removal of the condition and to appear at an INS interview in connection with that petition. The petition must be filed within the 90 day period preceding the 2nd anniversary of the person’s admission. INA 216(d)(2). A petition not filed on time or failure to appear at the interview without good cause results in termination of LPR status.
      - An immigrant unable to meet the requirements can ask the AG to waive them under 216(c)(4). You will have to show extreme hardship (either to the conditional resident, his spouse, dependent kids, etc). You will also need to show the marriage was entered into in good faith, and was not at fault in failing to meet the usual requirements. INA 216(c)(4)(B). There is also a waiver for spousal abuse.
   - IMFA provisions do not apply to those accompanying or following to join.
   - IMFA also extends to anyone who acquires permanent residence status by virtue of being the son or daughter of an individual through a qualifying marriage. INA 216(a)(1), 216(g)(1).
   - An NC who marries during exclusion or deportation proceedings cannot use the marriage to initiate the immigration process until he has left the country for 2 years after the marriage.
E. Child Defined

1. Generally
   - A child is defined in 101(b)(1). It basically says a child is an unmarried person under 21 who:
     a. Is born in wedlock;
     b. A stepchild born in or out of wedlock, provided the child was under 18 at the time the marriage creating the step-relationship occurred;
     c. The child was legitimated under the laws of the child’s residence or domicile, or under the laws of the father’s residence or domicile, provided such legitimation occurs before the kid is 18 and while the kid is in legal custody of the legitimating parent; (legitimacy requires placing the child in “all respects on the same footing as if begotten and born in wedlock Mourillon)
     d. A child born out of wedlock who has a bona-fide parent-child relationship with the biological mother or father;
     e. A child adopted under the age of 16 if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years.
     f. There are move provisions, but I’m not going to summarize them.
   - Under immigration law, bothers and sisters have a common parent. Two people will be considered siblings only if they were once children of a common parent.

F. Case:
   - Matter of Mourillon: Petitioner is a 52 year old US citizen born out of wedlock in the British West Indies. His parents never married and his mom abandoned him. He and his dad moved to the Dutch West Indies and the petitioner came to the US in 1954. In 1942 his dad married and they lived together as a happy family. In 1953 his half sister was born. He wants to get the sister a family sponsored visa.
     In order to create a step-relationship, the marriage must take place when the kid is under 18. Petitioner first argues that they had a common father, but that didn’t work since he had been born out of wedlock. Children born out of wedlock are the children of their mother, but not necessarily the dad. Under the present law, Petitioner would clearly be a child of his father because they had a bona fide parent-child relationship.
     In order to use legitimation he had to have been legitimated under child or dad’s residence or domicile states. But Dutch law had no legitimation, they would have had to actually marry. So there was no common father. But the court did find a common mother. They got married when petitioner was 13, so there’s a stepchild relationship.
     Step-sibling relationships must exist in fact or the step-parent/parent marriage must continue. Here there was no recognized step-parent/parent marriage, but there was a step-sibling relationship in fact.

V. Employment Based Program

A. Generally
   - Employment Based: Includes those with certain occupational skills, certain investors, and miscellaneous others.
     - Total Worldwide Annual Limit: 140,000 + Any Family Sponsored Visas Available in the Preceding Year but Not Used.

B. Employment Based Preferences
   - Employment Based visas are subdivided into 5 preferences, several of them are subdivided further.
   - The first three preferences are the real employment based preferences. The people admitted have certain job skills needed for the US economy.
     - The level of impressiveness drops as you go from the 1st to the 3rd preference.
       i. Priority Workers (No Labor Certification Needed): Includes immigrants with extraordinary abilities in sciences, arts, education, business or athletics. Includes outstanding professors/researchers, executives of multinational companies, etc.
         - Subceiling: 28.6% of All Employment Based Visas + any Visas the 4th and 5th Preferences Do Not Need.
       ii. Members of Professions Holding Advanced Degrees and Aliens of Exceptional Ability (Labor Certification Required): this usually means holding a graduate degree or other exceptional (not extraordinary) ability.
         - Subceiling: 28.6% of all Employment Based Visas + Any Visas the 1st Preference Does Not Need.
       iii. Skilled Workers, Professionals, and Other Workers who can show their Labor is Needed in the US (Labor Certification Required): Includes skilled workers, professionals with bachelors, unskilled workers taking jobs that don’t have enough US workers.
         - Subceiling: 28.6% of Employment Based Visas + Any Visas 1st and 2nd Preferences Do Not Need.
       iv. Certain Special Immigrants Not Exempt from the Quota: Includes certain religious workers and certain long-term foreign employees of the US government.
- Subceiling: 7.1% of Employment Based Visas
v. Employment Creation: Entrepreneurs who invest at least $1M each in enterprises that employ at least 10 Americans. It’s like buying a green card. Is this really a good idea? Is the $1M too high?
- Subceiling: 7.15% of Employment Based Visas.

C. Labor Certification 212(a)(5)(A)

1. Generally
- Labor certification can be waived by the Secretary of DHS. Certification used to be frequently waived, but not so much anymore.
- To get labor certification, the ER will prepare a document with the job requirements and the employee credentials he is seeking.
- There is no rule that once you come in with labor certification you have to remain in that job for x years. There would be potential for exploitation if that was the case.

2. Requirements (Graham Case)
- Labor certification requires three things:
  i. ER must show that there are no US workers who are qualified/able to do the job.
  ii. Employment of the alien must not adversely affect the wages and working conditions of US workers similarly employed.
  iii. Business necessity for the job restrictions (this requirement is added by the Graham Court)
    - The business necessity requirement prevents employers from creating unduly restrictive credentials. It also creates a presumption that there is no business necessity if:
      a. The ER is requiring things other than those normally required for the job in the US;
      b. The requirements exceed the requirements in the Dictionary of Occupational Titles;
      c. Restrictions include a foreign language;
      d. Restrictions involve a combination of duties; or
      e. Restrictions require the worker to live on the ER’s premises
    - Under these circumstances, the ER must demonstrate by documentation that its requirement arise from business necessity.
- Business Necessity has been proven if:
  i. The job requirements bear a reasonable relationship to the occupation in the context of the ER’s business; and
  ii. The requirements are essential to perform, in a reasonable manner, the job duties as described by the ER.
- The differences between requirements i and ii? “Occupation” is broader than job duties. Job Duties:
  - Tasks to be performed. Job Requirements: Skills required to get the job.
- The job duties being reasonable requirement in part protects the migrant and the US workers.
  - For example, a law firm will hire an associate to work with specific clients who like to do business on the golf course. So the firm requires that the associate play golf. This would satisfy requirement ii, but there really isn’t a reasonable relationship between golfing and being a lawyer.
  - But if you look at the requirement in the context of the ER’s business, that might change the answer.
- The term “business” is loosely defined, but there must be a close connection between the job requirements and business necessity.
- The Labor Certification requires that there be no “sufficient, able, willing, qualified…” The requirement is not “equally qualified.” What if the foreigner is “most qualified” but there are qualified Americans?

3. Cases:
- Matter of Marion Gaham: Graham wanted to hire a housekeeper from a different country to live in her house, care for her kid, clean up, answer the phone, etc. She required that the nanny live in, and she wanted this foreigner. The Court said no, she did not establish with documentation that the circumstances of the household itself and other extenuating circumstances required that the nanny live on. Mere personal preference is not enough. Graham failed to those the frequency of late night calls and why a professional answering service could not perform that function, how often she was gone overnight, etc.
- Matter of Ching: Wanted to hire a Chinese nanny to teach the kids Chinese language and culture. BALCA said fine, we can’t differentiate between what we think the ER needs vs. what the ER wants. The foreign language requirement comes up often.
- Matter of Lucky Horse: The Board en banc held that having a non-English speaking workforce does not justify a foreign language requirement. The Board held that foreign language proficiency is not reasonably related to the occupation of sewing machine repair, even in the context of the ER’s business.
- Matter of Lippert Theaters: Board held that an ER who wished to combine duties must establish business necessity unless the ER normally combines the two functions in a single position or it is customary to do so.
The ER must demonstrate that hiring two separate EEs would be not just inefficiently or costly, but so impractical as to be infeasible. Very hard to show “infeasible” – you’d probably have to show it would ruin the company.

VI. Diversity Immigrants
   A. Generally
   - Diversity Immigrants: Those admitted because they hail from countries or regions from which the US has received relatively little immigration in recent years.
   - Basic Annual Ceiling: 50,000 reduced to offset Guatemalan and Salvadoran admissions authorized by special legislation.
   - So the 50,000 visas are awarded to natives (born there) of low admission states. Once the year ends, any diversity visas unused expire – even if you won the lottery but for reasons out of your control you couldn’t get over, your visa expires.
   - Most of the diversity visas go to Europe, followed by Africa.

B. Mechanics of Lottery:
   i. The AG calculates for each foreign state the # of people from that state who became LPRs during the preceding 5 years. Any foreign states for which that 5 year number exceed 50,000 is considered a “high admission” state. Every other state is a “low admission state.”
      - All of the 50,000 diversity visas are allocated to natives of low admission states.
   ii. The world is divided into 6 regions, and a region is labeled high admission if its natives accounted for more than 1/6 of the total LPR grants of the preceding five year period. Every other region is low admission.
   iii. The AG then computes for each region the total population of the low admission states of that region.
   iv. The AG then divides up the 50,000 visas between the two groups: the high admission regions and the low admission regions. The AG figures out what % of the previous 5 years’ immigrants were natives of the high admission regions. The low admission regions together get that % of the 50k visas. The high admission regions get the rest.
   v. Within that group of low admission regions, the visas are allocated among the different regions in proportion to the population of the low admission states in those regions. Similarly, within the group of high admission regions, the visas are allocated among the regions in proportion to the population of the low admission states in those regions. If a region doesn’t use its full allotment, the unused visas go to the other regions in proportion to the allotments they would have otherwise received.
   vi. Within each region, the individual must meet specified requirements concerning education level or work experience, and not more than 7% of the 50K visas may go to natives of any single state.

VII. Impact of Immigration:
   A. Generally:
      - Nett argues we ought to recognize a right to free movement. Is there a moral obligation for open borders. Do US lawmakers have a moral obligation to do what’s best for the US citizens or for the world?
      - It’s not easy to find a truly moral basis for closed borders. The closest argument might be a property analysis – the country could assert a right to exclusive control over its property.
      - In most other contexts, we frown on discrimination based on accident of birth, yet not for immigration.
      - Brimelow challenges US immigration laws with the practical effect of increasing the population of non-white immigrants.
      - Assimilation occurs over time, via pop culture, and maybe race affects the rate of assimilation.
      - Is multiculturalism a good thing? Brimelow says you need a common ethnic core to serve as a unifying force. Others say you need only a unifying, common idea.
      - Brimelow thinks multi-ethnic immigration worked before because we were assimilating everyone, but now, people aren’t becoming assimilated, they’re keeping their own identities. Immigration has worked in the past because we have taken breaks.
      - Until 1965 we had the national origins quota system, it was abolished around the Civil Rights Movement time. No one predicted the impact of the immigration reforms on the ethnic composition of America.
      - He says it’s wrong for people to say “so what” to the increasing non-white European population. He says the burden should be on those who want to transform America to say why they want to do it.
      - Perea’s vision of America is more of the granola vision – that all culture contribute to American culture.

VIII. Non-Immigrant Visas
   A. Generally:
      - Nonimmigrants are admitted for only temporary periods, and only certain types are permitted to work. The admission criteria is usually less demanding than those for immigrants.
Nonimmigrant admissions are usually not numerically restricted. Nonimmigrant visas are often a precursor to seeking permanent residency.

1. Requirements for gaining a non-immigrant visa:
   i. Must show that you fit under § 101(a)(15);
   ii. Some are subject to numerical limits (under (H) – worldwide limits – not per country);
   iii. Can’t fall within an exclusion ground.

B. Types of Nonimmigrant Visas:
   - Those admitted under (E)(i) are treaty traders.
   - Those admitted under (E)(ii) are treaty investors.
   - The person must be entitled to enter the US under and in pursuance of the provisions of a treaty. Admission is normally for 2 years initially with unlimited possibility for 2 year extensions.
   - Must have an intent to retain one’s foreign residence, and the INS and State Department require an intent to depart upon termination of E status.

   - This is the principal vehicle for admission of temporary professional workers. It requires that the person be in a “specialty occupation.”
     - A specialty occupation is one that requires theoretical and practical application of a body of highly specialized knowledge and that in the US, requires at least a bachelors. 214(i)(1).
   - The nonimmigrant must be coming temporarily. He can be admitted for up to 6 years. The nonimmigrant can enter with the hope of attaining LPR status at a future time.
     - The (H)(i)(B) is often used to get an EE over and started if the LPR waiting period is too long.
     - Agricultural workers, athletes, and entertainers are not generally ineligible for H-1B visas. They must usually apply for H-2A or O or P status.
   - The ER must file a labor condition application with the Department of Labor attesting (1) that it is paying at least the prevailing wage level in the area of employment or the actual wage level at the place of employment, whichever is greater; (2) that the working conditions of similarly employed workers will not be adversely affected; (3) that there is not a strike or lockout; and (4) that the ER has notified its existing EEs of the filing so that they can object if they wish.

   - An H-2 nonimmigrant comes to the US to perform agricultural labor and services of a temporary nature, or to perform other temporary service if unemployment people in the US cannot be found.
   - The person must “have a residence in a foreign country which he has no intention of abandoning” and he must “be coming temporarily to the US.”
   - The ER must obtain labor certification. Visas are usually good for 1 year with the possibility of extensions up to 3 years.
   - The limit on H-2Bs is 66,000.

   - F-1 nonimmigrants (F-2 is their spouses and children) are valid “for duration of status.” Someone will estimate how long it will take them to finish. They can apply for extension through their school for up to one year.
     - To get an extension, however, the F-1 student must agree to leave the US at the expiration of his authorized extension.
   - To get an F-1 visa, the student must demonstrate that he has sufficient funds. Students can work about 20 hours a week on campus.
   - F-1 status will not be granted to kids to attend a public elementary school, nor to attend a public secondary school unless the student pays the cost of the education. Even then you only get one year. 214(m)(1)(A); 214(m)(1)(B).
     - F-1 students can attend private schools. 214(m)(2).
   - Information about the students is required to be collected by the AG on every foreign student enrolled in US colleges and universities.

   - Exchange visitors are part of a mutual exchange program in which students, teachers, scholars, and others enter the country temporarily to pursue various educational goals.
- The purpose of the program is to provide training that will enable the visitors to benefit their countries of origin when they return, to foster intellectual and cultural interchange, and to build positive foreign relations.
- The J visa has slightly more liberal employment rules than an F visa. Both cover students.
- J students in degree programs may remain as long as they are pursuing full courses of study at the institution for which they are approved. This is similar to the F visa.
- There is a big limitation on the J visa in 212(e):
  - If you hold a J visa and:
    i. Your participation in the education program was financed in whole, or in part, directly or indirectly, by an agency of the US or by the government of your country of nationality or last residence;
    ii. At the time of admission you were a national or resident of a country which the US has designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which you were engaged, or
    iii. You came to the US or acquired such status in order to receive graduate medical education or training; Then you are not allowed to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under sections (H – Temporary Worker) or (L – Intracompany transferee) until you go back to your country for two years.
- Under all three, if you can show an exceptional hardship upon your citizen or LPR spouse or child, or if in returning you would subject to persecution, the AG has the discretion to waive that requirement.
- Under the first two, if the foreign country provides a writing saying it has no objection to you not coming back for two years, then the AG also can waive.

