

FIRST IMPRESSIONS AND LAST RESORTS: THE PLenary POWER DOCTRINE, THE CONVENTION AGAINST TORTURE, AND CREDIBILITY DETERMINATIONS IN REMOVAL PROCEEDINGS

ABSTRACT

The Convention Against Torture prohibits the exclusion or removal of any foreign national who is likely to be tortured upon returning to his homeland, without exception. In the United States, this absolute rule is the law of the land. Such universal applicability exists nowhere else in American immigration law, and for aliens convicted of serious crimes, its significance is difficult to overstate. But those seeking relief under the Convention are unlikely to receive it.

Many cases turn almost entirely on convincing the presiding immigration judge to believe the applicant's testimony—a task far easier said than done. The decision-making process in administrative removal proceedings is often unduly influenced by a number of problematic factors, and adverse credibility determinations are commonly accompanied by flawed logic and flimsy reasoning. These decisions are rarely second-guessed on appeal, and petitioning for judicial review generally does little more than delay the inevitable.

At the center of this troubling state of affairs is the plenary power doctrine, the extra-constitutional foundation upon which American immigration law rests. For the political branches, the doctrine is a wellspring of extensive and unparalleled authority; for the courts, it is a short leash of subdued and toothless deference. After establishing that the extraordinary degree of deference usually required by the plenary power doctrine is unwarranted when protection is sought under the Convention Against Torture, this Comment proposes an alternative standard of review for cases where such relief has been denied as a result of adverse credibility determinations.

INTRODUCTION	1237
I. THE CONVENTION AGAINST TORTURE	1238
A. <i>Relief of “Last Resort”</i>	1239
B. <i>Seeking CAT Relief: Issues at Trial</i>	1241
1. <i>A Tortured Definition of “Torture”</i>	1241
2. <i>Unlikely Success Under the “More Likely than Not”</i> <i>Standard</i>	1243
C. <i>Credibility Determinations</i>	1244
II. THE PLENARY POWER DOCTRINE	1246
A. <i>The Plenary Power’s Sovereign Roots</i>	1247
B. <i>“Civil” Removal and the Slow Growth of Procedural Rights</i>	1250
III. BALANCING DEFERENCE AND DUE PROCESS	1254
A. <i>Fuller v. Lynch: Judicial Inaction in Action</i>	1254
B. <i>The Private Interests at Stake for Individuals</i>	1258
C. <i>The Risk of an Erroneous Deprivation</i>	1259
1. <i>Impact of Trauma on Memory</i>	1260
2. <i>Sexual Identity and Self-Presentation</i>	1261
3. <i>Implicit Bias</i>	1261
4. <i>Law Displaced by Lottery</i>	1263
D. <i>The Government’s Interest</i>	1265
IV. A DEFERENTIAL COMPROMISE	1268
CONCLUSION	1270

INTRODUCTION

As part of a comprehensive effort “to make more effective the struggle against torture . . . throughout the world,”¹ the Convention Against Torture (CAT) prohibits the compulsory return of an individual to a homeland where he faces a dangerous likelihood of torture.² In accordance with the Convention’s foundational premise that torture is never justifiable, the rule applies universally. This principle, known as non-refoulement, is reflected domestically in the United States through an assortment of federal statutes and regulations, and its lack of exceptions is unique under American law.³ However, because the CAT offers the only viable alternative to removal for foreign nationals with serious criminal records, applications for relief under its protection inevitably invite suspicion.⁴ Accompanying this unavoidable tinge of insincerity are a number of other, less obvious factors, which together bring about a deficit of impartiality in administrative removal proceedings.⁵

This tendency toward bias is particularly problematic when—as is often the case—hard evidence is wanting and eligibility for relief turns primarily on the presiding immigration judge’s (IJ) impression of the applicant’s trustworthiness. However, many IJs do not believe applicants because of irrelevant or tangential testimonial flaws,⁶ and in some cases, these adverse credibility determinations are colored by reasoning that can only be described as wrong.⁷ Yet little recourse exists when relief is denied. This is due, in part, to a regrettable tradition of judicial passivity.

Unlike the rest of American law, the federal government’s authority to control immigration derives not from the Constitution but from international law.⁸ Known as the plenary power doctrine, this deeply engrained jurisprudential fixture mandates an unmatched degree of judicial restraint.⁹ Consequently, removal proceedings occupy a unique legal locality, situated between competing guarantees of sovereign autonomy and individual liberty. The end result is a process in which judicial deference is at its peak and

¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT].

² *Id.* at art. 3(1).

³ *Id.* at pmb1.; see *infra* notes 13–24 and accompanying text.

⁴ See *infra* notes 199–206 and accompanying text.

⁵ See *infra* notes 178–218 and accompanying text.

⁶ See *infra* notes 62–67, 154–58 and accompanying text.

⁷ See *infra* notes 144–47 and accompanying text.

⁸ See *infra* notes 81–86 and accompanying text.

⁹ See *infra* notes 77–78 and accompanying text.

petitioners may only challenge administrative decisions on procedural grounds. Federal courts, bound by statute and precedent, deny almost every petition for review.¹⁰

This Comment will show that, where withholding or deferral of removal under the CAT is involved, such an extraordinary degree of deference is improper. While immigration law is, by nature, concerned primarily with geopolitical boundaries, claims for relief under the CAT center on a different, far more significant type of border—that is, the one separating safety from fear, peace from pain, and life from death. Those seeking to avoid torture should not be on the same footing as lottery contestants. Furthermore, unlike other aspects of immigration law, the CAT’s protections reflect the political branches’ desire to constrict the United States’ otherwise absolute sovereign autonomy. This self-imposed limitation should, in turn, serve to restrain the plenary power’s influence over judicial review of denied applications for CAT-based relief. Therefore, courts in this context should apply a deferential compromise reflecting the Constitution’s guarantees of procedural due process while balancing domestic statutory constraints with the United States’ international obligations.

This Comment proceeds in four parts. Part I addresses the CAT’s implementation in the United States. Part II explains the plenary power doctrine, with a focus on national sovereignty and the doctrine’s gradual limitation vis-à-vis procedural due process. Part III provides an illustrative case study, and then frames the CAT within the *Mathews v. Eldridge* balancing test. Part IV, in turn, proposes a way in which reviewing courts can take a more active role in preventing erroneous denials without straying outside the legal boundaries imposed under the political branches’ plenary powers.

I. THE CONVENTION AGAINST TORTURE

In addition to requiring State Parties to take active steps toward preventing torture internally, Article 3 of the CAT prohibits the expulsion, return, or extradition of “a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture.”¹¹ Reflecting this principle of non-refoulement, American immigration law allows

¹⁰ See *infra* notes 54–55 and accompanying text.

¹¹ See CAT, *supra* note 1, at art. 3(1).

aliens who qualify for CAT relief to avoid removal in circumstances where such relief would otherwise be unavailable.¹²

This Part proceeds in three sections. Section A addresses the unique implications of CAT relief as a “last resort” in American immigration law. Section B highlights the hurdles that applicants face at trial, focusing on the government’s narrow definition of “torture” and the applicant’s deceptively high burden of proof under the “more likely than not” standard. Section C introduces the problem of adverse credibility determinations and the judicial deference accorded thereto on petition for review.

A. *Relief of Last Resort*

The CAT went into force on June 26, 1987,¹³ was signed by the United States on April 18, 1988, ratified by the Senate on October 27, 1990,¹⁴ and as a non-self-executing treaty, took effect domestically eight years later when the Foreign Affairs Reform and Restructuring Act (FARRA) became law.¹⁵ Adopting Article 3 as the federal government’s official policy,¹⁶ FARRA delegated the CAT’s implementation to the Executive Branch, subject to the Senate’s “reservations, understandings, declarations, and provisos.”¹⁷ Significantly, Congress instructed the Administration to exclude from protection aliens “described in section 241(b)(3)(B) of the Immigration and Nationality Act” (INA).¹⁸ Under the INA, certain aliens threatened with persecution in their home countries are eligible for withholding of removal,¹⁹ but the provision cited in FARRA lists four exceptions: (1) aliens who have persecuted others; (2) aliens

¹² See *infra* notes 18–32 and accompanying text.

¹³ S. EXEC. REP. NO. 101–30, at 2 (1990) [hereinafter CAT RATIFICATION].

¹⁴ S. TREATY DOC. NO. 100–20 (1988); CAT RATIFICATION, *supra* note 13, at 2; 136 CONG. REC. S17,429, 17,486 (daily ed. Oct. 27, 1990).

¹⁵ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105–277, § 2242, 112 Stat. 2681, 2681–822 (1998) [hereinafter FARRA]; see also Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8,478 (Feb. 19, 1999) (codified at 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253, 507).

¹⁶ Compare FARRA, § 2242(a) (“It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture”), with CAT, *supra* note 1, at art. 3(1) (“No State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

¹⁷ FARRA, § 2242(b)–(c); see also 28 C.F.R. § 200.1 (2013) (“A removal order under Title V of the Act shall not be executed in circumstances that would violate Article 3 of the [CAT]”).

¹⁸ FARRA, § 2242(e) (citing the parallel codification in 8 U.S.C. § 1231(b)(3)(B) (2012)); accord 8 C.F.R. § 1208.16(d)(2) (2016).

¹⁹ See 8 U.S.C. § 1231(b)(3)(A) (stating that the government cannot deport any alien whose “life or freedom would be threatened in [his home] country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion”).

who, “having been convicted . . . of a particularly serious crime [and are] a danger to the community”; (3) aliens who are reasonably believed to have “committed a serious nonpolitical crime” prior to arrival; and (4) aliens who are reasonably believed to be “a danger to the security of the United States.”²⁰ While these exceptions apply in full force with respect to asylum and withholding of removal,²¹ Congress made it clear that they could only apply “[t]o the maximum extent consistent with the obligations of the United States under the [CAT].”²² Because there are no exceptions to Article 3’s non-refoulement obligations, aliens who are ineligible for withholding of removal under the INA can still avoid removal.²³ This exception to the exception exists in the form of temporary deferral of removal, and it is unique to the CAT.²⁴

For some observers, deferral of removal represents a “disturbing and dangerous loophole” that “has resulted in the presence on our Nation’s streets of hundreds of dangerous aliens.”²⁵ This is an oversimplification for several reasons. As an initial point, deferral does not equate to freedom. Grantees “found to be specially dangerous”²⁶ are subject to the government’s discretion “to detain [them] indefinitely and place them on restrictive supervised release.”²⁷ And even for those fortunate enough to be released from custody, deferral is far from ideal. The CAT does not in any way protect against removal elsewhere.²⁸ The government is also free to engage in renewed de novo review against those granted relief at any time,²⁹ and the attorney general can—also at any time—

²⁰ *Id.* § 1231(b)(3)(B).