- Tourist visas are usually straightforward. The biggest hurdle is dispelling the suspicions that you’re planning to remain permanently.
- B-1 visas are for business, B-2s are for pleasure. B-2s accounted for 77% of all nonimmigrants admitted in 1998.
  - Initial admission ranges from 6 months to one year, and extensions may be granted.
  - B-2s are the only category of nonimmigrant absolutely barred from working.
- To prove no intent to remain, it’s good to show ties in your home country: family, job, etc. The consular official will always want to see a return ticket and money to support yourself while you’re in the US. If your family lives in the US, they may think you want to come over permanently, or that you have a job waiting for you. If you applied for other visas and were previously denied (especially immigrant visas) this would show a potential intent to remain.
  - If you are applying from a poor, 3rd world country, scrutiny might be a little greater to make sure you don’t intend to remain.
  - Denial of a B-2 visa is non-reviewable. But you can always reapply.
- Case: Healy and Goodchild: These two men got nonimmigrant tourist visas to come over. But they were found to have letters of acceptance for admission to a 9 month course at a non-approved school. They were charged as excludable for being nonimmigrant students not in possession of valid nonimmigrant student visas, and for willfully misrepresenting material facts.
  - The problem here was that the school was not approved. A school may not be approved because of inadequate staff, maybe it is a sham to take advantage of foreigners, or it might not have a system in place to meet the reporting/monitoring requirements. The court said no, if your primary purpose is to study, you can’t come in one a tourist visa. Tourist visas are not catch all’s for those who want to come to the US for any reason, it was designed with specific aliens in mind, not those who want to study.

- The NC cannot apply for an immigrant visa until after the marriage, and the processing can take a few months. The alternative to waiting is for the couple to remain outside the US while waiting. This would be hard.
- 101(a)(15)(K) and 214(d) were enacted to alleviate the problem. The noncitizen fiancé receives K-1 status; any noncitizen minor kids receive K-2.
  - 214(d) requires that the fiancés have met each other during the two year period preceding the filing of the petition.
  - In addition, 101(a)(15)(K)(ii) permits the spouses of US citizens to enter as K nonimmigrants (and to work) while their immigrant visas are being proceeded. The NC spouses receive K-3 visas, the kids K-4.

8. Victims of Trafficking in Persons: 101(a)(15)(T)
- Must be over 15 and agree to assist in the investigation. Must also show extreme hardship upon removal.
- T status may also be granted to designated family member.
- 5,000 per year limit, not counting family. After three years the T nonimmigrants may adjust to LPR.
- Acts falling under the provision are enumerated, they include rape, torture, trafficking, incest, etc.
- Person must agree to help investigate.
- Various family members may be admitted if you can show extreme hardship. The limit is 10,00 per year, not counting family. After three years you can adjust to LPR.

- The new V category permits the admission of spouses and children of LPRs as nonimmigrants while they wait for their priority dates to become current, but only if you filed the petition pre 12/21/00.

11. Students at Vocational or Other Recognized Nonacademic Institution: 101(a)(15)(M)

12. Aliens of Extraordinary Abilities in Arts, Sciences, Athletics, etc.: 101(a)(15)(O)


C. NonImmigrant Visa Issues
1. Intent to Remain
- Most nonimmigrant categories require that the person seek to enter “temporarily” (B, H, J, L) or that the person have a foreign residence “which he has no intention of abandoning” (B, F, J) or both.
- If after admission you are found to have intended to remain permanently, you can be deported.
- The BIA and several courts have held that a desire to remain in the US permanently in accordance with the law, should the opportunity present itself, it not necessarily inconsistent with lawful nonimmigrant status. So you can enter with the intent to remain permanently but hope to eventually acquire LPR status someday if the law permits.
- It is okay for a lawyer to tell his client the consequences of forming each intent, but the client ultimately has to decide what to do.

2. Change of Visa: INA 248/245
- Under §248, certain nonimmigrants can switch to different nonimmigrant categories without leaving the country. You must:
  i. Have been lawfully admitted as nonimmigrant, must be continuing to remain in status;
  ii. Show you qualify for whatever new visa you want;
  iii. Can’t be subject to a 2 year foreign residency requirement for J visas. (subsection 3 of 248)
  iv. Obtain favorable exercise of INS discretion.
- Under §245, certain nonimmigrants can become LPRs without leaving the US.

D. Statutory Interpretation
1. Three rules of statutory interpretation:
   i. Literal Plain Meaning Rule: Focuses on the literal language of the statute. When the language admits of only one meaning, the court must adopt that meaning even if doing so will produce absurd results.
   ii. Social Purpose Rule: The court seeks out the purposes of the legislation and adopts whichever interpretation will best advance those purposes.
   iii. Golden Rule: The court gives the literal language its ordinary meaning unless doing so would produce an absurd result.

2. Case
   - Silverman: Case arguing over the interpretation of the hardship waiver provision in INA 212(e) which states: “Upon the favorable recommendation of the Director, pursuant to the request of an interested US government agency, or of the Commission of the INS after he has determined hardship…” Fight was over whether the Secretary of State had to issue the waiver, or whether the Commission could do so as well. The court held that only the Secretary of State could grant the waiver.
   The court looked to the legislative history to support its reading of the statute. Before the version of the law, the Sec of State had a veto power. The legislative history stated that the new law didn’t mean to change anything except the place where the immigrant would serve out his two years, so presumably the Secretary’s veto power remained.

IX. Exclusion (Inadmissibility) Grounds: INA 212(a)
A. Generally:
- 212(a) lays out the main exclusion grounds. Here’s a list of where to find what:
  - 212(a)(7)(A and B) exclude immigrants and nonimmigrants who are not in possession of valid passports or visas, subject to a discretionary waiver.
  - 212(a)(5)(A) makes certain employment based immigrants inadmissible if they do not have labor certification.
  - 212(a)(6)(F) excludes NCs who have committed specified forms of document fraud and have been formally ordered to pay penalties, subject to discretionary waivers in certain family related circumstances (212(d)(12)).
  - 212(a)(6)(C)(i) makes inadmissible for life those NCs who procure visas, admission or certain other documents or benefits by fraud or misrepresentation.
  - 212(a)(6)(C)(ii) renders inadmissible those who make false claims of citizenship.
  - 212(a)(6)(A) renders inadmissible those who are present in the US without having been admitted or paroled, as well as those who arrive other than at officially designated ports of entry.
  - 212(a)(9)(B)(ii) defines a person as being unlawfully present if he is present in the US after the expiration of the period of stay authorized by the AG or is present in the US without being admitted or paroled.
  - 212(a)(9)(B)(iv) tolls the accumulation of unlawful presence time during the period from expiration of the original stay to the time the INS decides the application, provided the application is “nonfrivolous” and the applicant has not worked without authorization.
    - Tolling applies only to the 3 year bar (not the 10 year) and even then the maximum tolling provided is 120 days. Most recently however, the entire stay while change of status is pending is considered a “period of stay authorized by the AG.” So BOTTOM LINE, under the INS interpretations of the tolling provision, you get a toll until the decision is made.
    - There’s also a waiver in 212(a)(9)(B)(v).
  - 212(a)(6)(B) renders inadmissible for 5 years any NC who, without reasonable cause, fails to attend his removal hearing.
  - 212(a)(9)(A) says that NCs ordered removed are generally inadmissible for either 5 or 10 years, depending on if you were removed upon or after arrival.
    - There is an AG discretionary waiver in 212(a)(9)(a)(iii)
  - 212(a)(9)(C) renders inadmissible for at least 10 years one who was unlawfully present for an aggregate period of more than one year, and who then enters or attempts to enter “without being admitted”.
  - 212(a)(3) security and related grounds. Only the terrorist exclusion remains waiveable, although some provisions have exceptions.
  - 212(a)(3)(A) excludes individuals believed to be seeking entry to engage in specified unlawful activities, including espionage, sabotage, and the forceful overthrow of the government.
  - 212(a)(3)(B) terrorist exclusion grounds.
  - 212(a)(3)(C) foreign policy grounds, with two exceptions.
  - 212(a)(3)(D) immigrant membership in a totalitarian party.
  - 212(a)(3)(E) participation in Nazi persecutions or genocide.
  - 212(a)(2) criminal and related grounds.
    - 212(a)(2)(A)(i)(I) crimes of moral turpitude
    - 212(a)(2)(A)(i)(II) violation of laws relating to a controlled substance.
    - 212(a)(2)(B) multiple criminal convictions
    - 212(a)(2)(C) controlled substance traffickers
  - 212(a)(1) health related grounds
  - 212(a)(4) public charge grounds

B. Some Specifics:

1. Economic Related Grounds
   - 2 main economic considerations:
     i. 212(a)(5): Labor certification
     ii. 212(a)(4): Likely to become a public charge.
   - Factors to consider when determining if likely to become a public charge: do you have a job? A large savings? Skills and education? Age, health, family status, etc.
   - Family sponsored immigrants must come up with an affidavit of support to show that they have friends to support them and will use those funds if necessary. These affidavits are considered legally binding contracts.
Sponsors must be a US national or LPR over age 18 and domiciled in the US. The sponsor must be the person petitioning for the immigrant’s admission. The petitioner can get a co-sponsor if he lacks the resources. The sponsor’s income must be at least 125% of the poverty level.

2. Health Related Grounds:
- These provisions describe various physical and mental disorders. Generally though, neither a physical nor a mental disorder is generally a basis for exclusion unless the associated behavior poses one of several specific threats. INA 212(a)(1)(A)(ii).
- Waivers are possible under 212(g) at AG’s discretion.
- Those with communicable disease of public health significance are excludable.
- Drug addicts and abusers are specifically inadmissible under 212(a)(1)(A)(iii).

C. Waivers:
1. 212(d)(3) General Nonimmigrant Waiver: Provides waiver after approval by the AG of a recommendation by the Sec. of State or the consular officer that the alien should be admitted as a nonimmigrant in the AG’s discretion.
   - This waiver is available for ALL of the inadmissibility grounds EXCEPT all of the national security grounds (except that dealing with terrorism) provided the alien wants to come in as a NONIMMIGRANT.

2. 212(h) Immigrant Criminal Inadmissibility Waiver: Provides limited relief in the form of a discretionary waiver of subsection 212(a)(2)(A)(i)(I), (II), (B), (D), and (E) by the AG.
   - This applies if you fall under any of the criminal grounds listed directly above, and any inadmissibility under 212(a)(2)(A)(i)(II) relates to a single offense of simple possession of 30 grams or less of marijuana.
   - In addition, there is no relief if you have been convicted of murder, or criminal acts involving torture, or an attempt or conspiracy to commit murder or torture.
   - In addition, no waiver shall be granted to an alien who has previously been admitted to the US as an LPR if either:
     i. Since the date of such admission the alien has been convicted of an aggravated felony; or
     ii. The alien has not lawfully resided continuously in the US for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the US.

   - 212(h)(1)(A): In the case of any IMMIGRANT you must establish:
     i. That the alien is inadmissible only under (D)(i) or (D)(ii), or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien’s application for a visa, admission, or adjustment of status,
     ii. The admission to the US of such alien would not be contrary to the national welfare, safety, or security of the US; and
     iii. The alien has been rehabilitated.

   - 212(h)(1)(B): In the case of an IMMIGRANT who is the spouse, parent, son, or daughter of a citizen of the US, or an alien lawfully admitted for permanent residence if it is established that the alien’s denial of admission would result in extreme hardship to the US citizen or lawfully resident spouse, parent, son, or daughter of such alien.

   - 212(h)(1)(C): the alien qualifies for classification under (iii) or (iv) of 204(a)(1)(A) or under clause (ii) or (iii) of 204(a)(1)(B) and the AG consents. This is for spousal, child battery or extreme cruelty.

3. 212(i) Immigrant Misrepresentation Inadmissibility Waiver: Provides a waiver at the AG’s discretion for those IMMIGRANTS deemed inadmissible under 212(a)(6)(C) if:
   i. This is the case of an immigrant who is the spouse, son, or daughter of a US citizen or of an alien lawfully admitted for permanent residence; and
   ii. It is established that there would be extreme hardship to the citizen or the LPR spouse or parent of such alien.

D. Admission Procedure
- The process for admission varies depending on the type of visa you are getting, i.e. immigrant vs. nonimmigrant.

1. Nonimmigrant Visa (i.e. Tourist Visa, X from India wants a B-2 visa)
a. Apply for the visa at the US consulate in India;
b. The consulate will try to determine if you intend to remain;  
c. If your visa application is denied, you’re screwed, you’ll have to reapply later;  
d. If the application is approved, the consulate will give you a visa stamp in your passport;  
e. Present you passport with the visa stamp to the immigration official at the port of entry.  

- Some nonimmigrant categories, particularly laborers, have additional requirements, like labor certification.

2. Immigrant Visa (i.e. Immediate Relative Visa, X from France married Y, a US citizen)  
a. Y files a visa petition with DHS. Y is the petitioner filing on behalf of X. The visa petition proves that X is the spouse of Y, who is a US citizen. Y will need to provide a marriage certificate as evidence of the marriage. In addition, Y would have to prove her citizenship, probably by a birth certificate or passport.  
b. If the petition is denied, you may need to provide more documentation. The INS will always state why it is denying. In addition, for more serious reasons, you can appeal to the BIA.  
c. If approved, the INS sends the petition approval to the National Visa Center in NH. The Center checks for accuracy, completeness, etc.  
d. The beneficiary will receive a bunch of forms to fill out and request an interview.  
e. The beneficiary will fill out a visa application at the US consulate abroad. The State Department can veto visa approvals in the interest of national security. The consular officer will interview to determine if X fits into any exclusion grounds. If the visa is approved, X has 6 months to appear at a port of entry to apply for admission. The immigrant visa is essentially a bunch of papers. If the marriage is less than 2 years old, IMFA will be triggered and the LPR status will be conditional.  
- The INS doesn’t encourage you to bring a lawyer with you to the consular interview. Consular officers want to keep the process fast, informal, and without coaching. This also prevents lawyers from preying on ignorant applicants. And consular officials don’t want to have to justify their decisions.  
- Visa application denials are supposed to be reviewed by the principle consular officer, but usually he just does a spot check. But there is the possibility of obtaining an advisory opinion from the visa office in DC. Whatever decision they make it is legally binding on the consular officer – or if he rejects the advice, he must provide a written statement explaining why. An attorney who wants a Visa Office review can request it directly, but would be more likely to get review if he got the consular officer to request it. So really there is no administrative or judicial review of visa application denials.  
- This is in part because it is a highly subjective process. The people who make these decisions are highly trained and good at what they do.  
- Some people are exempt from having to get a visa. For example, returning LPRs, those from visa waiver countries, refugees, etc.

f. X appears at a port of entry and presents his visa to the immigration inspector (who works for DHS) in order to apply for admission. The inspector has the authority to duplicate everything that’s already been done (application for admission). If the inspector doesn’t think you’re admissible, X will get a full evidentiary hearing before an immigration judge. It’s an adversarial process. Either side can appeal the decision of the IJ to the BIA. If X is denied and the BIA doesn’t rule in his favor, he can also appeal to the Court of Appeals. If the inspector grants admission, X gets his green card.  
- The immigration official will decide whether the NC is clearly and beyond a reasonable doubt entitled to be admitted. If yes, then the person is admitted. If not, they he “shall be detained” for a removal proceedings. INA 235(b)(2)(A).  

- If you are applying for an employment based visa, you will need to first apply for labor certification.  
- So essentially to get an immigrant visa there is a four step process:  
  i. Labor certification  
  ii. Visa Petition (I-130 for family based; I-140 for employment based)(ERs will petition for employment based visas)  
  iii. Visa Application  
  iv. Application for admission to immigration inspector at port of entry.  
- This four step process prevents people from giving up their jobs, spending a lot of money to come out only to find that they are inadmissible.  
- Commercial carriers can be fined for not checking you documentation first. If you’re found inadmissible, the carrier will have to pay for your return and be fined. This serves as an additional check, but it might be bad for asylum seekers.  
- Some people can petition for themselves. For example, victims of domestic violence. But it might be hard for battered women to prove abuse because there may be no documentation because they were always scared to call the police, they might fear retaliation from the husband, might not have gone to a hospital out of fright.  
- It will also be hard to show that the marriage was entered into in good faith. In a normal marriage you would show good faith with common houses, leases, car titles, joint bank accounts, etc. However this is
harder to show for undocumented people who are trying to go undetected. The spouse might use this leverage to get his wife sent home.

E. Exclusion

1. General Exclusion Process
   - Only a small proportion of those arriving NCs who are refused admission exercise their right to a hearing. The majority depart voluntarily.
   - An INS hearing will not start until 10 days after service of the Notice to Appear, in order to allow the NC time to find representation. INA 239(b)(1).
   - The NC will usually be detained while exclusion proceedings are pending and occurring.
     - Detention keeps the NC from disappearing, there might be fears he would pose a threat to national security, and detention might serve as a deterrent. As a disadvantage, there is not a lot of detention facility space, and it has the appearance of punishment.
   - Procedures followed in removal hearings are contained in INA 240 and the Rules of Procedure for Immigration Judge Proceedings.
   - Burden of proving admissibility is on the arriving NC. INA 291. The applicant must show that he “is clearly and beyond doubt entitled to be admitted and is not admissible under 212.” INA 240(c)(2)(A).
     - You could argue phrase could mean that he has to show he is clearly and beyond doubt entitled to be admitted under one of the broad programs, and show he is not inadmissible under 212(a) to some unspecified standard.
   - The INS and the NC can appeal and adverse decision to the BIA, and also to the court of appeals after the BIA rules.

2. Expedited Removal INA 235(b)(1)
   - As a result of 1996 AEDPA immigration reform, immigration officers at ports of entry are authorized to removal certain arriving NCs through expedited removal, also called summary exclusion.
   - 235(b)(1) applies whenever the immigration officer determines that an arriving NC is inadmissible under either 212(a)(6)(C) (fraud) or 212(a)(7)(lack of proper documents). INA 235(b)(1)(A)(i).
     - Once it’s determined the NC falls within one of these categories, the person is removed without further hearing. There is no administrative appeal except in the case of returning LPRs, admitted refugees, and people who have already received asylum. INA 235(b)(1)(C).
   - The only permissible judicial review of expedited removals is on the issues of whether the person is a citizen, whether the person was in fact ordered removed, and whether the person falls within one of the exceptions.
     - Those indicating a fear of persecution or an intention to apply for asylum receive screening interviews.
     - When admission is unlikely, it is often smart to withdraw your application. Under 212(a)(9)(A), removal at a port of entry renders someone inadmissible for 5 years.

3. National Security and Foreign Policy Exclusion Cases:
   - INA 235(c) sets up a special procedure for cases that present national security or foreign policy issues.
     - If the immigration officers or judge suspects the arriving NC may be inadmissible under INA 212(a)(3)(A)(i or iii), (B or C), the officer or judge shall order the alien removed. INA 235(c)(1)
   - The AG automatically reviews these removal orders. If he has confidential information on which he makes his decision for removal, the AG need not disclose these grounds if they could be “prejudicial to the public interest.” The AG can then order the NC removed without a hearing. Otherwise he decides what further inquiry is needed. INA 235(c)(2).

4. Adjustment of Status: INA 245
   - If you are already physically present in the US, in certain situations it is silly for you to have to return to your home country and reapply for a new status.
   - In order to get adjustment of status: INA 245(a)
     i. The NC must meet all the substantive requirements of the LPR status he wants, and
     ii. That visa must be immediately available (current).
   - 245(c)(2) disqualifies people who are now or have ever been out of status – unless you’re an immediate relative.
   - 245(i) was a temporary measure that expired in 1998, but those whose applications were still in the pipeline can still use this.
   - 245(k) replaced 245(i). This provision applies only to certain employment based visas (1st three preferences and some 4th preference) and you have to have been legally admitted initially.
   - With these adjustment of status cases, need to watch out for 212(a)(9)(B)(i)(I and II).
X. Ethical Concerns

A. INA 274C

1. INA 274C(a)(5)
   - Makes it a civil offense, punishable by fines of $250-2000 for first offenders, to prepare, file or assist the filing of any immigration-related application or document “with knowledge or reckless disregard of the fact that such application or document was falsely made.”
   - It is now a crime, punishable by up to 10 years in prison to knowingly present any application or document required by the immigration laws which contains any false statement or which fails to contain any reasonable basis in law or fact.

2. INA 274C(3)
   - “A person who knowingly or willfully fails to disclose, conceals, or covers up the fact that they have, on behalf of any person, and for a fee or other remuneration, prepared or assisted in preparing an INS application which was falsely made is subject to a prison term of up to 5 years.”

B. Model Rules

1. Rule 5.5(b)
   - Prohibits a lawyer from “assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”
   - Ethical Consideration 306 (not sure if this is still in force) provides that delegation of tasks to clerks, secretaries, etc. is fine if the lawyer maintains a direct relationship with his client and supervises the delegated work.

C. Cases
   - Fl. Bar v. Matus: Matus held himself out as qualified to provide legal services when in fact he wasn’t. He offered to help his client (an INS officer) enter into a sham marriage. The court enjoined him the unauthorized practice of law.

XI. Deportability Grounds

A. Generally
   - Deportability grounds are found in INA 237(a). These grounds pertain to people who had been admitted.
   - NCs who have entered but not been admitted (i.e. those who entered without inspection) are considered inadmissible, not deportable. INA 212(a)(6)(A), 235(a)(1).
   - Fong Haw Tan v. Phelan: As a matter of statutory interpretation, ambiguity in a deportation statute should be construed in favor of the NC, because deportation is so severe.

1. Process Generally:
   a. INS starts the formal deportation process by serving on the NC a Notice to Appear.
      - The Notice alleges facts and specifies the statutory deportability (or inadmissibility) grounds the INS is charging.
   b. The Immigration Judge, a justice department official, presides over the removal hearing.
   c. If IJ finds the person deportable, he may grant discretionary relief, terminating the proceedings (i.e. voluntary departure), or issue an order of removal.
   d. The NC or the INS can appeal the IJ’s decision to the BIA. The NC, but not the INS, can obtain judicial review of the BIA decision by filing a “petition for review” directly in the applicable US Court of Appeal. UNA 242(a)(1).

2. Theory of Deportation
   - Courts have consistently denied that deportation is designed to punish. Rather, the historical function has been to serve as a check on the admission process.
   - Deportation was originally conceived of as a device for removing those who shouldn’t have entered in the first place – either because they were never admitted, or because they were admitted but shouldn’t have been.
   - Modern deportation policy serve to remove those whose continued presence is injurious to the public welfare.

B. Deportation Procedure:
   - Five basic steps:
     i. Apprehension;
     ii. Removal hearing;
     iii. Administrative Review;
iv. Judicial Review;
v. Execution of Removal Order
- Usually once you’re apprehended you are detained unless you are not a risk of flight and not dangerous to the community.
- For more detail on each of these steps, see “Deportation Procedure, pg. 630-643” typed notes.

C. Entry vs. Admission

1. Generally
- Up to 1996, “entry” determined whether you were subject to exclusion or deportation. If you had “entered” you were deportable.
- IIRIRA replaced “entry” with “admission.” However “entry” is still used in selected inadmissibility and deportability grounds. Congress’ definition of “admission” itself refers to “entry.” See 101(a)(13)(A) below.
- So the question of when a physical crossing becomes an “entry” is still quite important. Generally, there is no entry until you are free of official restraint. So if you sneak across the border, that is not an entry.

2. Entry
a. 101(a)(13):

INA 101(a)(13)(A):
“The terms “admission” and “admitted” mean, with respect to an alien, the lawful entry of the alien into the US after inspection and authorization by an immigration officer.”

INA 101(a)(13)(C)
“An alien lawfully admitted for permanent residence in the US shall not be regarded as seeking an admission into the US for purposes of the immigration laws, unless the alien:
(i) Has abandoned or relinquished that status;
(ii) Has been absent from the US for a continuous period in excess of 180 days;
(iii) Has engaged in illegal activity after having departed from the US;
(iv) Has departed from the US while under legal process seeking removal of the alien from the US, including removal proceedings under this Act and extradition proceedings;
(v) Has committed an offense identified in 212(a)(2) unless since such offense the alien has been granted relief under 212(h) or 240A(a); or
(vi) Is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the US after inspection and authorization by an immigration officer.”

Fleuti: You will be regarded as making an entry if your trip was intended to meaningfully interrupted your permanent residence. Courts will look to length of time you were gone, purpose of the trip, and documents you procured to take the trip, etc. To be non-meaningful, a trip can be much longer than several hours, sometime several months will be okay.

- If there has been a lawful entry, and the returning LPR does not fall within any of the listed categories above, there is not a new admission.
- Generally, if you fall within one of the 6 holes above, you are regarded as seeking readmission. But what does the word “unless” really mean?
  - It might indicate that if you do fall within one of the categories, you might not be subject to admission and Fleuti.
  - In Collado Munoz the BIA held that a returning LPR who falls within one of the above categories is to be regarded as seeking admission. The BIA further held that Fleuti was irrelevant.
  - In Richardson, a US district court held that returning LPRs who fall within one of the above categories are subject to a Fleuti analysis to determine if their departure meaningfully interrupted their permanent residence in the US.

b. Fleuti:
**Bottom Line:** You didn’t intend to depart unless you intended to meaningfully interrupt your permanent residence. The Court will look to length of visit, purpose of visit, if you procured documents, etc.

- The INS tried to deport Fleuti for being excludable at the time of his entry. He should have been excluded when he arrived because he was gay (this was the 1960s), but it wasn’t caught when he entered. He was an LPR who had gone over the Mexican border for a few hours to shop. The question was whether his return constituted an “entry” such that he was subject to new admissibility grounds.
- The old statute state: LPRs don’t make new entry if: (a) departure to the foreign place was not intended; or (b) departure was not reasonably expected; or (c) presence was not voluntary.
- Under the literal language of the old statute, Fleuti made an entry. But the court looked beyond the literal language. If found that applying the literal language resulted in absurd results.
  - In DiPasquale, the LPR took a train from Buffalo to Detroit that went through Canada. The court held this was not a new entry, and the LPR didn’t intend to depart.
  - In Delgadillo, the LPR’s boat was torpedoed off the coast of Florida and he was taken to Cuba to recover.
    The court said his presence in Cuba was not voluntary so this was not another entry.
- The majority used the exceptions codified by Congress in the old statute to formulate broader, underlying principles, particularly that deportation shouldn’t hinge on an even like this.
  - The noted that §316 creates a 5 years residency requirement of LPRs to naturalize, provided they weren’t gone for more than 6 months at a time and not for more than a total of 2.5 years. The majority says this indicates that a brief period away shouldn’t make a big difference.
- The dissent argued that all the exceptions Congress wanted were codified. If Congress wanted to make a broad exception for LPRs, it would have done so – look at §316.

D. Specific Deportability Grounds: Immigration Control

1. Entry while Inadmissible, INA 237(a)(1)(A):
   - This provision renders you deportable if at the time you entered the US you were inadmissible. Must show:
     i. Entry (an entry will do, not just the most recent);
     ii. Inadmissibility Ground;
     - **Waiver** for LPR’s who are inadmissible for Committing Fraud: INA 237(a)(1)(H). Must show:
       i. Entry;
       ii. Inadmissible because of fraud (212(a)(6)(C)(i));
       iii. Are the spouse, parent, son or daughter of a US citizen or LPR; and either:
         [iv. Was in possession of an immigrant visa or equivalent (doesn’t have to be valid); and
         v. Is not otherwise inadmissible (except for being inadmissible under (5)(A) and (7)(A) as a direct result of the fraud is fine)] OR
         [iv. Qualifies under clause (iii) or (iv) of 204(a)(1)(A) or (ii) or (iii) of 204(a)(1)(B) (spousal/child abuse)]

   a. In Violation of US Law, INA 237(a)(1)(B)
      - An NC who is “present in the US in violation of the Act or any other law” may be deported.
      - This provision is used to catch those who violate the conditions of their stay, for example by overstaying or by working without authorization.
   b. Failure to Comply with Immigration Status Conditions: 237(a)(1)(C)(i)
      - These types of violations also trigger 237(a)(1)(C)(i): failure to maintain or comply with the conditions of one’s immigration status.
   c. Failure to Satisfy IMFA Requirements: 237(a)(1)(D)
      - Those who fail to satisfy IMFA for the full two years are deportable under 237(a)(1)(D).
   d. Failure to Comply with Registration and Reporting Requirements: INA 237(a)(3)(A):
      - Certain classes of NCs have the obligation to register, report addresses, etc.
      - Willful violations of the requirements are criminal offenses and can be grounds for deportability even without criminal convictions.
   e. People Smuggling: 237(a)(1)(E)
      - A criminal conviction for people smuggling is not required. The AG has discretion to waive this ground for LPRs who assist only certain family members. 237(a)(1)(E)(iii).

E. Criminal Deportability Grounds:

1. Generally
   - There is very little political cost in being tough on criminal aliens.
   - LPRs often plead guilty to criminal offenses without realizing that this conviction will make him deportable.
   - The validity of a criminal conviction may not be collaterally attacked in removal proceedings. However, there are various post-conviction remedies that can be pursued in the court that entered the conviction.
Cases:
- **Parrino**: 2nd Circuit COA would not allow Parrino to withdraw his guilty plea to conspiracy to kidnap charges unless it would constitute a manifest injustice to hold him to the plea. The court found surprise resulting from erroneous information received from your attorney is not enough to constitute manifest injustice absent a showing of unprofessional conduct. The subject matter of the surprise: deportation, it a collateral consequence. (Dissent points out that other courts have found this to be a manifest injustice.)
- **Pozo**: SC of CO allowed the alien to withdraw his guilty plea because his attorney’s performance in failing to investigate the deportation issue fell below and objective standard of reasonableness and the deficient performance resulted in a prejudice to the alien. The attorney, in failing to investigate, did not act as a reasonable attorney would act in the same circumstances.

2. Criminal Offenses: 237(a)(2)

   - To deport for a crime of moral turpitude, you must show:
     i. Conviction of a Crime;
     ii. Involving Moral Turpitude;
     iii. **Committed** less than 5 years After Admission (NOT convicted, look to commission); and
     iv. Sentence of One Year or Longer May be Imposed.
   - Convictions? Juvenile offenses won’t usually apply. What if the conviction was expunged?
   - Moral Turpitude: Test is whether the required elements of the crime in the abstract necessarily involve turpitude. Ask, is it possible to violate this provision without involving moral turpitude? If yes, the court should hold this is not a crime of moral turpitude, but often this doesn’t happen.
     - Generally the crime must involve baseness, vileness, or depravity
     - Any crime that necessarily involves dishonesty will necessarily involve moral turpitude. Best to consult a treatise to determine if something involve moral turpitude.
     - Example: Larceny: A mother steals milk to feed her child. This wouldn’t involve moral turpitude, but the courts would still hold that larceny is a crime of moral turpitude.
   - If you are appealing your conviction as a matter of right, the deportation will be stayed. If the appeal is discretionary, this will not preclude finality and you can be deported.

   - To be deported for multiple criminal convictions, you must show:
     i. Convicted of committing two or more crimes;
     ii. Crimes involved moral turpitude;
     iii. Crimes were committed **any time after admission**;
     iv. The crimes did not arise out of a single scheme of criminal misconduct
   - In this provision, it does not matter when the crimes were committed, as long as they were committed any time after admission, and also it does not matter what sentence you get.
   - Single Scheme? There are two views:
     - **Pacheco** (1st Cir): The crimes must be committed at one time. There can be no substantial interruption that would allow the participant to disassociate himself from the enterprise and reflect on what he has done.
     - 9th Cir: The statue refers to a single scheme, not a single act. So it is enough that the two crimes were planned at the same time and executed in accordance with the plan.

   c. Aggravated Felony: 237(a)(2)(iii)
   - 101(a)(43) defines what offenses constitute “aggravated felonies.” When reading these definitions, they often refer to a minimum term of imprisonment that “may be imposed.”
     - The **term of imprisonment** is defined in 101(a)(48)(B) to include “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”
     - The term “**conviction**” means a guilty plea or adjudication of guilty by a court where (i) the judge or jury has found the alien guilty or the alien pleads guilty; and (ii) the judge or jury has ordered some form of punishment, penalty, or restraint on the alien’s liberty. 101(a)(48)(A)
   - 101(a)(43) has a part at the very end that states that the definitions also apply to an offense in **violation of the law of a foreign country** “for which the term of imprisonment was completed within the previous 15 years.”
     - Under this provision, if you commit an aggravated felony in a foreign country, for which you serve time, you are inadmissible for 15 years.
- 101(a)(43)(F) covers **crimes of violence** when the term of imprisonment is one year or more. Crimes of violence are defined as follows:
  a. An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
  b. Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
    - Prong b requires the offense to be a felony, prong a does not.
    - Prong a requires the element of use, attempted use, or threatened use of physical force, branch b requires only a substantial risk of such force.
    - Prong a speaks of an element of the offense, contemplating scrutiny of the criminal statute in the abstract. There is debate over whether prong b requires that as well or if it is fact specific.