²¹ *Negusie v. Holder*, 555 U.S. 511, 514 (2009) (first citing 8 U.S.C. § 1158(b)(2)(A)(i); then citing *id.* § 1231(b)(3)(B)(i)); *see also* 8 U.S.C. § 1231(b)(3)(A) (stating that the government cannot deport any alien whose “life or freedom would be threatened in [his home] country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion”); *id.* § 1231(b)(3)(B).

²² FARRA, § 2242(c).

²³ 8 C.F.R. §§ 1208.16(e)(4), 1208.17(a); *see also Negusie*, 555 U.S. at 514 (2009) (stating that the “persecutor bar” . . . does not disqualify an alien from receiving a temporary deferral of removal under the Convention Against Torture”).

²⁴ *Compare* Convention Relating to the Status of Refugees, art. 33(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention] (providing national security and community safety exceptions to the rule against refoulement), *with* CAT, *supra* note 1, art. 3 (providing no exceptions to the rule).

²⁵ *Immigration Relief Under the Convention Against Torture for Serious Criminals & Human Rights Violators: Hearing Before the Subcomm. on Immigration, Border Security, & Claims of the H. Comm. on the Judiciary*, 108th Cong. 3 (2003) [hereinafter *Immigration Relief Hearing*] (statement of Rep. John N. Hostettler, Chairman, H. Subcomm. on Immigration, Border Sec., & Claims).

²⁶ 8 C.F.R. § 1241.14(a).

²⁷ *Yusupov v. Att’y Gen. of U.S.*, 650 F.3d 968, 978 (3d Cir. 2011) (first citing 8 U.S.C. § 1231(a)(3)(D) (2012); then citing 8 C.F.R. § 1241.14).

²⁸ 8 C.F.R. §§ 208.17(b)(2), 1208.16(f); *see also Immigration Relief Hearing*, *supra* note 25, at 4 (statement of Sheila Jackson Lee, Member, H. Subcomm. on Immigration, Border Sec., & Claims) (responding to Rep. Hostettler’s criticism of the CAT).

²⁹ *Id.* § 208.17(d)(1).

terminate deferral on the basis of diplomatic assurances from the receiving country.³⁰ Further, although neither form of CAT relief provides a standalone basis for adjustment to permanent resident status, withholding of removal allows foreign nationals to pursue permanent residency through other means, while deferral does not.³¹ Thus, for individuals convicted of “particularly serious crime[s],”³² the CAT represents a last line of defense, and as objectively unattractive as deferral may be, it certainly beats the alternative—few would rather be tortured than detained. Those seeking to qualify for the CAT’s protections, however, face an uphill battle.

B. Seeking CAT Relief: Issues at Trial

Rather than representing a guaranteed defense to removal for “bad actors,”³³ the regulations providing for deferral of removal under the CAT are better understood as a bare minimum codification of America’s international obligations. To qualify, an alien must prove that “it is more likely than not that he . . . would be tortured” if returned to his home country.³⁴ Two obstacles loom large in this requirement: the federal government’s narrow definition of torture and the alien’s burden of proof.

1. A Tortured Definition of “Torture”³⁵

Under Article 1 of the Convention, “‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” to obtain information or a confession, for the sake of punishment, intimidation, or coercion, or “for any reason based on discrimination of any kind.”³⁶ Importantly, Article 1 also requires that “such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”³⁷ While American law

³⁰ *Id.* § 208.17(f).

³¹ *Yusupov*, 650 F.3d at 978.

³² 8 U.S.C. § 1231(b)(3)(B)(ii); *cf.* *Fuller v. Lynch*, 833 F.3d 866, 869 (7th Cir. 2016) (noting that “[the IJ] first concluded that Fuller’s conviction for attempted criminal sexual assault . . . was a ‘particularly serious crime’ that barred him from withholding of removal under the INA and the CAT”).

³³ *Immigration Relief Hearing*, *supra* note 25, at 2 (statement by Rep. John N. Hostettler, Chairman of the H. Subcomm. on Immigration, Border Sec., & Claims).

³⁴ 8 C.F.R. § 1208.16(e)(2) (2017). Note that aliens seeking CAT relief may only seek judicial review by filing a petition with the appropriate circuit court of appeals. 8 U.S.C. § 1252(a)(4).

³⁵ Phrasing borrowed from Irene Scharf, *Un-torturing the Definition of Torture and Employing the Rule of Immigration Lenity*, 66 RUTGERS L. REV. 1 (2013).

³⁶ CAT, *supra* note 1, at art. 1(1).

³⁷ *Id.* This does not include suffering resulting solely from “lawful sanctions.” *Id.*

incorporates this general definition,³⁸ several important qualifications limit its scope.

When ratifying the CAT, the Senate conditioned its advice and consent on various reservations, understandings, and declarations.³⁹ Included in the Senate's understandings are six important clarifications regarding Article 1,⁴⁰ the most important of which defines "torture" as an act of specific intent.⁴¹ This, in effect, has made the CAT inapplicable when severe pain or suffering is inevitable but unintended.⁴² Another important understanding clarified "acquiescence" as entailing an official's awareness of circumstances prior to the torturous activity,⁴³ which has made relief inapplicable when torture results from governmental ineptitude or impotence.⁴⁴ Both of these understandings seem to conflict with the U.N. Committee Against Torture's understanding of the Convention.⁴⁵ The Senate's four remaining understandings include (1) a requirement of physical control or custody,⁴⁶ (2) a clarification that legally-imposed sanctions could not permissibly extend past the Convention's object

³⁸ See 8 U.S.C. § 1208.18(a)(1) (repeating, nearly verbatim, CAT, *supra* note 1, at art. 1(1)).

³⁹ CAT RATIFICATION, *supra* note 13, at 29–31.

⁴⁰ *Id.* at 30.

⁴¹ See *id.* ("[A]n act must be *specifically intended* to inflict severe physical or mental pain or suffering" (emphasis added)).

⁴² See, e.g., *In re J-E-*, 23 I. & N. Dec. 291, 300, 303–04 (B.I.A. 2002) (13–7 decision) (holding that imprisonment in Haiti did not amount to torture because, while the Haitian government intentionally detained criminal deportees despite knowing of its prisons' substandard conditions, there was no evidence that imprisonment was specifically intended to cause severe pain and suffering).

⁴³ CAT RATIFICATION, *supra* note 13, at 30.

⁴⁴ See, e.g., *Andrade-Garcia v. Lynch*, 828 F.3d 829, 836–37 (9th Cir. 2016) (denying petition for review because "a general ineffectiveness on the government's part to investigate and prevent crime will not suffice to show acquiescence" and the petitioner had failed to show that the Guatemalan "police were aware of [torturous conduct] and breached their legal responsibility to stop it").

⁴⁵ Regarding the definition of torture, see U.N. Committee Against Torture, List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America, ¶¶ 1–4, U.N. Doc. CAT/C/USA/Q/2 (Feb. 8, 2006) (first citing Memorandum Opinion from Daniel L. Levin, Assistant Att'y Gen., Office of Legal Counsel, to the Deputy Att'y Gen., Office of Legal Counsel (Dec. 30, 2004) [hereinafter 2004 Memorandum]; then citing Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172, 220 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter 2002 Memorandum], *superseded by* 2004 Memorandum, *supra*) (asking the United States to "explain why the interpretation of [torture outlined in two Department of Justice] memorandums seems to be much more restrictive than previous United Nations standards"). On the issue of governmental ineffectiveness, compare Committee Against Torture, Communication No. 613/2014, ¶¶ 4.11, 8.8, U.N. Doc. CAT/C/56/D/613/2014 (Dec. 15, 2015) (disagreeing with the State party's argument that removing the complainant to Guinea would not contravene Article 3 because, although female genital mutilation is legally prohibited in Guinea and the "situation for girls . . . [who] wish to avoid genital mutilation has improved somewhat," the complainant would "not have access to an effective remedy and to appropriate protection by the authorities"), with *Andrade-Garcia*, 828 F.3d at 836 (refusing to consider governmental ineffectiveness).

⁴⁶ See CAT RATIFICATION, *supra* note 13, at 30.

and purpose,⁴⁷ (3) an elevated standard for what constitutes “mental pain or suffering,”⁴⁸ and (4) an assertion that “noncompliance with applicable legal procedural standards does not *per se* constitute torture.”⁴⁹

In summary, eligibility for CAT protection turns first on whether an applicant can offer “*specific objective* evidence” demonstrating his or her likelihood of experiencing

- (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions.⁵⁰

Ultimately codified as federal regulations,⁵¹ these understandings present the first obstacle for individuals seeking CAT protection.⁵²

2. *Unlikely Success Under the “More Likely Than Not” Standard*

Even for applicants whose claims fit within torture’s narrow definition, proving that its future occurrence is “more likely than not” presents an equally (if not more) daunting task. On paper, this burden of proof—“equivalent to a ‘preponderance of the evidence’”⁵³ standard—may not seem particularly exacting. In practice, most applicants are unlikely to satisfy it. Of the 12,944 fully adjudicated (either approved or denied) cases in FY 2016, relief was granted only 621 times, and only 140 of those grants were for deferral of removal.⁵⁴ This negligible success rate is typical.⁵⁵ The government’s narrow

⁴⁷ *Id.*

⁴⁸ *Id.* These parameters were intended to “ensure[] that mental torture would rise to a severity seen in the context of physical torture.” 2002 Memorandum, *supra* note 45, at 18.

⁴⁹ CAT RATIFICATION, *supra* note 13, at 30.

⁵⁰ *Mazariegos v. Lynch*, 790 F.3d 280, 287 (1st Cir. 2015) (citation omitted).

⁵¹ *See* 8 C.F.R. § 1208.18(a) (2017) (“The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos [outlined by the Senate].”).

⁵² *See id.* § 1208.16(c) (“The definition of torture contained in § 1208.18(a) of this part shall govern all decisions made . . . about the applicability of Article 3 of the Convention Against Torture.”).

⁵³ *Gomez-Zuluaga v. Att’y Gen. of U.S.*, 527 F.3d 330, 349 (3d Cir. 2008) (quoting *Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407, 424 (1984)); *see also* *Rajjmann v. U.S. Att’y Gen.*, 313 F. App’x 236, 239 (11th Cir. 2009) (upholding as constitutional the [Board of Immigration Appeals] equating the “more-likely-than-not” and “preponderance of the evidence” standards in CAT removal proceedings); *cf.* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328–29 (2007) (equating the two standards in another context).