- So to be **deportable for an aggravated felony**:
  i. Convicted of an aggravated felony (see 101(a)(43))
  ii. Any time after admission.
- There is dispute over whether something like a DUI would constitute a crime of violence.

- **Waiver of Certain Criminal Offenses**: 237(a)(2)(A)(v)
  - Under this provision, if the alien is granted a full and unconditional pardon by the governor of any state or the President, you cannot be deported for crimes of moral turpitude 237(a)(2)(A)(i); multiple criminal convictions 237(a)(2)(A)(ii); aggravated felony 237(a)(2)(A)(iii), or high speed flight 237(a)(2)(A)(iv).

- **Drug Offenses**: 237(a)(2)(B)
  - Rather than enumerate all the drugs and all the proscribed activities, the statute refers to NC who have been convicted of violating “any law or regulation… relating to a controlled substance.”
  - To be deported for conviction related to controlled substances you must:
    i. Convicted of a violation of any law or regulation of a State, the US or a foreign country
    ii. Relating to a controlled substance
    iii. Other than a single offense involving possession for one’s own use of 30 grams or less of marijuana.
  - Drug abusers and addicts are deportable under 237(a)(2)(B)(ii)
  - If you are convicted of “illicit trafficking in a controlled substance” you also have to worry about 237(a)(2)(A)(iii) because that is an aggravated felony under 101(a)(43)(B).
  - Deportability provisions treat even the mildest drug offenses more severely than some other more serious crimes involving moral turpitude.

- **Other Miscellaneous Criminal Grounds**:
  i. Certain Firearm Offenses: 237(a)(2)(C)
  iii. Domestic Violence: 237(a)(2)(E)
  iv. Failure to Register and Document Fraud: 237(a)(3)(B)
  - None of these provisions requires either that a particular sentence be imposed or that the crime be committed within a certain number of years after admission.
  - Some deportability grounds don’t require a criminal conviction at all, even though the conduct they describe is a criminal offense:
    i. Illegal Voting: 237(a)(6)
    ii. Marriage Fraud: 237(a)(1)(G)

- **Political and National Security Grounds of Deportability**: 237(a)(4)
  - Variety of grounds, including:
    a. Engaged in spying, sabotage, violate or evade an law prohibiting certain exports: 237(a)(4)(A)(i)
    b. Engaged in a criminal activity that endangers public safety or national security: 237(a)(4)(A)(ii)
    c. Opposing, control or overthrow the government by force, violence or other unlawful means: 237(a)(4)(A)(iii)
    d. Engaged or engaging in a terrorist activity: 237(a)(4)(B)
    e. Foreign Policy: Activities would have potentially serious adverse foreign policy repercussions: 237(a)(4)(C)
    f. Assisting in Nazi persecution or engaging in genocide: 237(a)(4)(D)
- **Kulle Case:** Kulle is being deported under 237(a)(4)(D) for assisting in Nazi persecution. He was a guard at a concentration camp. Kulle argues he was just a guard. But the court held that assistance in Nazi persecution can be inferred from mere presence at the place where there was persecution. Personal involvement in atrocities need not be proven, it can be inferred from the circumstances.

G. **Public Charge: 237(a)(5)**
- To be deported for being a public charge you must show:
  1. Within 5 years after date of entry
  2. Alien has become a public charge
  3. From causes not affirmatively show to have arisen since entry.

XII. **Cancellation of Deportability – Lasting Relief from Deportability**

A. **Generally:**
- Some NCs are generally ineligible for relief. These people generally include:
  1. Those who fail to appear at removal hearings, or who receive voluntary departure and fail to leave cannot obtain any remedies for 10 years;
  2. Aggravated Felons are disqualified expressly from most major relief provisions;
  3. Those deportable on terrorist grounds are often barred.
- 240A cancellation can only be applied for during removal proceedings. You can move to reopen the removal proceedings later on if something comes up. If the BIA has already ruled, you file the motion with the BIA, otherwise go to the IJ.

B. **Cancellation of Removal Part A: INA 240A (Lasting Relief)**
- Part A describes a remedy available only to certain LPRs. Its most common use is in cases where the deportability charges stem from criminal convictions.
- Applies to both deportability and inadmissibility grounds.

1. Development of the Law
   a. **Matter of L:** LPR convicted of a crime involving moral turpitude more than 5 years after admission. L left and tried to return but was deemed to have made reentry. The INS tried to deport him under 237(a)(1)(A) for being inadmissible after reentry. Under the old law, L could have tried to get the Secretary of Labor’s discretion to admit him at the time of his original return. But he did not. The AG waived the admissibility that existed at the time of readmission.
   b. **Matter of GA:** LPR convicted of a drug crime, and became deportable for that. He left the US and became inadmissible at entry. This is different from Matter of L because GA was actually deportable when he left. L could have stayed put and been fine, but GA was deportable regardless. GA got the inadmissibility ground waived, but when he returned, he was still deportable. Why waive inadmissibility if you’re just going to be deported for the same thing? The BIA decided it could waive the deportability grounds based on the inadmissibility grounds it waived.
   c. **Francis v. INS:** LPR who never left the country was deportable for a drug conviction. The court found it would be irrational to limit relief to those long-term LPRs who temporarily leave the US after the events that leave them deportable. The court found this to be a violation of equal protection and extended the statute to eligible people who had never left.
   d. **Hernandez-Casillas:** Under old law, can only waive deportability grounds when there is an analogous inadmissibility ground.

2. **Part A Process: 240A**
   - To qualify you must show 240A(a):
     1. LPR for at least 5 years;
     2. 7 years of continuous residence in the US after having been admitted;
     3. No convictions for aggravated felonies;
     4. AG must grant you the cancellation in his discretion.
   - This cancellation of removal applies to both deportability and inadmissibility grounds.
   - The **continuous residence** requirement is spelled out in 240A(d). The continuous residence period terminates with the earlier of:
     1. Service of notice to appear; or
     2. The alien commits an offense referred to in 212(a)(2) that renders the alien inadmissible under 212(a)(2) or removable under 237(a)(2).
3. Disqualifications:
- The only criminal offenders disqualified are aggravated felons: 240A(a)(3), and those who are inadmissible or deportable on national security grounds: 240A(c)(4).

C. Cancellation of Removal Part B: INA 240A (Lasting Relief)
- Part B refers to cancellation of removal for certain nonpermanent residents, but also LPRs who do not meet the requirements of Part A can use it.
  - So undocumented migrants are eligible for part B, and so are LPRs.
  - Used to be called “suspension of deportation.”
  - This remedy exists because people establish roots that you don’t necessarily always want to break.

1. Part B Substantive Requirements: 240A(b)
- The requirements for this cancellation have been made harder in recent year. You must show:
  i. Physical present in the US for a continuous period of not less than 10 years preceding the date of application;
  ii. Good moral character during such period;
  iii. No convictions of offenses under 212(a)(2), 237(a)(2) or 237(a)(3);
  iv. Removal would result in “exceptional and extremely unusual hardship to the alien’s spouse, parents, or child who is a citizen of the US or an alien lawfully admitted for permanent residence.”
  v. AG’s discretionary grant of the cancellation.

- Physical presence for a **continuous period** of 10 years is interrupted is the alien departs from the US for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days. 240A(d)(2).
- A failure to keep continuous presence may indicate a lack of roots.

- **Exceptional hardship** is a hard requirement to meet. It is the toughest hurdle.
  - The issue of hardship can surface in 2 settings:
    - First is in the removal proceeding when the applicant applies for cancellation. Here the applicant has the burden of establishing the hardship. There is no court review of any judgment regarding the granting of relief.
    - Second is after the removal proceedings but before the issuance of the final removal order. The alien can move to reopen the removal proceedings and then reapply for cancellation.
  - In either setting you must establish a prima facie case of hardship, but even then the INS has the discretion to deny cancellation or reopening the case.
  - There are some circumstances in which the BIA would say yes, you’ve made a prima facie case, but we’re still going to deny the reopening. For example, maybe if you’ve shown yourself to have overwhelming negative discretionary factors. Even then though, everything is a question of degree and there is some question as to whether you should be allowed to present evidence. The BIA is afraid of endless series of review by people wanting to delay removal.

2. Case
   - **Jong Ha Wang**: Wang wanted to reopen his case. He didn’t have 7 years of continuous residence at the time the case went through, but by the time the order of removal was entered, it had been 7 years. By reopening the removal proceedings, they could apply for cancellation. The BIA, however, said Wang had failed to show a prima facie case of hardship. Wang had argued that his kids would suffer in Korea for worse education, not knowing the language, etc. He also argue it would be an economic hardship to have to move. The 9th circuit said there was a prima facie case. The SC agreed with the BIA and ruled that the allegations by Wang were vague and unsupported by evidentiary documents, and that the 9th circuit usurped the BIA’s discretionary authority.
   - Cheney Principle: Courts can’t affirm an agency decision on a ground not given by the agency. The agency had the discretion here to decide if there was enough evidence to establish a prima facie case. Even when you allege a prima facie case, that is not sufficient because the INS still has discretion to deny the reopening.

D. Nacara:
- Nacara grants special dispensations to nationals of certain named counties (Nicaragua and Cuba). It essentially provides amnesty under provisions similar to 240A, but more relaxed.
- For more information, see my notes entitled “Cancellation of Removal: Part B, pgs. 579-595, 601-606.”

E. Registry:
1. Generally:
   - Governed by §249: confers a discretionary authority on the AG to award LPR status to NCs who entered the US before a specific date.

2. Requirements:
   - The applicant:
     (i) Not inadmissible under 212(a)(3)(E) – Participant in Nazi persecutions or genocide,
     (ii) Not inadmissible under 212(a) insofar as it relates to criminals, procurers, and other immoral persons, subversives, violators of the narcotic laws or smugglers or aliens;
     (iii) Must have maintained continuous residence in US since entry, which must be since at least 1/1/2,
     (iv) Must be of good moral character, and
     (v) Must not be ineligible for citizenship;
     (vi) Not deportable under 237(a)(4)(B) – Terrorist activities.
   - If you have failed to appear at your removal hearing or failed to comply with voluntary departure orders, you can’t get registry for 10 years.
   - Apply for registry before removal proceedings, with the INS, or with the IJ after removal proceedings have begun.

3. Registry vs. Cancellation of Removal Part B:
   - LPRs convicted of crimes are not eligible for either remedy.
   - Purpose of both is to waive removal for illegal aliens who have been present in the US for a long time.
   - Differences:
     (i) For 240A(b) you need physical presence (more easily interrupted – you have to be physically present, easily interrupted by temporary trips abroad).
     - With continuous residence, you can take trips home or wherever, provided you maintain a continuous residence. If you plan to go home, however, you aren’t a resident.
     (ii) 240(A)(b) requires a showing of hardship.
   - You would be eligible for 240A(b) and not 249 if you have not been here since 1972.

4. Policy:
   - Should the policy be, if you’ve been in the US for X number of years, instead of since a certain date? Maybe a certain number of years would be better because it is unfair to make ties in the US and then be forced to leave.
   - Why hasn’t Congress done this? Administrative costs, fear of sending a message that if you sneak in and evade detection for X number of years you’re fine.

F. Legalization:
1. Generally:
   - This is not really in effect anymore. There are three different plans:
     (i) General legislation, laid out in 245A
     (ii) Special legalization program for agricultural workers, 210
     (iii) Special program for Cubans and Haitians.
   - IRCA aimed to reduce the level of immigration in two ways:
     (i) Impose sanctions on ERs who employ illegal immigrants;
     (ii) Gives people amnesty and allow them to start with a clean slate.
   - As a result of 245A, 2.7M people benefited.

2. General Legalization §245A:
   - Two prongs:
     (i) Apply for temporary resident alien status, which required:
       a. Continuous, unlawful presence from 1/1/82 to the time of filing.
     (ii) Apply for LPR status, which required:
       a. Continuous residence,
       b. Certain English language skills;
       c. Some knowledge of American history and government.
   - There were no numerical quotas, and for a while, there were no provisions authorizing family members to stay as well. Eventually they gave limited relief, and 1.6M benefited.

3. Special Agricultural Worker Program §210:
   - SAW program enacted in response to growers’ concerns. To apply:
     (i) Apply temporary resident alien status
a. Must have performed seasonal agricultural services in the US for at least 90 man days during 12 month period ending 5/1/86.

(ii) Apply for LPR status.
   a. Generally no requirements to get LPR status, AG will just make sure you weren’t lying or anything.
   - Not subject to quotas.

4. Cubans and Haitians in 1986:
   - Unlike both the general legalization program and SAW, this one was discretionary and allowed qualified applicants to obtain LPR status immediately.
   - New status was effective retroactively to 1982.

5. Nicaraguans and Cubans in 1997 under NACARA:
   - One provision provided amnesty for certain Nicaraguans and Cubans.
   - The person has to have been otherwise admissible, except that certain common inadmissibility grounds were made applicable.
     - The inadmissibility grounds for those who had been out of status 180 days or one year were also made inapplicable.

6. Haitians in 1998:
   - NACARA left a gaping hole. So Congress passed the Haitian Refugee Immigration Fairness Act.
   - Created a legalization program, culminating in adjustment of status for certain Haitian nationals who resided in the US since Dec. 31, 1995, and who had applied for asylum or had been paroled before that date.

G. Adjustment of Status §245:
   - This statute is really only applicable to:
     (a) Those who are deportable for overstaying or otherwise violating the terms of the nonimmigrant visas; and
     (b) Those who are exempt from the out of status bar because they are now either
       (i) Immediate relatives; or
       (ii) Employment based immigrants who have not been out of status for more than 180 days.
   - Adjustment of status is not available for people who have failed to appear at their removal hearings or who failed to comply with voluntary departure orders for 10 years.
   - You apply for this form of relief at the removal hearings. It’s a form of discretionary relief.
   - If you’re an immediate relative, the fact that you overstayed doesn’t prevent you from adjusting status, so you would still be able to apply for this.
   - Prior, we talked about the procedure for coming to the US. That is, instead of making you go overseas and come back, we will let you apply for your visa here. So adjustment of status is both an alternative to the visa process, and also a defense to deportability.

H. Private Bills:
   - Legislation that provides LPR status for a specific individual when existing provisions would not.
   - These aren’t as common anymore. It involves convincing a congressman to introduce the bill.
   - The biggest fear is that immigration will become politicized – those with more power and money will be exempt from deportation.
   - the more the legislature provides the requirements, the more evenly applied the law will be, but it also takes the flexibility away from the judicial branch to carefully consider the facts of each case.

XIII. Limited Relief from Deportability
A. Deferred Action:
   1. Generally:
      - Also known as prosecutorial discretion or nonpriority status. Instead of removing right away, the DHS puts the case on the back burner.
      - This is completely up to the DHS, and is not something that the NC can petition for. The DHS would do this when the cases are unusually compassionate – cases in which humanitarian factors would make deportation “unconscionable.”
      - Deferred action doesn’t give you LPR status and doesn’t make you entitled to work.
      - There’s no judicial review as to the AG’s decision to file for your removal.

   2. Factors DHS considers in Granting Deferred Action:
      - Most important factor is the relative importance of the applicable federal government interest.
- Whether the person is an LPR; duration of his residence; any criminal history; humanitarian concerns; whether there were past criminal history; humanitarian concerns; existence of past immigration violations; the likelihood of ultimate removal; availability of alternative course of action; availability of detention space, etc.