⁵⁴ U.S. DEP’T OF JUSTICE EXEC. OFFICE OF IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK M1 (2017).

⁵⁵ *See* U.S. DEP’T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2015 STATISTICS YEARBOOK, M1 (2016) [hereinafter FY 2015 STATISTICS YEARBOOK] (10,483 fully adjudicated cases, relief granted 625

definition of torture has undoubtedly influenced these statistics,⁵⁶ but other factors are at work here as well. One such factor is the simple matter of credibility. Frequently, avoiding the dangerous consequences of removal hinges almost entirely on the presiding IJ's impressions.⁵⁷

C. Credibility Determinations

As with asylum and withholding of removal, aliens seeking CAT protection bear the burden of proof.⁵⁸ An applicant's testimony, *if credible*, can satisfy this burden on its own, but the presiding IJ is free to demand corroborating evidence (or an explanation for the lack thereof) when reasonable.⁵⁹ This results in a sliding scale: "the weaker an alien's testimony, the greater the need for corroborative evidence."⁶⁰ The standard for assessing testimonial strength, however, is extraordinarily open-ended.

Credibility determinations are governed by the REAL ID Act of 2005.⁶¹ Before the REAL ID Act, "an IJ could base an adverse credibility determination only on 'issues that [went] to the heart of the applicant's claim' and not on 'irrelevant inconsistencies' or inconsistencies that could not be viewed 'as

times, 121 grants of deferral); U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2014 STATISTICS YEARBOOK M1 (2015) (11,138 fully adjudicated cases, relief granted 536 times, 121 grants of deferral); U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2013 STATISTICS YEARBOOK M1 (2014) (10,081 fully adjudicated cases, relief granted 506 times, 131 grants of deferral); U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2012 STATISTICS YEARBOOK M1 (2013) (10,353 fully adjudicated cases, relief granted 643 times, 129 grants of deferral); U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2011 STATISTICS YEARBOOK M1 (2012) (11,121 fully adjudicated cases, relief granted 629 times, 136 grants of deferral).

⁵⁶ See Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture*, 88 OR. L. REV. 777, 795–806 (2009) (pointing out the flawed reasoning behind the specific-intent requirement and emphasizing its unjust impact); Scharf, *supra* note 35, at 2–4, 12–15 (highlighting the adverse and inconsistent consequences of such a narrow understanding of "torture").

⁵⁷ See Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 129 (2006) ("Credibility is arguably the most crucial aspect of any asylum case."); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 368 (2003) (explaining that "being deemed credible may be the single biggest substantive hurdle" for asylum applicants).

⁵⁸ Compare 8 C.F.R. § 1208.13(a) (2017), and *id.* § 1208.16(b), with *id.* § 1208.16(c)(2).

⁵⁹ *Soeung v. Holder*, 677 F.3d 484, 487–88 (1st Cir. 2012) ("[The Board of Immigration Appeals] has adopted a rule that 'where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided . . . [or] an explanation should be given as to why such information was not presented.'" (second alteration in original) (quoting *In re S-M-J-*, 21 I. & N. Dec. 722, 725 (B.I.A. 1997))).

⁶⁰ *In re Y-B-*, 21 I. & N. Dec. 1136, 1139 (B.I.A. 1998).

⁶¹ Pub. L. No. 109-13, 119 Stat. 302 (codified in scattered sections of 8 U.S.C.).

attempts by the applicant to enhance his claims of persecution.”⁶² Today, credibility determinations rest “on the ‘totality of the circumstances’ and take into account ‘all relevant factors.’”⁶³ To this end, the REAL ID Act lists a number of examples that might influence an IJ’s assessment of an applicant’s claims. These include relatively straightforward issues, such as the level of “consistency between the applicant’s or witness’s written and oral statements,” “the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions),” and, of course, “any inaccuracies or falsehoods.”⁶⁴ But these elements, despite their seemingly objective nature, can quickly become subjective because decision makers are explicitly excused from considering “whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim.”⁶⁵ The statute also permits IJs to take a number of other, more obviously subjective factors into account, such as an applicant’s “demeanor, candor, or responsiveness” and the “inherent plausibility” of his or her testimony.⁶⁶ The list is definitively non-exhaustive.⁶⁷ As a result, final decisions sometimes trend toward the arbitrary.⁶⁸

Compounding the negative effects of such a broad standard is the fact that courts cannot take “a fresh look at the evidence.”⁶⁹ Rather, the judiciary is

⁶² *El-Moussa v. Holder*, 569 F.3d 250, 256 (6th Cir. 2009) (alterations in original) (quoting *Sylla v. Immigration & Naturalization Serv.*, 388 F.3d 924, 926 (6th Cir. 2004)); *accord* *Wang v. Holder*, 569 F.3d 531, 537–38 (5th Cir. 2009) (“Congress’s express rejection of the prior ‘heart of the applicant’s claim’ standard demonstrates an intent to provide more discretion to the IJ in determining credibility”); *Krishnapillai v. Holder*, 563 F.3d 606, 616–17 (7th Cir. 2009) (“As the terms of the statute make clear, the IJ is no longer required to link inconsistencies, inaccuracies, and falsehoods in a witness’s testimony to the heart of the immigrant’s claim before relying on those defects as a reason to discredit a witness’s testimony.”); *Lin v. Mukasey*, 534 F.3d 162, 167 (2d Cir. 2008) (“[O]ur previous holding that an IJ may not base an adverse credibility determination on inconsistencies and omissions that are ‘collateral or ancillary’ to an applicant’s claims has been abrogated by the amendments to the statutory standard imposed by the REAL ID Act.”) (citation omitted); *Lin v. Mukasey*, 521 F.3d 22, 26 (1st Cir. 2008) (“Under our case law, an adverse credibility determination may not be predicated on inconsistencies in an applicant’s testimony that do not go to the heart of the applicant’s claim. This rule has been superceded [sic] by the Real ID Act of 2005”) (citation omitted); *Chen v. U.S. Att’y Gen.*, 463 F.3d 1228, 1233 (11th Cir. 2006) (explaining that “to the extent Chen argues the inconsistencies and discrepancies are ‘trivial’ and ‘irrelevant to the dispositive issues,’ he ignores the amendment” effected by the REAL ID Act).

⁶³ *El-Moussa*, 569 F.3d at 256 (quoting 8 U.S.C. § 1158(b)(1)(B)(iii) (2012)).

⁶⁴ 8 U.S.C. § 1229a(c)(4)(C).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See id.* (ending the list of factors with permission to take into account “any other relevant factor”).

⁶⁸ *See infra* notes 142–58, 187–218 and accompanying text.

⁶⁹ *Fuller v. Lynch*, 833 F.3d 866, 871 (7th Cir. 2016); *cf. Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (“A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.” (citations omitted) (internal quotation marks omitted)).

limited to deciding petitions based entirely “on the administrative record.”⁷⁰ Courts “may grant the petition only if [they] can conclude confidently that substantial evidence does not support the IJ’s adverse credibility determination.”⁷¹ Put differently, credibility determinations can only be overturned when “any reasonable adjudicator would be compelled to conclude to the contrary,”⁷² when “the facts compel a conclusion contrary to the one that the IJ [or Board of Immigration Appeals (BIA)] reached,”⁷³ or when the decision reached has been “manifestly contrary to law.”⁷⁴ For a foreign national facing the dire consequences of removal, the sole “thin comfort” available lies in the hope that the IJ might reopen the case *sua sponte*.⁷⁵

One reason for courts’ reluctance to second-guess administrative immigration decisions can be credited to principles of *Chevron* deference.⁷⁶ However, the judiciary’s deference in the immigration context is more significantly rooted in same source of authority through which Congress passed the REAL ID Act in the first place: the plenary power doctrine.

II. THE PLENARY POWER DOCTRINE

A long tradition of judicial self-restraint has given the federal government the power to admit, exclude, and expel non-citizens with near impunity. This policy of deference, commonly referred to as the “plenary power doctrine,” is entrenched in long-standing jurisprudential principles of national sovereignty derived from customary international law. In spite of a well-documented legacy of discrimination and injustice,⁷⁷ the doctrine remains the federal government’s

⁷⁰ 8 U.S.C. § 1252(b)(4)(A).

⁷¹ *Fuller*, 833 F.3d at 871 (citing *Tawuo v. Lynch*, 799 F.3d 725, 727 (7th Cir. 2015)).

⁷² 8 U.S.C. § 1252(b)(4)(B).

⁷³ *Fuller*, 833 F.3d at 871.

⁷⁴ 8 U.S.C. 1252(b)(4)(C).

⁷⁵ *Fuller*, 833 F.3d at 872 (citing 8 C.F.R. § 1003.23(b)(1) (2016)); *see also* 8 U.S.C. § 1252(a)(4) (noting that “a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the” CAT).

⁷⁶ *See, e.g.*, *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (“[The Board of Immigration Appeals] should be accorded *Chevron* deference as it gives ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication.’”) (quoting *Immigration & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

⁷⁷ *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 858–63 (1987); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.–C.L. L. REV. 1, 3–4 (2010); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 13 (2003).

principal source of power over immigration today.⁷⁸ This Part shows how the plenary power doctrine's origins in international law more than two centuries ago set the stage for the limited scope of judicial review available to petitioners today. Section A traces the doctrine's development and continued relevance as a source of authority rooted in principles of state sovereignty. Section B discusses the gradual application of procedural due process as a means of limiting the political branches' plenary powers in the context of removal.

A. *The Plenary Power's Sovereign Roots*

Prior to 1889, a number of federalism disputes strongly indicated that the federal government's exclusive authority over immigration derived from the Commerce Clause.⁷⁹ But when first presented with a challenge to the government's exclusionary powers in *Chae Chan Ping v. United States* (The Chinese Exclusion Case),⁸⁰ the Supreme Court shifted that source of power to customary international legal principles of state sovereignty.⁸¹ Confronted with a challenge to a federal statute denying entry to all Chinese citizens⁸²—including those who had previously obtained permission to leave and return⁸³—the Court

⁷⁸ See *Kerry v. Din*, 135 S. Ct. 2128, 2136 (2015) (“This Court has consistently recognized that these various distinctions are ‘policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress.’” (quoting *Fiallo v. Bell*, 430 U.S. 787, 798 (1977)). See generally David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (criticizing the claims of numerous scholars who have wrongly predicted the doctrine's demise).

⁷⁹ See *People v. Compagnie Générale Transatlantique*, 107 U.S. 59, 60 (1882) (invalidating a state-imposed immigration tax as “a regulation of commerce with other nations”); *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1875) (“The mind . . . can scarcely conceive a system for regulating commerce between nations which . . . prescribed no terms for the admission of . . . vessels[.]’ . . . their cargo or their passengers.” (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824)); *Smith v. Turner* (The Passenger Cases), 48 U.S. (7 How.) 283, 400 (1849) (holding that Congress's powers under the Commerce Clause are exclusive, and thereby invalidating state-imposed passenger taxes). Compare *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876) (rejecting a California immigration law because it was preempted under the Commerce Clause), with *Head Money Cases*, 112 U.S. 580, 589–600 (1884) (affirming a federal statute nearly identical in substance to the state law in *Chy Lung* was constitutional).

⁸⁰ 130 U.S. 581 (1889); see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation* 100 YALE L.J. 545, 551 (1991).

⁸¹ *The Chinese Exclusion Case*, 130 U.S. at 604 (noting that “within its own territory,” a sovereign nation's jurisdiction “is necessarily exclusive and absolute,” subject only to limitations imposed by its own consent (quoting *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (internal quotation marks omitted))).

⁸² Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58–61 (repealed 1943).

⁸³ See Scott Act of 1888, ch. 1064, § 2, 25 Stat. 504 (repealed 1943) (amending the Chinese Exclusion Act to prohibit the return of any Chinese immigrants who had previously lived in the United States). The petitioner, Chae Chan Ping, went through considerable effort to obtain the right to re-enter, but the complete bar on entry became law during his return voyage. See *The Chinese Exclusion Case*, 130 U.S. at 604.

unanimously decided in the government's favor.⁸⁴ Writing for the Court, Justice Field ignored the Commerce Clause entirely and, instead, couched immigration law in terms of foreign affairs—an area in which the United States “are one nation.”⁸⁵ Specifically, he characterized the Chinese Exclusion Act as a legislative remedy to a perceived invasion, relying on each sovereign nation's inherent right of self-preservation under customary international law.⁸⁶

Three years later, in *Nishimura Ekiu v. United States*,⁸⁷ the Court reaffirmed its *Chinese Exclusion Case* reasoning, stating

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.⁸⁸

The Court then expanded the doctrine's reach, holding that this sovereign prescriptive power necessarily includes the power to delegate broad enforcement powers to the executive.⁸⁹

The next year, in *Fong Yue Ting v. United States*,⁹⁰ the Court expanded the plenary power doctrine to cover removal as well as exclusion. The statute at issue required each resident Chinese citizen to obtain a certificate from an immigration official; failure to produce said certificate upon request resulted in deportation.⁹¹ Writing for the majority, Justice Gray declared, “The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their

⁸⁴ *The Chinese Exclusion Case*, 130 U.S. at 611.

⁸⁵ *Id.* at 604.

⁸⁶ *See id.* at 606 (“To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. . . . If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing.”).

⁸⁷ 142 U.S. 651 (1892).

⁸⁸ *Id.* at 659.

⁸⁹ *Id.* at 660.

⁹⁰ 149 U.S. 698 (1893).

⁹¹ *Id.* at 726.

entrance into the country”⁹² Thus, within just a few years, the Court untethered immigration law from the Constitution’s protective boundaries and bestowed upon the political branches a plenary power conterminous with state sovereignty. The result has been a legacy of unparalleled judicial deference.⁹³ To borrow from Justice Frankfurter: “[W]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress.”⁹⁴ Congress, however, frequently delegates this responsibility to the Executive, and, in doing so, confers the same level of protection from judicial scrutiny.⁹⁵ It

⁹² *Id.* at 707; *see also id.* at 713 (“The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.”). It is also worth noting that, throughout these three landmark cases, the Court cited a significant amount of classical scholarship in support of sovereign power, but the accuracy of that assessment is questionable. *Compare* EMER DE VATEL, *THE LAW OF NATIONS* 226–27 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758) (“[I]t belongs to the nation to judge, whether her circumstances will or will not justify the admission of that foreigner. . . . *But this prudence should be free from unnecessary suspicion and jealousy;—it should not be carried so far as to refuse a retreat to the unfortunate, for slight reasons, and on groundless and frivolous fears.*” (emphasis added)), with *Fong Yue Ting*, 149 U.S. at 707–08 (quoting the same passages, but omitting Vattel’s exclusion of a nation’s right to “refuse a retreat to the unfortunate, for slight reasons, and on groundless and frivolous fears”). *See generally* James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT’L L. 804, 825–27 (1983) (arguing that the Court’s interpretation of classical scholarship was inaccurate).

⁹³ *See, e.g., Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (“An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. . . . But when it comes to refugees who lack any such connection to the United States, . . . the balance tips in favor of the Government’s compelling need to provide for the Nation’s security.”); *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (“The dynamic nature of relations with other countries requires the Executive Branch to ensure that [immigration] enforcement policies are consistent with this Nation’s foreign policy with respect to these and other realities.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (“It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (holding as constitutional the Attorney General’s decision to exclude petitioner on the grounds that her admission would be prejudicial to the country’s interests); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (“As a member of the family of nations, the right and power of the United States in [international affairs is] equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to . . . expel undesirable aliens . . . exist[s] as inherently inseparable from the conception of nationality.”); *cf. Hampton v. Mow Sun Wong*, 426 U.S. 88, 114 (1976) (holding the Civil Service Commission’s denial of employment to non-citizens unconstitutional because the Commission “has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies”).

⁹⁴ *Harisiades*, 342 U.S. at 597 (1952) (Frankfurter, J., concurring).

⁹⁵ *See Andrade-Garcia v. Lynch*, 828 F.3d 829, 834 (2016) (“Congress has ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’ When Congress delegates this plenary power to the Executive, the Executive’s decisions are likewise generally shielded from administrative or judicial review.” (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)). *But cf. Curtiss-Wright*, 299 U.S. at 319–20 (“[T]he very delicate, plenary and exclusive power of the President

is in this setting that reviewing courts must address administrative immigration decisions, including claims for CAT relief.⁹⁶ While Congress's ability to legislate substantive immigration law remains largely unqualified, the Constitution's territorial application has gradually compelled the Court to recognize protections for resident aliens facing removal under the Fifth Amendment's Due Process Clause.⁹⁷

B. "Civil" Removal and the Slow Growth of Procedural Rights

Since it was first raised as an issue in *Fong Yue Ting*, removal has been considered a civil—not a criminal—matter.⁹⁸ Habeas corpus rights notwithstanding, those facing removal during the first few decades following the plenary power's inception could expect nothing more than illusory due process.⁹⁹ Even when the Court did eventually acknowledge the need for procedural protections in *Yamataya v. Fisher*,¹⁰⁰ Justice Harlan qualified the holding to render it essentially meaningless,¹⁰¹ allowing the government to

as the sole organ of the federal government in the field of international relations . . . must be exercised in subordination to the applicable provisions of the Constitution.”).

⁹⁶ See, e.g., *Andrade-Garcia*, 828 F.3d at 834 (discussing the plenary power doctrine in the context of a CAT applicant's petition for review); cf. *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (“[J]udicial deference in the immigration context is of special importance, for executive officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’”) (quoting *Immigration & Naturalization Serv. v. Abudu*, 485 U.S. 94, 110 (1988)).

⁹⁷ U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”). See generally Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (arguing that, because the plenary power doctrine precludes substantive judicial review of immigration law, courts have used procedural surrogates to indirectly influence the substantial rights of aliens).

⁹⁸ See *Fong Yue Ting v. United States*, 149 U.S. 698, 729 (1893) (“[H]ere are all the elements of a civil case.”); *id.* at 730 (“The order of deportation is not a punishment for crime. It is not a banishment, in the sense . . . of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon . . . which the government . . . has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property without due process of law, and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.”).

⁹⁹ See, e.g., *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (holding that, while an alien who has been denied entry “is doubtless entitled to a writ of *habeas corpus*,” any executive or administrative decisions made within the confines of congressionally delegated power “are due process of law”).

¹⁰⁰ 189 U.S. 86, 102 (1903) (holding that no executive officer could “arbitrarily . . . cause an alien . . . to be taken into custody and deported without giving him all opportunity to be heard”).

¹⁰¹ See *id.* at 101 (clarifying that due process in the context of removal is “not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act”); see also *Low Wah Suey v. Backus*, 225 U.S. 460, 468 (1912) (“In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to

prevail in a case that was unfair by any legitimate standard.¹⁰² The decision to ignore due process in immigration proceedings was not universally popular, however, and the dissenters in *Fong Yue Ting*—Justice Brewer,¹⁰³ Justice Field (the same Justice Field who penned *The Chinese Exclusion Case* opinion),¹⁰⁴ and Chief Justice Fuller¹⁰⁵—ultimately influenced later trends toward greater procedural due process guarantees for resident aliens charged with removability.

Justice Brewer, whose dissent best represents the trio as a whole, diametrically opposed the majority’s characterization of removal, proclaiming, “Deportation is punishment . . . [and] punishment implies a trial.”¹⁰⁶ Furthermore, he argued, those who have developed strong communal ties to the United States (e.g., lawful permanent residents) should accordingly be allotted greater constitutional protections than those who lack communal ties (e.g., temporary workers or tourists).¹⁰⁷ Justice Brewer reserved his strongest rhetoric, although, for the majority’s reliance on principles of national sovereignty. The passage is worth quoting at length:

It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers—ours [are] fixed

prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final.”)

¹⁰² The proceedings were premised on a “pretended” investigation, during which the alien “did not . . . know that the investigation had reference to her being deported from the country.” She did not speak English, nor did she understand the “nature and import” of the questions she was asked. *Id.* at 101–02.

¹⁰³ 149 U.S. at 732–44 (Brewer, J. dissenting).

¹⁰⁴ *Id.* at 744–61 (Field, J., dissenting).

¹⁰⁵ *Id.* at 761–63 (Fuller, C.J., dissenting).

¹⁰⁶ *Id.* at 741 (Brewer, J. dissenting); *see also id.* at 754–55 (Field, J., dissenting) (setting aside due process “would be to establish a pure, simple, undisguised despotism and tyranny”); *id.* at 763 (Fuller, C.J., dissenting) (“No euphuism can disguise the character of the act . . . It is, in effect, a legislative sentence of banishment, and, as such, absolutely void.”).