3. Policy:
- §237, the deportability statute, uses mandatory language… “The AG shall…” So where does the INS get its power to give this deferred action?
  - This is normal prosecutorial discretion, and Congress has only allocated a certain amount of funds to removal.
  - Also it says you will be deported “upon the order of the AG.”

B. Voluntary Departure §240B:
1. Two types:
   (i) §240B(a): is allowed either in lieu of removal proceedings or before they have been completed. (He thinks this is inartful drafting because a grant of voluntary departure ends the proceeding);
     - Time allowed for departure is 120 days.
   (ii) §240B(b) allows voluntary departure at the conclusion of proceedings.
     - Subsection (b) has more disqualification possibilities, and bond for (b) is mandatory, not discretionary.
     - Time allowed for departure is only 60 days.
     - This subsection is much more stringent.
   - Congress wants to encourage people to take voluntary departure before removal proceedings being.
   - Both (a) and (b) are departure at the NC’s own expense.
   - Voluntary departure is not available for people who have failed to appear at their removal hearings or failed to comply with voluntary departure orders for 10 years.

Summary:
- If you take voluntary departure before removal proceedings begin, you will be inadmissible for 3 or 10 years, depending on how long you were here illegally (212(a)(9)(B)(i),(ii)).
- If you go for removal proceedings and are ordered removed, you’re inadmissible for 10 year (212(a)(9)(A)(ii)).
- If you apply and get voluntary removal during removal proceedings, you’re home free.

2. Why take Voluntary Departure?
- Those ordered removed are ineligible for return for 10-20 years unless they can obtain INS permission to come sooner.
- Those who accept voluntary departure are not subject to a particular bar – but may also be delayed from reapplying.
- Often there is little to gain from waiting for a removal hearing and they would either have to post bond or remain in detention.

3. Policy:
- The vast majority of deportable NCs leave by way of voluntary departure. Benefit is tremendous, as lots of money is saved.
- There is a danger that DHS may pressure NCs with arguably valid cases to accept voluntary departure.

4. Objections to Destination:
- Governed by §241(b)(2): Alien can choose one country to which he would like to be deported, and the AG has to send him there.
- AG may in some circumstances disregard choice, and in that case, should send NC to (i) Where he was admitted from;
  (ii) Foreign port location from where he left for the US;
  (iii) Where he resided before he came to the US;
  (iv) Where he was born;
  (v) Sovereignty over his birthplace;
  (vi) Anywhere that will take him.

5. Stays of Removal:
- After an IJ or BIA has issued the final removal order, the DHS generally gives the person a certain amount of time to take care of personal matters before leaving the US.
- Sometimes when that time is not enough, the DHS has the discretion to grant a temporary stay.
- Especially important in the context of motions to reopen. Want to ask the BIA to reexamine the case. The BIA does not have to grant the request for the stay, they could remove you, and then say that your motion to reopen is not moot.
- Why would the law allow the DHS to do this? If it were otherwise, motion to reopen would prolong stays indefinitely. If there seems something significant to the argument, they will stay the removal, but if it was frivolous, you’re out of here.

6. Defenses:
- Citizenship.

XIV. Deportation Procedure:
A. Removal Proceedings:
1. Generally:
   - There used to be exclusion and deportation proceedings. Now, post-IIRIRA, we have removal proceedings.
   - But there are still some procedural differences in removal proceedings for those at the border vs. removal of those in the interior.
   - An Order to Show Cause is given to start the proceeding, but the government has the burden of proof. Now the alien gets a Notice to Appear.

2. Exceptions to the Deportation Removal Procedures:
   (i) Expedited Removal;
   (ii) Crime Related Removal;
   (iii) Inabsentia Removal;
   (iv) Removal of those previously removed who came back illegally;
   (v) Crewmen;
   (vi) Terrorist Removal Proceedings (See E below).

B. Representation:
1. Generally
   - In removal proceedings, one has the privilege of being represented at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in removal proceedings. INA 240(b)(4)(A)
   - Lawyers, law students and graduates not yet admitted to the bar and under direct supervision, reputable individuals with good moral basis, and accredited representatives from recognized organizations can represent NCs. CFR 292.1
   - Law students can’t be paid by the client. Why not? Purpose is to teach.
   - Many NC’s go unrepresented, so it’s a good idea to allow a broader group of law students to represent them.
   - We could take it a step farther and allow licensed attorneys, accredited representatives, or anyone else with permission from the judges.
   - That might increase the amount of representation. But problems with discretionary decisions, and you’d have to take time to accept each potential representative.
   - The regulations already to allow people who are not licensed lawyers, this is because many NCs are indigent and can’t afford representation.
   - An NC could try to argue due process: The facts of this case require provision of legal representation. This is more of a theoretical argument, it rarely works.
   - Congress has cracked down on legal services organizations, saying if you represent an NC, you can’t receive legal services corporation money, with a few exceptions.
   - Many legal services providers have just spun off their NC representation into a separate entity.

2. Discipline of Practitioners:
   - Provisions found in 8 CFR 3.102, pg. 655-656.
   - (j): Frivolous claims can be used for stalling, which can be a big problem.
   - (j)(1): If practitioner knew or reasonably should have known that her acts lacked an arguable basis in law, that is frivolous behavior.
   - (k): Ineffective assistance of counsel. Practitioner has to walk a fine line between filing frivolous claims and offering ineffective assistance.
   - Ineffective assistance is a new ground. The fact that this is a recent addition may indicate something. This may also create problems of communication between new counsel. It was primarily created to end motions to reopen for ineffective assistance of counsel, rather than to protect the NC.
C. Evidence
1. Generally:
   - Admissibility: Evidence must be probative to be admitted.
     - The hearsay rule does not apply to immigration. The evidence is admissible if:
       (i) Must be probative;
       (ii) Can’t be fundamentally unfair on the facts to admit the evidence.
   - 4th Amendment: Illegal search and seizure of evidence.
     - INS v. Lopez-Mendoza: SC said exclusionary rule generally doesn’t apply to removal proceedings. Although, there may be egregious cases, occasionally, where you might be able to get 4th Amendment protection.

2. Standard and Burden of Proof:
   a. Standard of Proof Generally
   - **Standard is**: Government must establish facts supporting deportability by “Clear, unequivocal and convincing evidence.”
     - Congress has since dropped the work ‘unequivocal. The standard is now codified in 240(c)(3)(A).
     - The SC took the same standard as used to be used in expatriation cases. They felt that no less a burden in appropriate in deportation proceedings, than in expatriation proceedings. The immediate hardship is often greater than that inflicted by denaturalization, which does not immediately result in expulsion from the US.
     - Debate on what the standard of proof should be, SC picked the above standard. It is the middle point between the civil standard of review of “more likely than not” and the criminal standard of review of “beyond a reasonable doubt.”
     - Judge Harlan would apply the standard that reflects an assessment of the comparative social disutility of each.
       - So, for example, is it better in this case to find the NC deportable and get rid of him when he was really not deportable, or to find him not deportable and let him hang around when he really should have been deported. Which outcome is worse?
   b. Case:
     - Woodby (SC): NC was a resident alien who entered the US from Poland in 1920. In 1963 the INS instituted deportation proceedings on the ground that he had entered the US in 1938 following a trip abroad without inspection as an alien. They had crap evidence from a witness on the boat 30 years before who claimed the NC was traveling under a passport with a different name. The SC held that the government must come up with clear, unequivocal, and convincing evidence that the NC should be deported.
   c. Burden of Proof Generally:
     - Burden of proof is who must prove the facts.
     - First ascertain who has the burden of proof, then figure out what the standard of proof is.
     - Burdens presently:
       (i) Burden on NC in exclusion cases.
       (ii) Burden on government in deportation cases.
         - First, INS must establish alienage. There is are rebuttable presumption that a person born abroad is an NC.
         - But the alien against whom deportation proceedings have been brought have the burden of proving the “time, place, and manner” of his entry into the US. If that burden is not sustained, the person is rebuttably presumed to be in the US in violation of law and is deportable under INA 237(a)(1)(B). INA 291.
         - If the NC chooses to remain must or fails to sustain the burden of proof, he will be found present without admission, and inadmissible.
       (iii) Burden on NC in naturalization cases.
       (iv) Burden on government in denaturalization cases.
     - We seem to be taking the status quo approach.
   d. Policy:
     - What standard should a court use in deciding who has the burden of proof?
       - In an inadmissibility proceeding, who is really bringing the claim? If you’re outside trying to get in, the NC is applying for admission.
     - Things to consider when assigning burden of proof:
       (i) Access to Evidence: Each party has different access to information, so this could impact who should have the burden of proof.
       (ii) Status Quo: You could put the burden of proof on whoever wants to change the status quo.
e. Deportation Example:
- INS picks up a foreigner working as a dishwasher at a restaurant. The NC has the burden to prove that he was admitted to the US or is admissible. If he cannot prove this, the INS wins. If he does, the INS must then show by clear and convincing evidence that the NC is deportable. If the NC doesn’t admit to being an alien, the INS will also need to prove that the NC is an alien. INS would argue that if the person were a citizen, he would have said so.

D. Judicial Review §242:
1. Generally:
   a. Petition for Review:
      - The petition for review is the only way to get judicial review of an administratively final order of removal.
      - The POR is filed with the COA to shorten the process.

   b. Staying Order of Removal via POR?
      - Until 1996, the filing of the POR stayed the removal until the petition was reviewed. Now, filing the POR doesn’t stay removal unless the court affirmatively grants you a stay.
      - How should courts handle PORs?
        - Automatically granting a stay seems to go against Congress’ 1996 revisions.
        - Most courts will do a quick review and rule on the motion for a stay. They want to avoid granting frivolous requests.

   c. Judicial Review §242
      - §242(a)(2) lists certain matters not subject to judicial review. No review for:
         (i) Most denials of discretionary relief (242(a)(2)(B));
             - Prong 1: 242(a)(2)(B)(i): No judicial review for cancellation of removal (240A) decisions, voluntary departure decisions (240B), adjustment of status (245), denial of waiver of certain inadmissibility grounds (212(h)), and denial of waiver for immigrant who is inadmissible for fraud or willful misrepresentation of material facts (212(i)).
             - Prong 2: This provision appear to cover discretionary decisions under INA 205: revocation of visa petition, refugee admissions, registry, etc. Citizenship can be reviewed, it’s not under this title (title II).
             - IJ denies registry saying you didn’t meet the continuous presence requirement. The BIA agrees. Can you get review under 242(a)(2)(B)? The decision to grant registry is not discretionary, but the decision that the NC did not think he met the continuous presence requirement is discretionary. So can you get review? Most court would take a narrow reading and say yes, you can get judicial review.

         (ii) Judicial review is barred for most crime related grounds (242(a)(2)(C)). No court has jurisdiction over removal orders arising from any criminal offense covered in 212(a)(2) or any offense covered by 237(a)(2)(A)(i) for which both predicate offenses are, without regard to their date of commission, otherwise covered by 237(a)(2)(A)(i).
             - Courts can review whether the person is removable, judicial review is barred only when the person “is removable.”
             - INS v. St Cyr said that 242(a)(2)(C) does not preclude habeas claims. Also, nothing in the statute prevents the court from deciding if it has jurisdiction.
             - So a court can decide if something was an aggravated felony. The issue is on the merits, and the issue of jurisdiction can be the same.

         (iii) Also not subject to judicial review include:
             (i)

   d. Habeas Corpus:
      - 3 Sources of Habeas Corpus:
        (i) Constitutional habeas;
        (ii) 28 USC 2241 Federal habeas corpus (commonly used in criminal cases);
        (iii) INA specifically authorizes habeas in certain cases (specific statutory reference).

      - The SC in St. Cyr interpreted the statute narrowly to provide habeas corpus relief. Why?
        - Habeas is constitutional, maybe we should always interprete statutes to avoid constitutional questions.
- Court doesn’t trust politicians enough to do away with judicial review unless it must.
- Courts often say if the bar of habeas isn’t explicit, habeas isn’t barred and yet, Congress keeps writing the statutes like this, so this implicitly is approved.

e. Judicial Review/Habeas Case:
- INS v. St. Cyr (SC): Cyr was a Haitian citizen admitted to the US as an LPR. He was convicted of an aggravated felony. Given 242(a)(2)(C), the question was whether the court could review his denial of cancellation of removal. SC said that although Congress meant to bar petitions for review, without crystal clear language, you can’t wipe out habeas corpus.

f. Judicial Review Policy:
- Benefits of judicial review?
  - Helps address errors, allows courts to take a second look.
  - Courts have advantages over administrative agencies.
    - They are less specialized, and thus, probably less biased, less likely to have formed a strong opinion.
    - Courts can analogize cases in different areas of law, i.e. immigration law to welfare law. Administrative tribunals have less, if any, exposure to other areas.
    - Tribunals do have, however, more specialized knowledge in the area in question. The judge is not a specialist and might have a disadvantage.
- Judicial reviews cost time and money. But also allow the petition to remain for longer in the US while the review is pending.
  - The person may be detained, or they may run. Petitioner might file frivolous appeals to extend their time in the US.
- Judges have lifetime appointments so they don’t have to fear handing down an unpopular opinion.
  - BIA judges, however, always worry about handing down an unpopular opinion and getting fired.
  - The AG, post 9-11, in 2003, streamlined the BIA, basically by cutting the most liberal members who were willing to hold for petitioners. Judges don’t have this problem. BIA independence is a big issue.
  - Court can hand down precedential opinions, and so can the BIA.
  - This can cut either way. If you keep only BIA decisions as precedential, you would have consistency across the country. Now, the outcome could depend on which court system you happen to end up in.

E. Terrorism Removal Proceedings:
1. Terrorist Removal Court:
  - To this day it has never been used. These procedures involve:
    (i) Closed removal hearings?? I think they might be open…
    (ii) Secret evidence hearings. Judge will hear the evidence in camera and decide if the alien should go free or be tried. If the evidence can’t be disclosed, alien gets a summary.
  - Government must prove by a preponderance of the evidence that the person is an alien terrorist. The judge must then order deportation, no asylum, nonrefoulement, cancellation of removal, voluntary departure, adjustment of status or registry.
  - Is this a fair procedure? Hard because the evidence against the defendant is not disclosed. The defendant does not know what the government knows. So it’s hard to defend against. Don’t want to disclose information the government doesn’t know. But on the other hand, it’s hard to come up with a better idea.

F. Rescission of Adjustment of Status:
- The AG may rescind a grant of adjustment of status within 5 years if the person was in fact ineligible for adjustment at the time it was granted.
- INS has 5 years to initiate the proceedings after adjustment.

XV. Immigration and National Security:
A. Generally:
  - Almost all immigration funding has been transferred to the homeland security department.

B. Detention:
  1. Pros and Cons of Preventive Detention:
    - Pros: Preventing the NC from harming anyone while proceedings are pending; deters NCs from doing anything that might be perceived as a terrorist act; prevents absconding, flight.
    - Cons: Cost of housing the NC’s; paying for buildings, personnel and supplies; Costs to the individual – being away from work, family, etc.; Problem of obtaining representatives in far away detention centers – might also have a hard time getting access to evidence, witnesses, etc.
- Preventive detention is not punishment. It is inappropriate to punish anyone before any wrongdoing has been found. What about a person who has gone through the removal proceeding and is detained pending removal? Courts have said as a legal matter, deportation is not punishment.

2. Mandatory Detention vs. Case by Case Analysis:
- IJ grants release on bond. DHS appeals to BIA. Order of release is automatically stayed until a final removal order is given.
- Pros and Cons of Mandatory Detention:
  - Pros: Better safe than sorry – the potential harm is great. Saves the cost of holding individualized hearings; deterrence. Doing a case by case analysis would require more judges to handle the cases, etc.
  - Cons: Will end up detaining people that don’t deserve detainment. All costs associated with detainment are then needless. The mandatory rule costs more money, you need more buildings, staff, etc. Greater potential for human rights abuses.