¹⁰⁷ *See id.* at 734 (Brewer, J. dissenting) (“[T]hose who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in, it”); *cf. id.* at 746 (Field, J., dissenting) (“[B]etween legislation for the exclusion of Chinese persons . . . and legislation for the deportation of those who have acquired a residence in the country under a treaty with China, there is a wide and essential difference.”); *id.* at 762 (Fuller, C.J., dissenting) (“Conceding that . . . the denial of entrance is not necessarily the subject of judicial cognizance, the exercise of the power to expel . . . rest[s] on different ground, since limitations exist or are imposed upon the deprivation of that which has been lawfully acquired.”).

and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power, and its framers were familiar with history, and wisely, and it seems to me, they gave to this government no general power to banish.¹⁰⁸

The Court has consistently tipped its hat to Justice Brewer's claim that "deportation is punishment,"¹⁰⁹ yet it continues to classify removal as a civil, non-punitive revocation of a discretionary privilege rather than as a criminal, punitive revocation of an established right.¹¹⁰ Read superficially, this classification seems to give the political branches an unqualified discretion to completely bar judicial review of removal orders. Nonetheless, the nearly complete lack of due process upheld as constitutional in *Fong Yue Ting* would almost certainly be impermissible today.

For example, in *Bridges v. Wixon*,¹¹¹ the Court held that the admission of hearsay evidence in removal proceedings was an unconstitutional "practice which runs counter to the notions of fairness on which our legal system is founded."¹¹² In its reasoning, the majority unequivocally recognized that "the liberty of an individual is at stake" in removal proceedings and that "[m]eticulous care must [therefore] be exercised lest the procedure by which [the individual] is deprived of that liberty not meet the essential standards of

¹⁰⁸ *Id.* at 737–38 (1893) (Brewer, J. dissenting); *cf. id.* at 757–58 (Field, J., dissenting) ("There is a great deal of confusion in the use of the word 'sovereignty' by law writers. Sovereignty or supreme power is in this country vested in the people, and only in the people."); *id.* at 763 (Fuller, C.J., dissenting) ("[The Act] contains within it the germs of the assertion of an unlimited and arbitrary power, in general, incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written Constitution by which that government was created, and those principles secured.").

¹⁰⁹ *Id.* at 740 (Brewer, J. dissenting); *see, e.g., Reno v. American-Arab Anti-Discrimination Comm'n*, 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring) ("Deportation, in any event, is a grave sanction."); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile."); *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[A]lthough deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling.") (citations omitted); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (removal may result in "loss of both property and life; or of all that makes life worth living").

¹¹⁰ *See Zadvyas v. Davis*, 533 U.S. 678, 690 (2001) ("The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). For more on the rights–privileges distinction, *see Motomura, supra* note 97, at 1650–51.

¹¹¹ 326 U.S. 135 (1945).

¹¹² *Id.* at 154; *cf. Fong Yue Ting*, 149 U.S. at 742–43 (Brewer, J. dissenting) (pointing out that Congress had failed to identify which judges could adjudicate removal matters and had left out a mechanism for producing witnesses, thus giving officials full discretion to employ state and local courts based on expedience while suppressing access to an essential element of each alien's case).

fairness.”¹¹³ But despite the broad constitutional language in *Bridges*, the Court explicitly limited the scope of its holding to the statute at hand.¹¹⁴ It was not until four decades later, in *Landon v. Plasencia*,¹¹⁵ that the Justices took the first meaningful step toward ensuring procedural due process in the immigration context.¹¹⁶

In the process of expanding due process protections for lawful permanent residents in exclusion proceedings, the Court in *Plasencia* fully adopted Justice Brewer’s argument in *Fong Yue Ting* that a resident alien’s constitutional rights are positively correlated with his ties to the United States.¹¹⁷ Additionally, the majority reaffirmed the premise that while only lawful permanent residents can benefit from due process protections in an exclusionary setting, “continuously present resident alien[s] [are] entitled to a fair hearing when threatened with deportation.”¹¹⁸ Importantly, the Court qualified that premise by acknowledging that “[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances.”¹¹⁹

To accommodate these circumstantial variations, the Court incorporated the *Mathews v. Eldridge* balancing test for determining whether procedural due process has been satisfied.¹²⁰ This requirement of a “fundamentally fair removal hearing”—now a cornerstone of American immigration jurisprudence¹²¹—has led courts to invalidate a number of administrative actions in the name of due process.¹²² The *Mathews v. Eldridge* balancing test provides the framework in

¹¹³ *Bridges*, 326 U.S. at 154.

¹¹⁴ *Id.* at 156–57; *see also* *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 345–46 (1925) (employing a liberal construction of the Immigration Act of 1924 with the aim of “preserv[ing] treaty rights unless clearly annulled,” consequently placing the wives and minor children of Chinese merchants inside one of the Act’s exceptions). Although beyond this Comment’s scope, this method of lenient statutory interpretation is alive and well. *See, e.g.*, *Vartelas v. Holder*, 132 S. Ct. 1479 (2012) (holding that the Illegal Immigration Reform and Immigrant Responsibility Act did not have ex post facto effect on lawful permanent resident petitioner’s ability to travel outside the United States because Congress had not expressly stated an intent to apply the statute retroactively).

¹¹⁵ 459 U.S. 21 (1982).

¹¹⁶ *Motomura*, *supra* note 97, at 1652–53.

¹¹⁷ *Compare Plasencia*, 459 U.S. at 32 (“[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”), *with* *Fong Yue Ting v. United States*, 149 U.S. 698, 734 (1893) (Brewer, J. dissenting) (“[T]hose who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through . . .”).

¹¹⁸ *Plasencia*, 459 U.S. at 32.

¹¹⁹ *Id.* at 34.

¹²⁰ *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)). For a recitation of the *Mathews v. Eldridge* balancing test, *see infra* note 126 and accompanying text.

¹²¹ *Leslie v. Att’y Gen. of U.S.*, 611 F.3d 171, 180 (3d Cir. 2010).

¹²² *See, e.g., id.* at 181 (holding that an IJ’s failure to inform petitioner of the availability of free legal services, in violation of immigration regulations, violated due process); *Malave v. Holder*, 610 F.3d 483, 488

which courts can assess the proper degree of deference applicable to reviews of adverse credibility determinations for CAT applicants.

III. BALANCING DEFERENCE AND DUE PROCESS

The *Mathews v. Eldridge* balancing test injects a clear due process exception into the plenary power doctrine. Although the doctrine continues to preclude substantive judicial review of immigration statutes, the sovereign's inherent right to expel is no longer "absolute and unqualified" within the Constitution's jurisdictional purview.¹²³ Rather, the federal government may only exercise its powers over immigration within the boundaries prescribed by the Fifth Amendment's guarantee that "no person shall be . . . deprived of life, liberty, or property, without due process of law."¹²⁴ These boundaries extend to CAT proceedings.¹²⁵

But no universal standard exists for determining when due process has been achieved. The degree to which the Fifth Amendment's protections apply depends on how courts weigh "the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures."¹²⁶ Sections B, C, and D of this Part frame applications for relief under the CAT within each aspect of the *Mathews v. Eldridge* balancing test. The following case study facilitates that analysis.

A. Fuller v. Lynch: *Judicial Inaction in Action*

LGBT persons have endured a well-documented history of "severe abuse and discrimination" in Jamaica.¹²⁷ These human-rights abuses "includ[e] assault

(7th Cir. 2010) (holding that prior to executing an unreviewable denial of adjustment of status based on adverse testimony, due process required "the IJ, as the Attorney General's delegate, [to] furnish the alien with compulsory process to seek the adverse witness's presence"); *Lewis v. Chertoff*, 194 F. App'x 1, 2 (2d Cir. 2006) (holding that the Board of Immigration Appeals summary dismissal of alien's petition for review based on alien's failure to file a brief violated due process).

¹²³ *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893).

¹²⁴ U.S. CONST. amend. V; *see also supra* notes 111–22 and accompanying text (describing the gradual adoption of procedural due process in removal proceedings).

¹²⁵ *See Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (en banc) ("The CAT and its implementing regulations are binding domestic law. . . . [Foreign Affairs Reform and Restructuring Act] and its regulations generate interests cognizable as liberty interests under the Due Process Clause" (first citing U.S. CONST. amend. V; then citing *Mathews v. Eldridge*, 424 U.S. 319 (1976))).

¹²⁶ *Plasencia*, 459 U.S. at 34 (citing *Mathews*, 424 U.S. at 334–35).

¹²⁷ *Fuller v. Lynch*, 833 F.3d 866, 868 (7th Cir. 2016).

with deadly weapons, ‘corrective rape’ of women accused of being lesbians, arbitrary detention, mob attacks, stabbings, . . . and targeted shootings.”¹²⁸ The authorities’ de facto policy of willful blindness and their proclivity for to “arrest, detain, and torture LGBT persons”¹²⁹—endorsed by a deeply engrained pop culture steeped in homophobic antagonism¹³⁰—offers little hope for victims and deters many from filing police reports.¹³¹ Furthermore, Jamaica’s government has directly endorsed the oppression of sexual minorities by legally prohibiting homosexual activity.¹³²

It was in this setting that Ray Fuller discovered his bisexual identity as a preteen growing up in Kingston.¹³³ At various points in his life, he was attacked with stones, cut with a knife, and shot—all on account of his sexual orientation.¹³⁴ Shortly after he was shot, his family condemned his sexuality and disowned him.¹³⁵ Fuller legally entered the United States in 1999 following his engagement to a woman who was a U.S. citizen, but his lawful status expired when the couple failed to attend an immigration interview in 2004.¹³⁶ That same year, Fuller pleaded guilty to attempted criminal sexual assault and was sentenced to thirty months of probation.¹³⁷ Eight years later, he was resentenced

¹²⁸ U.S. DEP’T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, JAMAICA 2013 HUMAN RIGHTS REPORT 21 (2013) [hereinafter JAMAICA 2013 REPORT]; see *Fuller*, 833 F.3d at 872 (Posner, J., dissenting) (“[I]n 2006 *Time Magazine* claimed that Jamaica was the worst place in the Americas for LGBT people and one of the most homophobic places in the world.” (internal quotations and citation omitted)); U.S. DEP’T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, JAMAICA 2012 HUMAN RIGHTS REPORT 20–22 (2012) (citing human rights abuses substantially identical to the 2013 Report).

¹²⁹ *Fuller*, 833 F.3d at 868; see JAMAICA 2013 REPORT, *supra* note 128, at 21–22 (noting that the Jamaican “police force in general . . . failed to investigate such incidents”).