3. Hold Until Clear Laws (Now Rescinded) (Penttbom)
- NC ordered removed, but detained until the FBI could clear the NC of suspicion.
- Yes, you don’t want terrorists to be sent home only to orchestrate attacks from abroad or sneak back in.
- But important to note that a lot of the NC’s have not been picked up for terrorism specifically. They are getting caught in the sweep and being adversely affected by it.

4. Monitoring Conversations of Detainees:
- The NC does not know the conversations are being monitored. They aren’t warned ahead of time.
- But if the government really believes the NC is planning a new terrorist attack with the help of the lawyer, that seem to be a good reason to monitor.

C. NSEERS:
1. Generally:
- Stands for National Security Entry-Exist Registration System.
- NSEERS is aimed at national security objectives, specifically, counter-terrorism. It is designed to record a whole range of information concerning the individual’s activities in the US, not just arrivals and departures.
- NSEERS is applicable only to nationals of selected countries that were suspected of harboring terrorists.
- NSEERS required that nationals from Iran, Iraq, Libya, Syria, Sudan and others presenting national security concerns, be fingerprinted and photographed upon their arrival. The person must report to the ICE annually.
- In addition, the AG can make special registration requirements for nonimmigrants from other countries. They have to register with the local INS office, and subject themselves to the risk of removal for immigration status violations.
- The regulation was used to include 24 mostly Arab countries.
- As a result of NSEERS, 1000’s of NCs, mostly Arab and Muslim, went to register with authorities and then were sent to removal proceedings.
- The government is walking a thin line here. The registration program can be a legitimate way to keep track of NCs. But only certain groups were made to register. So that selectiveness is a little shady.

D. Special Interest Removal Hearings:
1. Generally:
- Don’t want to let terrorists know when we’re on to them and what we know. So these hearings are closed to the public.
- But does this closing to the public make sense if the defendant will hear the evidence in court and can then use it later? Why have this? Maybe defendant might fear for his safety by later disclosing the info to others so he will keep it to himself.
- Assumption is the defendant will want to talk, but not always. Admittedly though, sometime the defendant will talk.

2. Other Types of Specialized Removal Hearings:
(i) Terrorist removal court;
(ii) Secret evidence hearings;
(iii) Closed removal hearings;
(iv) Military tribunals.

3. Civil Liberty Issues:
- The public has a right to know that is going on. To see that due process is being afforded.
- Due process and fairness is generally assumed to be provided, but there was no case where the defendant argued this was a violation of due process.
- Closed/Secret Evidence Hearings – hard for the defendant to defend when he doesn’t know the charges. It’s just hard to rebut the evidence when you don’t know what it is.

E. Racial Profiling:
1. Is racial profiling, ethnic profiling, nationality profiling effective?
   - Prof. Cole notes that less than .01% of Arabs and Muslims are involved in terrorist organizations.
   - But maybe he is asking the wrong question. What is the % of NC’s involved in terrorism who are from Muslim or Arab descent?
   - It’s hard to target Muslims and Arabs anyway, because it’s hard to tell a person’s nationality just by looking at them.

2. Civil Liberties:
   - What is so harmful about discrimination?
     - Could reinforce popular prejudices, but again, so what? It’s a deprivation if you’re deported or say denied a visa because of your ethnicity, race, etc.
     - There’s a difference between discrimination itself, and particular deprivations imposed discriminatorily.
     - Is it illogical to be opposed to driving while black vs. flying while Arab.
   - Is there a difference between profiling based on nationality and profiling based on ethnicity or religion?
     - Seems more reasonable to target countries that are sponsors of terrorism. If the country has an adversarial relationship with the US, it may be more likely to sponsor terrorism.
     - Maybe this is just a matter of statistical correlation.
     - But, country of nationality can also be a pretext for targeting an ethnicity or religion. Maybe the government really is targeting a certain country. Harm does fall disproportionately on one ethnicity or religion.
     - Is it fair for one segment of the population to have to bear the burden of making the US safer? A social harm question.

F. Student Programs:
1. Generally
   - Why the focus on students?
   - Student Exchange Visitor Information Program (SEVIS): IIRIRA formed SEVIS and required each college to collect certain info on every foreign student enrolled.
     - Student privacy rights were expressly eliminated.
     - The USA Patriot Act broadened the schools covered and added additional information to collect.
     - EBSVERA further expanded the requirements for data that must be collected and review the data.

XVI. Refugees and Asylum
A. Overseas Refugees: INA 207
1. Overseas (Offshore) Refugee Program Generally:
   - Benefits those physically outside the US.
   - Internally displaced persons are those who remain in the country of persecution, but more to a different area within the country. IDP’s are recognized by the US as refugees.
     - The UNHCR does not recognize IDPs as refugees.
   - The US will allow overseas refugees to come to the US, will pay for their airfare, etc.

2. Process:
   (i) President makes annual determination of how many refugees can be admitted (Oct. of each year). President will break down the number by region.
   (ii) President consults with Congress on ceilings.
   (iii) AG decides what to do in all of the regions. He can admit those who meet three requirements:
     (a) those not firmly resettled elsewhere;
     (b) those of special humanitarian concern to the US; and
     (c) those who are admissible.
   (iv) The applicant applies overseas.
     - Refugees are processed according to a system of priorities established by the INS and State Department. Those of higher priorities are admitted first until the ceilings have been reached.
     - Priority one is for those who are in the greatest or most immediate danger; prior two is for certain refugees from Bosnia, Burma, Cuba, Iran, USSR, Vietnam, and some African states.
Applicants over 14 will appear before overseas INS officers for inquiry under oath on his applicant. They only have limited rights of administrative reconsiderations, based on new evidence.

(v) After 1 year of admission, the refugee can get adjustment of status. Most receive it without a problem.

(vi) President in unforeseen emergencies can authorize for additional refugees.

- There is no judicial review if you are denied as an overseas refugee. There is no case law.

3. Parole: INA 212(d)(5)
- AG can grant parole to those outside of the country for urgent humanitarian consideration.
- Pre-1980 refugee act, this was used to bring in refugees.
- Now, with the Act, the President can’t parole anymore unless there are compelling reasons in the individual case.

4. Policies Behind Overseas Refugee Program:
- Suhrke Article: Certain factors seem to correlate with refugee flows.
  - Some think refugees flows are correlated to competition for land and resources, population growth, unequal distribution of wealth, structural weaknesses of 3rd world countries.
  - Those who just live in dangerous places are not considered refugees.
  - Push factors vs. pull factors. If you adopt more favorable policies for refugees, it might incent (pull) people to leave.

B. Onshore Refugees:
Process for Asylum Claims:
(1) Is the harm alleged persecution? (2) If yes, can you say its on “on account of” one of the 5 protected grounds?
1. Generally:
   a. Generally
   - Those who have made it to a US port of entry or the interior. This is the majority of asylum seekers.
   - They may be here legally or illegally. 2 situations in which you can apply for asylum:
     (i) Removal Proceedings have already been instituted: You’re using asylum as an affirmative remedy.
      - Decision maker is the IJ (exception in cases of expedited removal)
      - Can appeal to BIA and COA.
     (ii) Affirmative Application: You go to the INS office and affirmatively apply.
      - DHS will assign the case to an asylum officer who will grant asylum in slam dunk cases or refer the case to an IJ for removal proceedings, and then the application for asylum can be renewed there.
      - Asylum officer can deny asylum when the person is here legally. Then the asylum application can be renewed after the authorized stay expires and the person has now overstayed and can be removed.

   b. Refugees Sur Place:
   - Those who were not refugees when they left home, but are not because of changed conditions in their home country.
   - Often asylum claims by refugees sur place arise because of the refugee’s own actions or words, rather than a change in the country of origin. There claims are often regarded skeptically because the threat of persecution is in a sense, self-induced. There could be temptation to assert unpopular opinions just to get asylum.
   - In the US, courts have been less inclined to find a well-founded fear of persecution when the fear arises because of post-departure activities.

2. Refugee Remedies:
   - 2 Remedies are available for Onshore Refugees:
     (i) Asylum §208 – Must show:
        (a) You’re a refugee 101(a)(42);
        (b) Get AG’s discretionary stamp of approval.
        - If you get asylum, you get to stay permanently. AG rarely uses his discretion to deny asylum once the applicant is ruled to be statutorily eligible.
     (ii) Nonrefoulement (Withholding of Removal) §241(b)(3):
        - US government can’t return you to the country of persecution, but you can be returned to a 3rd country.

3. Refugee Definition: 101(a)(42)
   - In order to be granted asylum, you must meet the definition of a refugee.
   - The Refugee definition requires:
     (i) Persecution or fear of persecution;
     (ii) On account of race, religion, nationality, membership in a particular social group, or political opinion;
(iii) Fear of persecution must be well founded;
(iv) Can’t fall into an exception;
- The term refugee does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.
- If you get through (i) – (iv) you are statutorily eligible for asylum. But you also need:
(v) AG’s favorable discretion.
- Withholding uses many of the requirements for asylum. If you apply for asylum, you also automatically apply for withholding.

4. Persecution or Fear of Persecution (Acosta)
a. Generally
- Persecution can be done by:
  (i) the government or
  (ii) private groups the government cannot or chooses not to control.
- There must be an intent on the part of the persecutor to cause harm in most cases.
- Russian lesbian case: Pitcherskaia: She was subjected to electroshock treatments, etc., by the Russian government.
  - Court held this was persecution even though there was no intent to harm. Same is true in some cases of genital mutilation.
- What about unrelenting hostility toward members of a certain race in a country. No tormenting, disappearances, etc., just dirty looks.
  - Persecution is limited to governments and private actors the government cannot or chooses not to control.
  - Persecution need not be danger to life or bodily health. Economic devastation has been found to be sufficient.

b. Fear of Persecution: Primary Motive
- BIA in Acosta said that in order to show “fear of persecution,” it must be your primary motive for not wanting to go back.
  - However, there are no cases where a person was denied asylum who had a well founded fear of persecution that wasn’t necessarily primary.

c. Fear of Persecution: Individual Targeting:
- Some courts require the applicant must have been individually targeted (or would be individually targeted).
  - But should a harm not be considered persecution just because a lot of people suffer it? There seems to be a fear that large numbers of people would apply to asylum if the individually targeted requirement was gone.
  - In the Bolanos case, the 9th Circuit held that something wasn’t persecution unless it was inflicted on a whole segment of the population. But this has been moved away from.
  - Justice Department regulations say no evidence of individual targeting to show a well founded fear of persecution is necessary if:
    (i) the applicant establishes that there is a pattern or practice in his country of nationality of persecution of a group of persons similarly situated to the applicant on account of race, religion, etc., and
    (ii) the applicant establishes his inclusion in that group and identification with such group of persons such that his fear of persecution upon return is reasonable.
  - Indirectly, the regulation seems to say that if the group has 1 million people and X has a 1 in 1 million chance of being persecuted, this might not be reasonable.
  - Would a well-founded fear be that persecution is more likely than not?

d. Persecution vs. Prosecution:
- Punishment for Violating a Law will be Persecution and not Prosecution when:
  (i) Courts often say even something that is criminal prosecution in form can be a pretext for singling out a certain group and can be persecution; or
  (ii) If the punishment is really severe for the crime committed, then again, the prosecution must be a pretext for persecution.
- Country X has a facially neutral law, but that law has a disproportionate impact on a certain group. Is punishment for failing to follow the law persecution?
  - i.e. Quakers who can’t conscientiously object to military service. Is this persecution?
  - It applies equally to equally to everyone. But if you are punished for violating the law, is it really persecution, or is it just prosecution for violating a law?
  - What is non-Jews in Israel were subject to a 1% surtax. Is this persecution?
e. Persecution/Fear of Persecution Process:
   (i) Is it sufficiently individually targeted to this person?
   (ii) Is it severe enough? Look to the most favorable thing that could happen. If that doesn’t arise to persecution, there no persecution. You can take into account individual circumstances to decide if something is persecution.
   (iii) Intent to harm (not always necessary)?

f. Case
   - Acosta (BIA): Acosta was part owner of COTAXI and several of his other co-managers had received death threats and had been killed by a guerrilla group who had wanted them to cease service to hurt the economy and the El Salvador government. Acosta himself received death threats. The BIA held that Acosta’s desire to avoid going back to his country was primarily motivated by a fear of persecution, but that the persecution was not based on his political opinion or membership in a social group, or race, religion or nationality. Moreover, the threat of persecution did not exist country-wide, he could have moved somewhere else.

5. On Account of Race, Religion, Nationality
   a. Generally
      - Claims based on race, religion and nationality are rare, but increasing.
      - UNHCR in its handbook defines race in its widest sense to include all kinds of ethnic groups that are referred to as “race” in common usage.
      - UNHCR defines nationality to include not only citizenship status, but also ‘membership in an ethnic or linguistic group.’ These bases frequently overlap with each other and with the social group or political opinion prongs.
      - The religion prong can be useful in some gender claims as well.

6. On Account of Political Opinion (Elias Zacarias)
   a. Generally
      - The majority of asylum claims are based on political opinion.
      - When we say “on account of political opinion” we mean the persecuted’s political opinion.
        - Ct. in Elias Zacarias found applicant feared being persecuted on account of his persecutor’s political opinion, not his political opinion.
      - Majority in Elias says it is not enough to show you are being persecuted for some overt, physical manifestation of political opinion. You must show the persecution is for your internal political opinion. But there’s still debate today.
   b. Neutrality as Political Opinion
      - Can a political opinion be expressed through inaction? Yes, sometimes.
      - SC in Elias Zacarias stated that neutrality will not ordinarily constituted a political opinion. There’s a difference, however, between indifference and affirmatively embracing neutrality.
        - Dissent in Elias Zacarias would read “political opinion” more broadly to include over manifestations – like not joining the guerrilla movement.
   c. Imputed Political Opinion:
      - Imputed political opinion occurs when the persecutor believes the applicant holds a particular view and intends to persecute the person because of it. It doesn’t matter that the belief is wrong.
      - Imputed political opinion doctrine is now settled and accepted in US courts.
      - Even falsely, or cynically imputed political opinion can suffice.
        - 9th Cir. Lazo-Majano Case: Lazo had been tortured by an army sergeant who threatened to falsely accuse her of subversion if she told police. The court said she had a claim of persecution based on imputed political opinion. Since the persecutor was well aware that the victim was not a subversive, the court’s conclusion required a holding that even falsely, or cynically imputed political opinion can suffice.
        - She could also have argued that if her tormentor really carried through with his threats, she would face persecution on account of political opinion. Or argue that she was expressing a political opinion that women should not be dominated by men.
   d. Examples:
- Union leaders who call for strikes are persecuted. Would you get asylum for union leaders?
- Under Elias, no. Persecution here was for the government’s political objectives, not the strike leaders’
  political opinion.
- X gives a speech in country Y criticizing it. The government persecutes him for it. Would X get asylum?
- Do we know if his speech is his real political opinion? If not, we can’t know if the persecution was based
  on X’s political opinion. Is the speech an over manifestation of political opinion (as dissent in Elias would
  ask). Majority in Elias would say if he is persecuted for giving a speech, that would not be on account of
  political opinion. If he was persecuted for his internal political opinion, that would be on account of
  political opinion.

7. On Account of Membership in a Particular Social Group

a. Definition of Social Group:
   Fatin 3 part test to establish a social group claim:
   (a) Group is a social group;
   (b) Applicant must be a member of that group;
   (c) She has a well-founded fear of persecution on account of such membership.

   (i) Acosta: Membership is defined by an immutable characteristic.
   - Immutable: A characteristic you can’t change, or is so fundamental to your personal identity the law
     should not require you to change it.
     - So you don’t need asylum if the characteristic is one that you could change.
   - To arrive at this definition, the court used the principle of ejusdem generis – the statute used general and
     specific words. The general words should be construed in a manner consistent with specific words.
   - Occupation isn’t immutable.

   (ii) Sanchez-Trujillo: Cohesive and homogenous group.
   - Cohesive: How closely they fit together. You would need a common characteristic fundamental to their
     identity as a member of that discrete social group.
   - Homogenous: How similar they are. Must be a question of degree. Look to number and quality of
     similarities, etc.
   - In the 9th Circuit, a social group exists if either it has an immutable characteristic, or is cohesive and
     homogenous. So either Acosta or Sanchez-Trujillo are allowed.

   (iii) DOJ Proposed Rule: Basic rule is Acosta immutability, but there are other factors as well.
   - 3 possible readings:
     (a) Either/Or: Immutability is a sufficient factor, but is not necessary, you could use the 6 other factors to
         show social group as well.
     (b) The group will be a social group if either the traits that define the group are immutable or the
         enumerated factors militate toward finding the group to be a social group.
     (c) Maybe the 6 factors show you how to find immutability.
DOJ is willing to look at past persecution as a way to create a social group because the past is immutable. But your joining the group must have been immutable as well, or past persecution won’t count.

- X was in jail for murder and was let out. As a released prisoner, he would be subjected to stoning when he went back to his home country. This would be something he could have changed, not immutable that he would be a murdered, he chose to do it. On the hand, can argue X cannot avoid persecution because he committed the crime. Would have to define the social group as convicted felons. Hard case!

- 6 Factors Listed by DOJ: (i) members of the group are closely affiliated with each other; (ii) members are driven by a common motive or interest; (iii) a voluntary associational relationship exists among the members; (iv) group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question; (v) members view themselves as members of the group; and (vi) society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of society.

(iv) Helton Article:
- Argues for a very liberal definition of social group. He thinks social group was meant to be a catch all to include all the bases for and types of persecution which an imaginative despot might conjure up.
- He would still require showing that there’s a group.
- If you think of asylum as a way to relieve suffering, then this approach would be favored. No courts have adopted it though.

b. Sexual Orientation as a Social Group (Toboso-Alfonso):
- The BIA held that gay (as a status) is a social group.
- Facts: Toboso lived in Cuba and was gay. He said he was subject to persecution for being gay, not for his gay activities. The government would detain him, force him to undergo medical evaluations, and sometimes force him to miss work.
  - Under Acosta, gay as a status is immutable. Would gay acts be immutable? Probably. Being gay and doing gay things are things you can’t change, and even if you can, you should be forced to.
  - Was this persecution? They were going to detain him, force him to do forced labor, etc. Probably this would arise to persecution. Prosecution vs. persecution distinction. This was not prosecution for breaking sodomy laws, this was persecution on the basis of gay status.

c. Gender and Social Group:
(i) Generally:
- Under Acosta, gender is an immutable characteristic and can therefore constitute a social group.
- Why did US leave gender off the list? Fear of numbers; cultural relativism (sometimes you don’t know whether the ill treatment of women is universally wrong or just a cultural difference).

(ii) Fatin 3 Part Test to Make out a Social Group Claim (3rd Cir 1993):
- Group is a social group;
- Applicant must be a member of that group;
- She has a well-founded fear of persecution on account of such membership.
- Fatin argues persecution on account of social group based on upper class Iranian women who support the Shah, a group of educated Westernized free thinking individuals. She did not want to wear the veil in public or practice Islam. She said this was persecution.
  - Court looked at three different possible social groups:
    - Women generally. This claim would fail because persecution would not be based solely on account of her gender. (Req. c problem)
      - Yes she would be discriminated against because of her gender, but the kind of things she would be subject to (wearing a veil) would not be persecution. Only a subcategory of women are being persecuted, so you can’t say Fatin is persecuted on account of her gender.
    - All women who find the compulsory wearing of the veil offensive. This social group claim would also fail. Court says this is not a social group under Acosta because this trait isn’t immutable. She could change her objection and comply. She finds it offensive, but being forced to wear something offensive isn’t persecution. (Req. a problem)
    - All women who find it so abhorrent they would disobey the law and take the consequences. This would be a valid social group, but Fatin does not establish she would fall in this category. (Req. b a problem). She isn’t part of this social group. Otherwise, if she was, compliance or non-compliance would amount to persecution.
  - So the court in Fatin seems to say that a belief is not fundamental to your identity unless you’re willing to break the law to stand up for your belief.
If she had said she would have defied the law for her family the court may have come out differently. What is punishment for failing to follow the law was a fine? Is it worse to say you can’t do a certain religious act vs. saying you must do something?

(iii) Kasinga (BIA 1996):
- Kasinga would have been subjected to FGM if she had been sent back to Togo. She had escaped it up until this point. The question was whether you could create a social group for FGM – could she get asylum based on fear of FGM if returned?
  - Court uses the social group of: All women of the tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.
  - If you don’t oppose the practice in the 1st place, there’s no persecution. So it’s hard to say why that clause is necessary. Fatin says simple opposition is not enough, you must defy the law. The court does not address that here. But in any case, it would probably be impossible for Fatin to defy the law.
- Is FGM persecution? Under UN Human Rights pronouncements, it is. What if it is done at a young age? Should be accept this as cultural relativism? It seems that universally there are things a government can’t force you to do against your will, but where to draw the line?
  - When it violates bodily integrity?
  - When it’s dangerous?
- Could you argue opposition to FGM is a political opinion? Can say it’s a form in which males assert dominance over women.

8. On Account Of
- The words “on account of” require some sort of nexus between the alleged persecution and one of the five protected grounds.
- If a person or group persecutes someone on precisely on of the 5 bases, the fact that the persecutor is additionally discriminating on some other basis doesn’t lessen the harm or diminish the victim’s need for protection. As long as the persecution would not have occurred but for the victim’s race, religion, nationality, political opinion, or membership in a particular social group, then the person should be held to meet the statutory definition of refugee.

9. Well Founded Fear and Would be Threatened:
   a. Withholding: §241(b)(3)
      - SC held that a person seeking withhold must establish “clear probability” that his life would be threatened on account of one of the five statutory grounds.
      - Clear probability means “more likely than not.”
   b. Asylum: §208
      - SC construed “well founded fear” to require “something less than more likely than not.” But it declined to spell out the precise standard.
      - The BIA and lower courts subsequently held that a fear is well-founded if “a reasonable person in the applicant’s circumstances would fear persecution.” DOJ regulations now essentially codify these holdings.
      - A non-exclusive list of factors relevant to reasonableness includes: whether the applicant would face other serious harm in the place of suggested relocation; any ongoing strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints such as age, gender, health, and social and family ties.
   d. Why the different standards?
      - Rarely is a person eligible for withholding but denied asylum.
      - Asylum is discretionary, so if you’re denied asylum on the basis of discretion, there’s often a good chance you really will be threatened. So then we are willing to give you withholding. For example, you’re denied asylum because of past criminal convictions, but you really will face persecution back home, so we give you withholding.
      - With asylum you can bring your spouse and kids, with withholding you can’t.

C. Methods of Proof:
1. How to prove a well founded fear of persecution?
   - What evidence can be used? Are there any certain commonly recurring facts that are material as to whether a person has a well founded fear?
     (i) Common Fact Pattern: Show you’re a member of a group that is persecuted.
     (ii) Common Fact Pattern: Show past persecution – 2 reasons this is relevant:
(a) Asylum: Refugee definition requires persecution or a well founded fear of persecution. So show past persecution.
(b) Past persecution can be evidence of future persecution.
- Using past persecution to establish refugee status often results in negative discretion by the AG (asylum is denied) unless you can show a true fear of future persecution. If a person is found to be a refugee solely on the basis of past persecution, then asylum must be denied on discretionary grounds unless the person has demonstrated either (a) compelling reasons for being unable of unwilling to return; or (b) a reasonable possibility that he may suffer other serious harm upon removal to that country. So really, you’ll want to use past persecution as an indicator of future persecution.
- Withholding requires that the applicant’s life or freedom “would be threatened” – so you need to use past persecution to show future persecution.
- The US definition of a refugee is more inclusive than the UNHCR which says only a well founded fear of persecution is allowed. US allows past persecution, but it’s hard.

2. Evidence
- It can be hard to gather evidence. The trickiest part is the applicant’s own testimony. How to ascertain credibility? How to support a finding of credibility?
- Damaize Case (9th Cir): IJ did not believe applicant saying (1) he went and lived in the country of alleged persecution (Nicaragua) for 2 years and was not bothered; (2) he did not seek refugee status in Costa Rice when he stayed there for years; (3) he didn’t marry his kid’s mom; and (4) discrepancies in oral responses vs. written application. COA said no, he is credible. He went to Nicaragua to check up on his family and left when he could. It’s fine to spend time another country and not apply for asylum. His personal choices for marriage say nothing about his credibility. And minor discrepancies are not a big deal.
- The IJ’s can rely on State Department opinions for background information on the countries.

D. Exceptions to Eligibility:
1. Generally:
- US exceptions to eligibility for asylum track closely to the UN Convention.
- There are asylum exceptions under 208, and withholding exceptions under 241.
  - These are the “exclusion clauses” – but we call them exceptions.
2. Those Who Don’t Need Asylum: Internal Flight Option/Safe 3rd Country Option:
- Internal flight option: Ask if the person could just be relocated to another part of the country. A person who could be safely relocated to another part of the country is ineligible for asylum.
  - What to do if you’re within the EU? If you’re an EU national, you have right of free movement from one country to another. Should we grant asylum to a gypsy in an EU country when he could just move to another EU country? Is this the kind of person we want to use up one of our asylum slots?
  - Safe 3rd countries are when you have a treaty with another country. For example, US and Canada have a treaty. Any asylum seeker who travels through the US to Canada can be returned to the US for asylum.
- If you’re already firmly resettled elsewhere, there is no need to grant you asylum. Since you don’t need asylum, you aren’t eligible.
- Firm resettlement won’t be found if the person’s entry into the third country was a necessary consequence of his flight from persecution, he remained in that country only as long as was necessary to arrange onward travel, and significant ties were not established.
4. Those Who Don’t Deserve Asylum
  - Claimants who have ordered, incited, assisted, or otherwise participated in the persecution of others on account of race, religion, etc. are statutorily ineligible for both asylum and withholding of removal.
  - The alien having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the US.
    (i) Carballe Case: You’re a danger to the community when you’re convicted of a particularly serious crime. This helps in part, to determine what is a particularly serious crime (i.e., you’re a danger to the community).
    - So even if you commit a particularly serious crime at age 14, and want asylum at age 48, you’re still ineligible.
This is about protecting the community and about making a moral determination of who is more deserving of asylum.

Also, this prevents having an IJ make a determination of who is a danger and who isn’t. We’re trying to avoid false negatives – i.e. oh yeah, he’s safe, he gets asylum. Then the next thing you know, he’s killed someone.

The Refugee Convention also allows you to send people back to country of persecution if the person committed a particularly serious crime. If the alien is given withholding and no one else will take him, he gets de facto asylum in the US.

(ii) Establishing a Particularly Serious Crime? (Carballe)
- Some crimes are inherently particularly serious on the elements, in the abstract.
- Other crimes might not be inherently particularly serious, in those cases, look to the facts of the individual case.
- Factors:
  (a) nature of the conviction;
  (b) the circumstances and underlying facts of the conviction;
  (c) the sentence imposed;
  (d) whether the type and circumstances of the crime indicate the alien will be a danger to the community.
- Crimes against the person are more likely to be particularly serious, but crimes against property can be as well.

- You can also try a balancing act which the UNHCR uses: balance the nature of the offense against the degree or persecution feared. The more severe the persecution the applicant fears, the graver the crime must be before it will be considered serious. The courts generally don’t use this, and the SC has said it’s useful but not binding.

- Contrast with crimes of moral turpitude. In crimes of moral turpitude we assess them in the abstract – on the elements of the crime – not on the facts.

- There are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the US prior to the arrival of the alien in the US.
- So here the requirements are:
  - Serious reasons for believing;
  - Serious
  - Nonpolitical crime
  - Committed outside the US before arrival.

- Contrast these requirements with those of a particularly serious crime – all you need there is a conviction and a particularly serious crime, it doesn’t matter if it was a political offense. So if something is a particularly serious crime, it would also be a serious nonpolitical crime, provided it was, of course, nonpolitical.

- There are reasonable grounds for regarding the alien as a danger to the security of the US.

e. Inadmissible Under Terrorist Grounds: 208(b)(2)(A)(v); 241(b)(3)(B)(iv) – This is a bit different than 208.
  - (i) The alien is inadmissible under 212(a)(3)(B)(i)(I, II, III, IV, or VI), OR
  - Unless in the case of an alien inadmissible under (IV) the AG determines in his discretion that there are not reasonable grounds for regarding the alien as a danger to the security of the US.
  - Removable under 237(a)(4)(B).

- For asylum, an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.
- For withholding, an alien who has been convicted of an aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime.

D. Asylum Procedure:
1. Generally:
- Many argue that asylum is a way to get illegal immigration into the US.
- UNHCR says detention for asylum seekers is permissible only when you have particularized reasons to detain.
- **Are genuine asylum seekers being denied asylum because of legal shortcuts? (expedited removal)**
- Asylum proceedings are completely confidential, that way you aren’t forced to say things in public against the government you may have to go back to.
  - Lots of countries will persecute you even if you just file an asylum claim.

2. **Specialization in Asylum Officers**
- What is the proper degree of specialization?
  - Some countries have very highly trained asylum judges, maybe even specialized by country.
  - Our IJs do immigration generally.
- Advantages to having specialized asylum adjudicators?
  - When you know more, the process is more efficient and consistent in terms of need for research.
  - The more specialized the decision maker, the more likely you are to get consistency. You also get equal treatment as an asylum seeker.
- How could specialization detract from consistency?
  - When you hear the same cases over and over again, you might get desensitized to mistreatment and be too hard on who gets in and who doesn’t.
  - Might not get the most honest opinion out of the state department. Their reports might be tainted by politics, but asylum seekers have no way to rebut the person who wrote the report – can’t bring him in and question him.
  - If US has asylum officers trained by region, they would be more knowledgeable. Martin makes the point that specialized systems work good for Switzerland, which is a small country, but here it’s hard to have asylum officers in appropriate cities.
- Is it necessary for asylum officers to be lawyers?
  - It’s nice to be able to read case law – legal questions do come up. But the majority of questions are factual. Having a lawyer at least gives you the option to set up a system that doesn’t require counsel.

3. **Adversarial System:**
- Each side has an incentive to bring up the relevant issues. Martin proposes a non-adversarial system.
- If you have an adversarial proceeding, you want to preserve access to counsel for the asylee.

4. **How Important is it to have Counsel?**
- Not too important in a non-adversarial proceedings. Not as important if you have a specialized judge.
- Martin would like a fair procedure, run efficiently, that satisfies those who feel the present asylum process lets people in who disappear before the date of the hearing.
- If you make the process such that you don’t need a lawyer, you won’t have to wait around to start the process, it will be faster and more efficient.

5. **Judicial Review: (Review of Court of General Jurisdiction)**
- Independence of the judiciary is good, not influenced by threats of dismissal, lower pay, etc. if they make undesirable judgments. They are judges for life.
- Only a small % even get to court in the first place. Maybe the very prospect of judicial review incents IJ’s and BIA to try to get it right and document their findings.
- Judges contribute to case law, so that’s good. But there can be splits of opinion between the circuits.
- Disadvantages? Once you allow judicial review, the cases are delayed – finalization is delayed.

E. **Bars or Discouraging Asylum**
1. **Filing Deadlines:** - Does not apply to withholding
- Asylum applicant must be filed within one year of the person’s arrival.
  - Not clear what happens if you leave and come back.
- You can avoid the 1 year deadline if you meet one of 2 exceptions:
  (i) Changed circumstances in country that materially affect the applicant’s eligible for asylum;
  (ii) Extraordinary circumstances relating to the delay in fighting.
- Applies only to asylum, not withholding.

2. **Safe Countries:**
- **Safe 3rd Country:** US has a law with Canada. Provision doesn’t apply if you arrive illegally – only applies if you arrive at a landport (not airports or seaports).
- In Europe, there are lists of safe countries that don’t practice the kind of persecution in the UNHCR. Asylum claimants from these countries on the safe list are presumed ineligible.
3. Expedited Removal:
- Kicks in when an immigration officer determines that an arriving NC is inadmissible for lack of documents or for fraud.
- You are turned back immediately unless you are seeking asylum. If an IJ invokes the expedited exclusion provision, and the person either requests asylum or otherwise indicates a fear of persecution, then an asylum officer interviews the person and performs a preliminary screening to decide whether there is a credible fear of persecution.
  - Credible fear requires a significant possibility that the alien could establish eligibility for asylum. INA 235(b)(1). If credible fear is shown, the person may be detained for further consideration.
  - The asylee then is placed in regular removal proceedings where asylum can be applied for.