¹³⁰ See *Fuller*, 833 F.3d at 872 (Posner, J., dissenting) (“Certain Jamaican music, which features hostility to homosexuals, such as in a T.O.K. song ‘Chi Chi Man’ which threatens to burn fire on gays and those in their company, employs the term ‘batty boy’ to disparage LGBT people. One notorious song, ‘Boom Bye Bye’ written by dancehall musician Buju Banton, advocates violence against *batty boys*, including shooting them in the head and setting them on fire . . .”).

¹³¹ *Id.* (noting that “most Jamaican homosexuals are not going to go public with their homosexuality given the vicious[ness] [of] Jamaican discrimination”); see also AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 2016/17: THE STATE OF THE WORLD’S HUMAN RIGHTS 209 (2017) (“[O]nly 36% of Jamaicans surveyed said they would allow their gay child to continue to live at home. Almost 60% of respondents said they would harm an LGBTI person who approached them. In June [2016], the Attorney General used social media to criticize the US Embassy for flying a Pride flag after the killings of LGBTI people in a nightclub in Orlando, USA.”).

¹³² JAMAICA 2013 REPORT, *supra* note 128, at 21; AMNESTY INT’L, *supra* note 131, at 209; cf. *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008) (“[T]he Jamaican government not only acquiesces in the torture of gay men, but is directly involved in such torture.”).

¹³³ *Fuller*, 833 F.3d at 868.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 867–68. Fuller and his wife divorced in 2005. *Id.* at 868.

¹³⁷ *Id.* at 868.

to serve four years in prison for violating the terms of his parole.¹³⁸ Upon his release from prison in 2014, Fuller was detained yet again—this time by the Department of Homeland Security—and placed in removal proceedings.¹³⁹ The IJ sustained his removability, and the BIA affirmed.¹⁴⁰ Instead of challenging his removability directly, Fuller sought relief under the INA and the CAT, citing both his own personal experience and other documented evidence of Jamaica's human-rights abuses as grounds for either withholding or deferral of removal.¹⁴¹

The IJ rejected Fuller's arguments and denied all relief.¹⁴² First, she concluded that Fuller was ineligible for withholding of removal because his criminal conviction constituted a "particularly serious crime."¹⁴³ Then, the IJ determined Fuller was ineligible for deferral of removal under the CAT because she believed neither Fuller's "basic assertion that he is bisexual" nor "that the Jamaican government would regard him as such."¹⁴⁴ The IJ's determination that Fuller was not bisexual, seconded by the BIA, was the core issue on review in the Seventh Circuit.¹⁴⁵

The IJ's conclusion regarding Fuller's sexual orientation resulted, in part, from her failure to grasp the most basic definition of bisexuality. As evidence of Fuller's heterosexuality, she cited "the fact that Fuller had been married to a woman, fathered children with two different women, and was convicted for sexual assault on a woman."¹⁴⁶ Of course, "[n]one of those actions is necessarily inconsistent with a bisexual orientation; after all, the very word 'bisexual' indicates that the person is attracted to both women and men."¹⁴⁷ Had that been

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* Fuller was charged as removable for "being convicted of an aggravated felony," "for being convicted of a crime involving moral turpitude," and "for losing his conditional permanent resident status." *Id.* (citations omitted). The IJ sustained all three grounds for removability, but the BIA only addressed Fuller's loss of conditional permanent resident status, declining to comment on the two remaining issues. *Id.*

¹⁴¹ *Id.* at 867–68; *cf.* 8 U.S.C. § 1231(b)(3)(A) (2012) (stating the general rule restricting removal of aliens facing persecution and applicable exceptions to that rule); Withholding of Removal Under Section 241(b)(3)(B) of the Act and Withholding of Removal Under the Convention Against Torture, 8 C.F.R. § 1208.16 (2002) (stating the procedural guidelines and applicability for withholding of removal under the CAT); Deferral of Removal Under the Convention Against Torture, 8 C.F.R. § 1208.17 (2008) (stating the procedural guidelines and applicability for grants of deferral of removal under the CAT).

¹⁴² *Fuller*, 833 F.3d at 869.

¹⁴³ *Id.* (first citing 8 U.S.C. § 1231(b)(3)(B)(ii); then citing 8 C.F.R. § 1208.16(d)(2)) (internal quotations omitted).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 871.

¹⁴⁶ *Id.* at 869.

¹⁴⁷ *Id.*

the sole basis for the IJ's decision, the Seventh Circuit "would have granted [Fuller's] petition," but the IJ also disbelieved Fuller on other grounds.¹⁴⁸

Fuller contradicted his own account of getting shot, and his claim to have only been shot once conflicted with a letter offered in support of his claims.¹⁴⁹ He also failed to consistently recall details concerning members of his family,¹⁵⁰ and he had lied on an immigration application to visit Jamaica fifteen years before.¹⁵¹ The IJ also set aside all seven of the letters sent by Fuller's children, friends, and former boyfriends in support of his claims.¹⁵² None of the authors was available to testify, several letters were "stylistically suspicious" due to their uniform inclusion of "a signature line made on a series of dots," and Fuller's claim to have called each signatory while detained did not line up with the jail's telephone records.¹⁵³

These discrepancies were "unquestionable, but trivial and indeed irrelevant" to the actual issue at hand—that is, Ray Fuller's sexual orientation.¹⁵⁴ The timing and quantity of his bullet wounds had no bearing on his sexuality.¹⁵⁵ Neither did his failure to effectively recall estranged relatives' names, nor did his inability to produce witnesses.¹⁵⁶ The fact that Fuller submitted letters sharing the same signature line is remarkably tangential.¹⁵⁷ But irrelevance, here, was irrelevant. Petition denied.¹⁵⁸

¹⁴⁸ *Id.* at 871.

¹⁴⁹ *See id.* at 869–70 ("In his written statement, . . . Fuller said that he was shot during his college years, from 1983 to 1988, at a party hosted by his college boyfriend Henry; he testified, in marked contrast, that the shooting happened nearly a decade later at the house of a boyfriend named Steven in 1997, shortly before his sister kicked him out of her house. . . . [In a supporting letter,] the author wrote that Fuller had been shot on multiple occasions, contrary to his testimony that he was shot only once.").

¹⁵⁰ *See id.* at 869 ("Fuller confused his sisters' names, mixed up a sister with his mother, and gave different figures for the number of sisters that he had.").

¹⁵¹ *See id.* ("[H]e wrote that he wanted to visit his sick mother in Jamaica, even though his mother at the time was actually living in the United States.").

¹⁵² *Id.* at 870.

¹⁵³ *Id.* (internal quotation marks omitted).

¹⁵⁴ *Id.* at 873 (Posner, J., dissenting) ("What this has to do with his sexual proclivities eludes me.").

¹⁵⁵ *See id.* ("[W]hat could the change [in dates] have to do with whether he is bisexual?"); *id.* (arguing that "[t]he number of times he'd been shot could not be thought to have undermined his evidence that he is bisexual," especially when Fuller had "minimized that number" despite having an incentive to exaggerate).

¹⁵⁶ *Id.* ("[T]here is no showing that the ex-boyfriends' unavailability to testify was attributable to Fuller's fearing they wouldn't help his case.").

¹⁵⁷ *See id.* ("There is no explanation of why this should be considered suspicious, since while a signature line is often an unbroken straight line it is sometimes composed of dots or dashes instead."). It is also worth noting that, despite implying that Fuller had drafted these testimonials himself, the IJ also discredited Fuller in part because of discrepancies between his testimony and a support letter. *Cf. supra* note 149. Under this logic, Ray Fuller had actively worked to sabotage his own case. It seems the letters were credible only insofar as they worked to his disadvantage.

¹⁵⁸ *Id.* at 872 (majority opinion).

B. *The Private Interests at Stake for Individuals*

The magnitude of a genuine CAT relief applicant's interests is profound. Even in the absence of possible persecution and torture, the Court has described removal as a "grave sanction,"¹⁵⁹ as "the equivalent of banishment or exile,"¹⁶⁰ and as an event that may result in the loss "of all that makes life worth living."¹⁶¹ These notions are amplified from the perspective of applicants in CAT cases, for whom erroneous denials necessarily entail "ghastly consequences."¹⁶²

To supplement the potentially grim forecast for Ray Fuller, consider Biuma Malu, who was sold for a "bride-price" at age eleven to "her uncle, a high-ranking officer in the Congolese military, [who] raped her, impregnated her, put her head in the toilet, urinated on her, burned her with cigarettes, stabbed her, and pierced her with a screwdriver."¹⁶³ Before age twelve, she had aborted three pregnancies and had just become pregnant again when "rebel soldiers invaded [her] home, killed two of her brothers and two of her sisters, beat her father, and raped [her] and her mother," causing a miscarriage.¹⁶⁴ Despite acknowledging the implications of these claims, the IJ remained unconvinced of their truthfulness; Malu, appearing pro se, had failed to provide "a reasonably obtainable medical evaluation of her scars, evidence establishing the identity of her uncle, and evidence substantiating her family's horrific encounter with the rebel soldiers."¹⁶⁵ Again, the same result: petition denied.¹⁶⁶

To grasp the tremendous interests at stake for genuine CAT applicants, one need only consider a hypothetical in which Ray Fuller's and Biuma Malu's allegations were, in fact, true. This analysis therefore assumes that the private interest at stake for CAT applicants is greater than in any other civil or administrative context.¹⁶⁷

¹⁵⁹ *Reno v. Am.-Arab Anti-Discrimination Comm'n*, 525 U.S. 471 (1999) (Ginsburg, J., concurring).

¹⁶⁰ *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947).

¹⁶¹ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

¹⁶² *Fuller v. Lynch*, 833 F.3d 866, 871–72 (7th Cir. 2016); cf. *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.").

¹⁶³ *Malu v. U.S. Att'y Gen.*, 764 F.3d 1282, 1285 (11th Cir. 2014).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1286.

¹⁶⁶ *Id.* at 1293.

¹⁶⁷ Notable exceptions to this premise include claims for asylum and withholding of removal, where the stakes are arguably just as high. The exclusive focus on CAT claims here is intended, not to discount the gravity of asylum and withholding of removal proceedings, but simply to stay within this Comment's limited scope and to avoid confusing the issues.

C. *The Risk of an Erroneous Deprivation*

To address the risk of an erroneous deprivation under current procedural protections requires, first, a brief description of what those protections are. Facially, the current procedural framework for removal satisfies the basic requirements of due process. An alien in removal proceedings is entitled to the following: (1) legal representation (albeit “at no expense to the Government”),¹⁶⁸ (2) “a reasonable opportunity to examine the evidence [offered against him],”¹⁶⁹ (3) “a reasonable opportunity . . . to present evidence on [his] own behalf,”¹⁷⁰ (4) “a reasonable opportunity . . . to cross-examine witnesses presented by the Government,”¹⁷¹ (5) maintenance of “a complete record . . . of all testimony and evidence produced at the proceeding,”¹⁷² (6) the right to appeal the IJ’s decision to the BIA and to be notified of that right,¹⁷³ and (7) the right to appeal the BIA’s decision by filing a petition for review in the applicable circuit court.¹⁷⁴ These assurances seem a far cry from the kangaroo court that won the day in *Yamataya*.¹⁷⁵

However, in an effort to reduce an increasingly backlogged caseload, regulations intended to streamline the BIA’s review process stripped the BIA of its ability to engage in de novo review of an IJ’s factual findings, including credibility determinations.¹⁷⁶ Similarly, circuit courts are confined to addressing “constitutional claims or questions of law” when considering petitions for review.¹⁷⁷ Therefore, the risk of an erroneous deprivation resulting from an adverse credibility determination exists almost entirely within the context of initial removal proceedings before an IJ. The following analysis highlights the numerous problems that can adversely affect an IJ’s chances of accurately assessing an applicant’s credibility.

¹⁶⁸ 8 U.S.C. § 1229a(b)(4)(A) (2012).

¹⁶⁹ *Id.* § 1229a(b)(4)(B).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* § 1229a(b)(4)(C).

¹⁷³ *Id.* § 1229a(c)(5).

¹⁷⁴ *Id.* § 1252(a)(4).

¹⁷⁵ *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 102 (1903).

¹⁷⁶ Board of Immigration Appeals; Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,902 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3); Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135–42 (Oct. 18, 1999) (codified at 8 C.F.R. pt. 3).

¹⁷⁷ 8 U.S.C. § 1252(a)(2)(D).

1. *Impact of Trauma on Memory*

A key component of many CAT proceedings is whether the applicant has suffered past torture.¹⁷⁸ Yet torture victims are not always capable of consistently testifying about their experiences.

Torture is not torture without trauma, and victims often suffer from Posttraumatic Stress Disorder (PTSD).¹⁷⁹ A general symptom of PTSD is the “[i]nability to remember an important aspect of the traumatic event(s).”¹⁸⁰ This does not apply exclusively to persons who have suffered specific and acute acts of torture. Those who have suffered from “a history of cumulative trauma” are also likely to suffer from “complex PTSD,”¹⁸¹ which entails, among other things, symptoms of “amnesia and denial of the impact and severity of traumatic events.”¹⁸² These symptoms are often unlikely to subside naturally for displaced victims, most of whose post-migration lives are accompanied by the fearful undertones of possible repatriation.¹⁸³ Further, LGBT migrants fleeing persecution—often rejected by their ethnic communities, yet unable to relate to the vastly different experiences of American LGBT individuals—face a strong likelihood of accumulated trauma.¹⁸⁴ Removal proceedings serve only to exacerbate that stress.¹⁸⁵ Taking these factors into account, Ray Fuller’s conflicting testimony concerning the shooting incident is arguably less suspicious.¹⁸⁶ In any case, credibility determinations involving the consistency of CAT applicants’ experiences should receive more than a cursory review and a quick nod of approval.

¹⁷⁸ See 8 C.F.R. § 1208.16(c)(3) (“In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to: (i) Evidence of past torture inflicted upon the applicant[. . .]”).

¹⁷⁹ Katrin Schock et al., *Impact of Asylum Interviews on the Mental Health of Traumatized Asylum Seekers*, EUR. J. PSYCHOTRAUMATOLOGY 2015, at 1–2; see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 274 (5th ed. 2013) [hereinafter DSM V] (citing torture as one cause of PTSD).

¹⁸⁰ DSM V, *supra* note 179, at 271.

¹⁸¹ Ariel Shidlo & Joanne Ahola, *Mental Health Challenges of LGBT Forced Migrants*, 42 FORCED MIGRATION REV. 9, 9 (2013). Events causing PTSD “include combat experiences, natural catastrophes, assault, rape, and serious accidents.” Andrea E. Bopp Stark, *Posttraumatic Stress Disorder in Refugee Women: How to Address PTSD in Women Who Apply for Political Asylum Under Grounds of Gender-Specific Persecution*, 11 GEO. IMMIGR. L.J. 167, 179 (1996) (citation omitted).

¹⁸² Shidlo & Adhola, *supra* note 181.

¹⁸³ Schock et al., *supra* note 179, at 2.

¹⁸⁴ Rebecca Hopkinson et al., *Persecution Experiences and Mental Health of LGBT Asylum Seekers*, 64 J. HOMOSEXUALITY 1650, 1652.

¹⁸⁵ Cf. Schock et al., *supra* note 179, at 2 (“Previous studies have shown that most asylum seekers experience the immigration process—including the asylum interview—as being stressful and provoking anxiety.”).

¹⁸⁶ See Fuller v. Lynch, 833 F.3d 866, 869–70 (7th Cir. 2016) (highlighting the inconsistencies in Fuller’s testimony).

2. *Sexual Identity and Self-Presentation*

In cases like *Fuller* where relief turns on the issue of sexual orientation, PTSD's problematic effects can be compounded by an applicant's internal conflict regarding self-presentation. LGBT individuals who grow up in cultures inimical to sexual minorities often, as a matter of survival, alter their behavior to assimilate within their culture's expected gender roles.¹⁸⁷ To compensate for this act of "passing,"¹⁸⁸ some applicants may feel compelled to engage in "'reverse covering'—manipulating their external presentation to fit the evaluator's stereotypes."¹⁸⁹ This fear, for lack of a better phrase, of appearing "too straight," is not unfounded; the BIA once affirmed an IJ's denial of asylum where the IJ found the applicant credible but reasoned protection was unwarranted, stating, "I certainly would not be able to tell, just from [the petitioner's] testimony and his appearance here in Court today that he was homosexual."¹⁹⁰ Even more disconcerting are cases like *Fuller*, where the IJ is fundamentally unequipped to make such a determination in the first place.¹⁹¹

3. *Implicit Bias*

Implicit bias poses another threat to judicial impartiality in CAT proceedings. Implicit bias "involve[s] negative attitudes and stereotypes that are based on ethnicity, gender, sexuality, age, religion, political affiliation, and numerous other categories," and it affects how a large portion of society makes decisions.¹⁹² Justice, at its most basic level, should compel adjudicators to strive "to get into an attitude of deciding other people's controversies, instead of waging them,"¹⁹³ but IJs remain vulnerable to unconscious influence.¹⁹⁴

¹⁸⁷ Shana Tabak & Rachel Levitan, *LGBTI Migrants in Immigration Detention: A Global Perspective*, 37 HARV. J.L. & GENDER 1, 17 (2014) (citations omitted).

¹⁸⁸ "Passing" occurs when gay people steer clear of gender nonconformity to "hid[e] their identity." *Id.* at 18 (citing Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002)).

¹⁸⁹ *Id.* at 22 (citing Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 909 (2002)).

¹⁹⁰ Opening Brief for Petitioner at 41, *Vega v. Gonzales*, 183 F. App'x 627 (9th Cir., June 2, 2006) (No. 04-70868), 2004 WL 5466690, at *41; *see also* *Eke v. Mukasey*, 512 F.3d 372, 381 (7th Cir. 2008) (denying petition for review when the IJ made an adverse credibility determination and "the applicant failed to either submit some kind of documentation indicating his sexual preferences . . . [and] could not provide the name of the gentleman with whom he was allegedly involved in a homosexual relationship").

¹⁹¹ *See supra* notes 146–48 and accompanying text (describing the IJ's misunderstanding of bisexuality).

¹⁹² Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 862 (2016).

¹⁹³ Justice Jackson's Story, Manuscript of Tape Recordings taken by Dr. Harlan B. Phillips, Oral History Research Office, Columbia University, 1952–1953, at 1097 (on file with the Library of Congress, Justice Jackson's Papers, Box 191).

¹⁹⁴ *See* Judge Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 JUDGES' J., Fall 2015, at 20, 21 (detailing examples of where the author, an IJ, has caught herself assessing credibility determinations based

Credibility determinations in immigration courts are much more likely to be colored by implicit bias for four primary reasons: vague and discretionary judgment standards,¹⁹⁵ constant pressure to make quick decisions as a result of heavy case backlog,¹⁹⁶ negatively impacted emotional states,¹⁹⁷ and cultural differences.¹⁹⁸ In addition to the effects that these factors have on the removal process as a whole, proceedings concerning deferral of removal under the CAT entail other specific—and potentially more dangerous—threats to judicial impartiality.

While deferral of removal under the CAT applies to various categories of aliens who are otherwise ineligible for relief,¹⁹⁹ applicants with domestic

on implicit bias); *see also* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009) (“[I]mplicit biases are widespread among judges.”).

¹⁹⁵ *See* PAMELA M. CASEY, NAT’L CTR. FOR STATE COURTS, STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 2 (2012) (“When the basis for judgment is somewhat vague (e.g., situations that call for discretion . . .), biased judgments are more likely.”); *supra* notes 63–67 and accompanying text (describing the standard for credibility determinations).

¹⁹⁶ *See* CASEY, *supra* note 195, at 4 (“[S]tressful (e.g., heavy, backlogged, or very diverse caseloads . . .) . . . circumstances can adversely affect judicial performance.”) (citations omitted); *see also* *Exec. Office for Immigration Review Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int’l Law of the H. Comm. on the Judiciary*, 111th Cong. 53 (2010) (statement of Hon. Dana Leigh Marks, President, Nat’l Ass’n of Immigration Judges) (“Despite the stakes of these proceedings, we operate with scarce resources at a pace that would make a traffic court judge’s head spin.”); Eli Saslow, *In a Crowded Immigration Court, Seven Minutes to Decide a Family’s Future*, WASH. POST (Feb. 2, 2014), https://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-family-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html?utm_term=.26d2c446daec (describing the experience of an immigration court where the IJ “had an average of seven minutes per case”).

¹⁹⁷ *See* Stuart L. Lustig et al., *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 59 (2008) (explaining that secondary traumatic stress “includes symptoms similar to the PTSD symptoms that afflict trauma victims themselves” and that “IJs indicated that they experienced significant symptoms of secondary traumatic stress”); CASEY, *supra* note 195, at 2 (“Certain emotional states (anger, disgust) can exacerbate implicit bias in judgments of stigmatized group members, even if the source of the negative emotion has nothing to do with the current situation or with the issue of social groups or stereotypes more broadly.” (citations omitted)).