4. Detention:
- To deter people from filing asylum claims solely to prolong their stays in the US and to assure the removal of those whose claims are finally denied.
- Congress and the INS have increasingly resorted to detention pending final adjudication.
- UNHCR had condemned the detention of asylum seekers, absent exceptional circumstances found after individualized determinations.

5. Denying Employment Authorization:
- INS cannot grant employment authorization to asylum applicants until 180 days after the filing of the application. Upon receiving asylum, the person obtains an immediate right to work.

6. Sanctioning Frivolous Applications:
- If you knowingly file a frivolous asylum claim, you are ineligible to ever get in later on. 208(d)(6).

7. Preinspection:
- INS and Customs operates inspection stations are foreign airports. The idea is that passengers can be inspected before they travel all the way to the US and if found inadmissible, will not face another voyage home.
- Those travelers do not have recourse to the adjudicative system available to most other arriving NC’s – an evidentiary hearing before an IJ, appeal to BIA, right of judicial review.

8. Interdiction:
- Haitian Interdiction Program
  - Under Reagan, 6 of 21,000 would be asylum seekers were given asylum. Bush cam in and allowed interviews in Guantanamo, and more were identified as true asylum seekers. Bush didn’t like the high numbers so he ended the interviews.
  - 241(b)(3) isn’t violated with Haitian interdiction because 241(b)(3) didn’t apply to high seas.

F. Asylum Policy and Random Crap:
1. Policy:
- Asylum law can be though of as a human rights mechanism.
- Asylum law can also be seen as humanitarian – to prevent or end suffering. But that would seem to get rid of the “on account of” language, as it wouldn’t matter why you were being persecuted. As long as you were suffering, you would get asylum under the humanitarian principles.

2. Random Crap: Convention Against Torture:
- CAT: Possible to apply for relief by invoking this Convention. Adopted by UN General Assembly and the US Senate, but the Senate added a long list of reservations, declarations and understandings.
- Convention is not self executing – its terms don’t apply automatically.
- If you have an asylum claim, you often will want to file with CAT too.
  - Article 3: State parties are prohibited from expelling, etc. someone to a country where there is substantial ground to believe he would be subjected to torture.
  - If you meet requirements of article 3, there are no circumstances in which a country can send you to somewhere where you’d be tortured.
- Torture foe any reason suffices under CAT, it need not be for race, religion, nationality, etc.
- CAT is much broader than US asylum laws. The Convention applies only to torture inflict by the government though. And you need torture as defined in the CAT.
- Many international human rights conventions specify that State parties can’t subject people to torture. The European Convention on Human Rights is the most powerful human rights convention.
- Under the ECHR an asylum seeker can’t be sent to a country where they would do things prohibited by the ECHR.
- The definition of a refugee under US law is quite restrictive.

3. Parole Power
- Parole power to let people into the US – Often people from Eastern European communist countries are paroled in.

4. Random Crap: Extended Voluntary Departure:
- Given where unsafe for people to return to their country of origin.
- Generally you get a year to leave after an order of removal, and that can be renewed if it’s still dangerous.

5. Temporary Protected Status INA 244:
- If Secretary of DHS finds any particular country has armed conflict, environmental disaster, or other extreme unsafe circumstances, the Secretary of DHS can name the country as a Temporary Protected Status State.
- Any nationals of that country who entered the US by a specified date (usually the date of the announcement by Secretary of DHS) may remain in the US for a specified period of time (usually about one year, and can be renewed).

XVII. Undocumented Migrants:
A. Generally:
1. IRCA (Immigration Reform and Control Act):
   - Passed in 1986. Created an ER sanctions regime intended to discourage hiring of undocumented migrants, and ultimately disincentivizing the migration of undocumented workers.
   - Verdict is still out on whether ER sanctions work.

2. IRCA Substantive Provisions:
   a. Generally:
      - Substantive Sanctions are found in:
         - 274A(a)(1)(A) – Knowingly hiring an alien who is unauthorized to work with respect to such employment.
         - 274A(a)(2) – Continuing to employ an alien who you find out is unauthorized to work with respect to such employment or who you know recently became unauthorized to work with respect to such employment.
   b. Knowingly
      - Collins says “knowingly” means – awareness was highly probable, and there was a conscious decision to avoid enlightenment, aka willful blindness.
      - Court was interpreting Mester which said constructive knowledge satisfies the knowing requirement. Thus, deliberate failure to investigate suspicious circumstances imputes knowledge.
      - INS regulations interpret knowingly to mean “knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.” Thus – “reason to know.”
   c. Ignorance of the Law
      - Would ignorance of the law be an excuse – say not knowing that a B-1 visa doesn’t allow you to work, and not checking into it?
      - Ignorance of the law is a defense when it prevents you from forming the mens rea for another offense. Here, that would probably be a defense. If you don’t know a B-1 doesn’t authorize work, you can’t knowingly employ an unauthorized alien.
   d. “With Respect to Such Employment”
      - Means if you’re only authorized to work 20 hours, and the ER knows this and hires you to work 30, you’re not authorized with respect to such employment.
   e. Innocuous Employment
      - The literal statutory language contains no exemption for innocuous employment, but the DOJ regulations define employment not to include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent.

3. IRCA Procedural Provisions:
   a. Generally
- Procedural Sanctions are found in:
  - 274A(b)(1): failing to do the required paperwork.
  - Defense: 274A(6): good faith compliance with technical or procedural requirements.

b. Strict Liability:
- Unlike in the substantive provisions, there is no requirement for knowing. Thus, it seems to impose a strict liability. The penalty is a fine.

4. IRCA Discrimination Provisions: 274B
a. Generally:
- An ER cannot discriminate on the basis of 274B(a)(1)(A,B):
  (i) national origin; or
  (ii) citizenship status, when the individual is a protected individual.
- A protected individual is: 274B(a)(3)(A,B)
  (i) a citizen or national of the US;
  (ii) an LPR, refugee or asylum
- But does not include:
  (i) those LPS who have become eligible for naturalization and have failed to apply within 6 months of becoming eligible; or
  (ii) who have applied in a timely basis, but have not been naturalized within 2 years after the date of application, unless the applicant was actively pursuing naturalization (time consumed in INS processing does not count towards the 2 years).

b. Knowledge Requirement – Disparate Treatment/Impact - Pretext:
- Do you have to know a person’s citizenship status in order to violate 274B(a)(1)(A)? The answer is unclear.
- Disparate Impact/Disparate Treatment: The language of 274B seems only to authorize disparate treatment claims. This is how Reagan read the statute, and ALJ decisions have consistently upheld this.
  - Reagan says the statute in 274B(d)(2) authorizes private actions only by those who allege knowing and intentional discriminatory activity, or a pattern or practice of discriminatory treatment. He says this means you need intentional discrimination – a disparate impact is not enough.
  - However, you can still argue that a disparate impact claim should be allowed. Try to make arguments that seemingly neutral hiring standards are really a pretext for national origin discrimination.

c. Exception 274B(a)(4)
- It is fine for an ER to prefer to hire citizens or US nationals over other equally qualified aliens.

d. Documentary Practices: 274B(a)(6)
- You cannot refuse to honor documents that one their face reasonably appear to be genuine, or require more or different documents if made with the purpose or with the intent of discriminating against an individual in violation of 274B(a)(1).
- Ambiguity:
  - Is 274B(a)(6) as separate, 3rd ground of discrimination? Or
  - Does 274B(a)(6) only apply when the individual is a protected individual? Nothing indicates you must be a protected individual, but it does refer you back to paragraph 1, so if you’re claiming discrimination based on citizenship, you’d have to be a protected individual to get (a)(6).

e. Assorted Crap:
  (i) Title VII Claims:
    - For a Title VII claim, you need 15 EE’s before you can bring the discrimination claim, or whatever.
    - Title VII recognizes both disparate treatment and disparate impact claims.
  (ii) OSC (Office of Special Counsel that prosecutes 274B claims) and EEOC Memo:
    - Memo of understanding between these two agencies indicates that each is an agency for the other and will refer charges to each other when appropriate.
    - The EE can file charges with either agencies to satisfy the statutory time limits as well.

5. Proposition 187 (CA)
a. Generally:
- Would have:
- Prohibited public elementary and secondary schools in CA from allowing any undocumented child to attend school.
- Required each school to verify the immigration status of every student and the parents or guardians of every student.
- Students not in lawful status would be expelled and schools would be required to report to the INS the identities of parents, students, or guardians suspected of being out of status.
- The proposition was eventually shot down by court injunctions and a settlement.
- Concerns about entrusting school officials with INS decisions.

b. Plyler:
- Children are innocent.
- Do we really want this massive class of uneducated people?
- In this case, TX argued that the migrants were less likely to give back to the US with their education because they will just leave. The SC rejected that argument.
- Not sure how the court would come out today.

c. Policy:
- The nation as a whole neither benefits nor suffers from illegal immigrations – the net effect on the country as a whole is about 0.
- But, some states bear the impact disproportionately, like CA and TX.
- CA was trying to push some of the illegal immigrants to other states where they could get schooling and such the State’s funds.
- This raises federalism issues. Don’t want a race to the bottom by the states. It’s probably better to have a uniform standard that sets certain limits.

XVIII. Citizenship
A. Citizens vs. Nationals
1. Generally:
- Citizens are a subset of nationals, they constitute 99.99% of nationals.
- US nationals that aren’t citizens are principally from American Samoa.
- In US domestic law, you usually see reference to nationality.
- Under international law, each country has the right to decide who’s a national and who’s not.
- If the US decides to make someone a national, the US has no say over whether the other State recognizes the renunciation of it’s national’s citizenship.
- About ½ of all countries will give effect to new nationalities, the US does not unless the renunciation is subjectively intended to truly not be an American anymore.

2. Why have Citizenship?
- Why have the concept of a citizen? Many of the argument are similar to the arguments for whether immigration restrictions are really morally justifiable. See that part of my notes above.

B. Acquiring Citizenship:
1. 2 Ways to Acquire citizenship:
   (i) Acquired at birth;
   (ii) Acquired after birth.
   - Acquiring after birth is naturalization. Naturalization is defined as the acquisition of citizenship after birth.

2. Acquiring Citizenship at Birth:
   a. Generally
   - There are two ways to acquire citizenship at birth:
     (i) Jus Soli: Right of Land. Confers a nation’s citizenship on persons born within the nation’s territory.
     (ii) Jus Sanguinis: Right of Blood. Confer citizenship on the children of its existing citizens, regardless of where the kids are born.

   b. Jus Soli
   - Jus soli is codified in the 14th amendment. It provides due process and equal protection to all persons born or naturalized in the US and subject to the jurisdiction thereof.
   - 2 exceptions to jus soli:
     (i) children born of foreign diplomats in the US are not citizens;
     (ii) children born of enemy occupying forces in the US are not citizens.
- But, if you’re born to undocumented immigrants or legal non-immigrants you can still get citizenship provided you were born in the US.

c. Jus Sanguinis:
- Can be complicated as the laws have changed over time and aren’t retroactive.
- Whatever law was in effect at the time you were born governs.
- To use the table:
  (i) First look to see if your parents were citizens, using the second column. Any requirement from the 2nd column must be satisfied before your birth.
  (ii) Then look to see if there are any retention requirements.
    - If you do not satisfy the retention requirement, you’re still okay. IN 1994 Congress enacted legislation permitting anyone who had lost his citizenship because of retention grounds to regain citizenship by simply taking an oath of allegiance to the US.
- How to get evidence proving that you were in the US as needed for citizenship requirements? Use school records, church records, medical records, personal effect (i.e. letters), census records, etc.

3. Acquiring Citizenship After Birth: Naturalization:
   a. Procedure:
      - Two steps: first the administrative phase in which the INS makes recommendations to a court. Then the judicial phase where the court formally granted or denied naturalization.
      - Now the process can be sped up and the applicant can take the oath with the INS. The AG now has the sole authority to naturalize.
   b. Substantive Criteria:
      1) Lawful Permanent Residence: Must first be “lawfully admitted to the US for permanent residence in accordance with all applicable provisions of the INA. INA 318
         - Thus, nonimmigrants are not eligible; those who were admitted as LPRs on the basis of fraudulent documents or while otherwise inadmissible are not eligible; and naturalization may not be conferred while removal proceedings are pending or an order of deportation is outstanding.
      2) Residence and Physical Presence: Must reside continuously in the US during the 5 year period immediately preceding the filing of the application, all after admission as an LPR; must be physically present in the US for at least ½ that period; and must “reside” continuously in the US from the filing of the application to granting of naturalization. INA 316(a)
         - The five year requirements become 3 years if you are married.
      3) Good Moral Character: INA 316(a)(3).
      4) Age: Only those over 18 can apply for administrative naturalization, children can be derivative naturalization. INA 334(b)
      5) English Language: Must demonstrate an understanding of the English language, including an ability to read, write and speak words in ordinary usage. INA 312(a)(1)
      6) Knowledge of Civics: Must have a knowledge and understanding of the fundamentals of the history and of the principles and form of government of the US. INA 312(a)(2).
      7) Political Requirements: INA 313 disqualifies applicants who, either during the 10 year period immediately preceding the filing of the application or during the interval between filing and taking the oath, fell within any of several related classes. The ineligible classes include advocates of opposition to organized government, members of the Communist party, and several others.
         - Petitioner must also affirmatively demonstrate an attachment to the principles of the US constitution. 316(a). Also he must swear under oath that he supports the Constitution, renounces all foreign allegiances, etc.

4. Child Citizenship:
   - Two ways other than what we’ve studied before.
   - The first automatically confers citizenship on any child who: §320
      (a) has a US citizen parent;
      (b) is under age 18;
      (c) resides in the US as an LPR in the legal and physical custody of the parent.
   - Citizenship is automatic, no need to apply.
   - So if you are a kid who is admitted as an immediate relative under age 18, and are in physical and legal custody of your citizen parent, you are automatically a citizen.
   - If you have an LPR parent that naturalizes, and you are under 18 and residing in the US in the legal and physical custody of your parent, you are a citizen.
The second permits a kid’s parents to apply affirmatively on behalf of the kid when certain conditions are met: §322
(a) has one US citizen parent (who must file the application);
(b) either the citizen parent, or the kid’s citizen grandparent has been physically present in the US for at least 5 years, at least 2 of which were after age 14;
(c) the kid is under age 18; and
(d) the kid resides outside the US in the legal and physical custody of the citizen parent, but is temporarily present in the US after lawful admission.

Unlike the provision for automatic citizenship by descent at birth, 322 allow either the citizen parent or citizen grandparent to meet the requirement of residence.

Unlike 301(g), 322 requires only that the 5 years/2 years requirement be satisfied before the kid turns 18; it’s not necessary to satisfy requirements before the kid’s birth.

It appears that the entire process must be completed before the kid turns 18.

D. Losing Citizenship:
- Two ways:
  1. Denaturalization (Revocation of Naturalization): 340(a)
     - Naturalization was illegally procured or procured by concealment of a material fact or by willful misrepresentation.
     - There is no time limit on this.

     - Another method in 340(h) of denaturalization allows the AG to “correct, reopen, alter, modify or vacate an order naturalizing a person.”

     - The INS will have to have clear, convincing and unequivocal evidence showing the INS granted the application by mistake, or that evidence was not known to the service officer during the original proceeding and that information would have had a material outcome on the original naturalization and would have proven that the application was based on fraud or that the applicant was not eligible.

     - This method must be done within 2 years.

  2. Expatriation:
     - You can’t be expatriated against your will. Must intend to relinquish your citizenship.

     - Must:
       (i) Voluntarily commit any one of several acts (i.e. taking an oath renouncing US citizenship); and
       (ii) Have intent to relinquish US citizenship.