¹⁹⁸ *See* Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1, 12–13 (1991) (“Failure to maintain eye-contact may be considered by people in Western cultures as manifestations of deception. . . . However, the social significance of eye-contact, as well as expressions of emotions, vary from culture to culture. . . .”); *see also* *Kadia v. Gonzales*, 501 F.3d 817, 819 (7th Cir. 2007) (“[I]mmigration judges often lack the ‘cultural competence’ to base credibility determinations on an immigrant’s demeanor.”); *Dia v. Ashcroft*, 353 F.3d 228, 276 (3d Cir. 2003) (en banc) (McKee, J., dissenting in part) (“[W]hile the failure to look someone in the eye while speaking is usually interpreted as an indication of deception by people in Western cultures, avoiding eye contact has a very different meaning in some other cultures.”); *Chouchkov v. Immigration & Naturalization Serv.*, 220 F.3d 1077, 1083 n.15 (9th Cir. 2000) (“[W]hat sounds peculiar in one country may be the norm in another.”); *Barapind v. Rogers*, No. 96–55541, 1997 WL 267881, at *2 (9th Cir., May 15, 1997) (holding that an inference of petitioner’s dishonesty based on his “‘stoic’ demeanor . . . appear[ed] to reflect cultural bias on the part of the IJ”).

¹⁹⁹ *See supra* notes 18–20 and accompanying text (identifying the four categories of aliens ineligible for all forms of relief outside of the CAT).

criminal convictions represent the majority of CAT claims today because of combined legislative and regulatory efforts to expand the meaning of “particularly serious crime.”²⁰⁰ Due to the way removal proceedings are currently structured, an IJ must decide whether a crime is particularly serious before considering whether an applicant is eligible for relief.²⁰¹ Consequently, by the time the IJ—occupying the roles of both judge and jury²⁰²—gets to the merits of the case, the factfinder is not only aware of the prior conviction, but has already concluded that the applicant is “a danger to the community of the United States.”²⁰³

This is problematic for two reasons. First, an IJ who has made such a determination is more likely to view a prior conviction as “indicating the [applicant’s] willingness to violate the law, and thus suggesting a willingness to violate the laws of perjury.”²⁰⁴ Second, making such a determination may unfairly alter the IJ’s perception of the merits of the applicant’s case.²⁰⁵ Rather than properly viewing the applicant in his capacity as a potential *victim*, an IJ who sees the applicant as “a danger to the community of the United States” could foreseeably view the applicant in his capacity as an established *perpetrator*.²⁰⁶ This shift in perspective is impermissible—removal, after all, is assumed to be “nonpunitive in purpose and effect.”²⁰⁷

4. *Law Displaced by Lottery*

Other seemingly arbitrary factors can significantly affect the probability of an erroneous denial. For many applicants seeking relief before a court official,

²⁰⁰ See Mary Holper, *Redefining “Particularly Serious Crimes” in Refugee Law* 13–22 (B.C. L. Sch. Legal Studies, Working Paper No. 381, 2016), <https://ssrn.com/abstract=2667865> (detailing the expansion of “particularly serious crime” from initially including only violent offenses to encompassing non-violent offenses such as drug trafficking, possession of child pornography, and financial crimes).

²⁰¹ See, e.g., *Fuller v. Lynch*, 833 F.3d 866, 869 (7th Cir. 2016) (noting that the IJ “first concluded that Fuller’s conviction for attempted criminal sexual assault . . . was a ‘particularly serious crime’ that barred him from withholding of removal under the INA and the CAT” (first citing 8 U.S.C. § 1231(b)(3)(B)(ii) (2012); then citing 8 C.F.R. § 1208.16(d)(2) (2016))).

²⁰² See 8 U.S.C. § 1229a(b)(1) (“The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence.”).

²⁰³ 8 U.S.C. § 1231(b)(3)(B)(ii); 8 C.F.R. § 1208.16(d)(2).

²⁰⁴ Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 564, 574–75, 577 (2014).

²⁰⁵ *Id.*

²⁰⁶ *Cf. id.* at 578 (arguing that, in the context of impeachment by prior conviction in criminal trials, “it is unrealistic to hope that the [limiting] instructions could serve to prevent jurors from using this evidence in forbidden ways, such as viewing it as a sign of a defendant’s propensity to commit crimes, or as a sign that a defendant is better off locked up”).

²⁰⁷ *Zadvyas v. Davis*, 533 U.S. 678, 690 (2001).

“the result may be determined as much or more by who that official is, or where the court is located, as it is by the facts and law of the case.”²⁰⁸ Although reported statistics for CAT applications are unavailable, statistics for asylum proceedings are instructive in this context—if only for the sake of establishing the premise that, in cases in which “administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death,”²⁰⁹ consistency is demonstrably absent.²¹⁰

For example, in 2015, 48% of asylum applications were denied at the national level; but in Atlanta, asylum relief was granted in only 2% of cases.²¹¹ Asylum seekers in New York, on the other hand, were successful 84% of the time.²¹² Wide variations also exist among the judges at each location; for FYs 2011 through 2016, one New York City IJ recorded a 59% asylum denial rate, while another denied relief to only 2.2% of applicants.²¹³ An applicant’s chance of success could also depend on the presiding IJ’s sex,²¹⁴ work background,²¹⁵ whether the applicant has access to legal representation,²¹⁶ and whether the applicant has any dependents.²¹⁷ The circuit courts are not immune to this

²⁰⁸ Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Adjudication and Proposals for Reform*, 60 STAN. L. REV. 299, 302 (2007); see also *Asylum Outcome Increasingly Depends on Judge Assigned*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIG., <http://trac.syr.edu/immigration/reports/447/> (last visited Feb. 9, 2017).

²⁰⁹ *Rodriguez-Roman v. Immigration & Naturalization Serv.*, 98 F.3d 416, 432–33 (9th Cir. 1996) (Kozinski, J., concurring).

²¹⁰ See generally Edward R. Grant, *Law of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 959 (2006) (noting the inconsistent trends among appellate review of asylum petitions). Asylum statistics are also instructive here because most asylum petitions considered at the appellate level are concerned with adverse credibility determinations. *Id.* Credibility determinations in asylum cases are governed by the same standard as in all other immigration proceedings, including CAT cases. See 8 U.S.C. § 1229a(c)(4)(C) (2012).

²¹¹ FY 2015 STATISTICS YEARBOOK, *supra* note 55, at K2. The inconsistency exists even if the applicant’s nationality is controlled for. See Ramji-Nogales et al., *supra* note 208, at 329 (“[A] Chinese asylum seeker unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of success on her asylum claim, as compared to 47% nationwide.”).

²¹² FY 2015 STATISTICS YEARBOOK, *supra* note 55, at K2.

²¹³ *Judge-by-Judge Asylum Decisions in Immigration Courts: FY 2011–2016*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR., <http://trac.syr.edu/immigration/reports/447/include/denialrates.html> (last visited Feb. 9, 2017); see also Ramji-Nogales et al., *supra* note 208, at 332–39 (describing disparities between immigration judges within immigration courts).

²¹⁴ See Ramji-Nogales et al., *supra* note 208, at 342 (“Female immigration judges granted asylum at a rate of 53.8%, while male judges granted asylum at a rate of 37.3%. An asylum applicant assigned by chance to a female judge therefore had a 44% better chance of prevailing than an applicant assigned to a male judge.”).

²¹⁵ *Id.* at 344–46.

²¹⁶ See *id.* at 340 (“Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel.”).

²¹⁷ See *id.* at 341 (“[W]hile asylum seekers with no dependents have a 42.3% grant rate, having one dependent increases the grant rate to 48.2%.”).

disparity either—an asylum applicant living in the Seventh Circuit has an 1800% greater chance of winning her petition than someone in the Fourth Circuit.²¹⁸

In sum, the risk of an erroneous deprivation in CAT proceedings is significant. Numerous factors can, independently or in concert, threaten to undermine the basic requirement that “the immigration laws of the United States . . . be enforced vigorously and uniformly.”²¹⁹ This section identifies five such factors: (1) complications resulting from PTSD; (2) difficulties posed by identity issues; (3) implicit judicial biases arising from vague legal standards, time constraints, emotional exhaustion, and cultural differences; (4) additional judicial biases resulting from particular aspects of CAT deferral proceedings; and (5) seemingly arbitrary factors such as court location and judge assignment. The need to address this high risk of error is further supported by the government’s heightened interest in ensuring the accurate adjudication of CAT proceedings.

D. The Government’s Interest

Generally speaking, the plenary power doctrine assigns disproportionate weight to the government’s interest in avoiding “the possible burdens of alternative procedures.”²²⁰ Even when its due process exception applies, the doctrine nonetheless bars courts from reviewing substantive constitutional challenges and generally demands judicial deference at a higher level than is required elsewhere.²²¹ But while the political branches’ powers over immigration are drawn from international law, courts nonetheless “must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”²²² Thus, while the United States does not officially recognize the *jus cogens* nature of non-refoulement in general,²²³ the current state of international law clearly limits the previously unqualified right

²¹⁸ *Id.* at 363.

²¹⁹ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384.

²²⁰ *Kuck v. Danaher*, 600 F.3d 159, 163 (2d Cir. 2010) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)); see *supra* notes 78–97 and accompanying text (describing the plenary power doctrine’s grant of disproportionate power to the political branches).

²²¹ See *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (“Judicial deference in the immigration context is of special importance . . .”); *supra* notes 97–120 and accompanying text (examining the due process exception to the plenary power doctrine and its limited reach).

²²² *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

²²³ U.S. Dep’t of State, *U.S. Observations on UNCHR Advisory Opinion on Extraterritorial Application of Non-refoulement Obligations*, STATE.GOV (Dec. 28, 2007), <https://2001-2009.state.gov/s/I/2007/112631.htm>.

of expulsion that each state enjoyed in centuries past.²²⁴ The Legislative and the Executive Branches maintain the right to enact statutes contrary to the United States' international obligations,²²⁵ but in the context of the CAT, the exact opposite is true.

The political branches' unequivocal decision to be bound by the CAT's unqualified refoulement prohibition distinguishes the government's interest in proceedings involving the CAT from others. For example, in an asylum or withholding of removal case where one of the statutory bars to relief applies,²²⁶ the United States can, ostensibly, comply with its obligations under the Refugee Convention²²⁷ even if the applicant faces an indisputably high likelihood of persecution upon return.²²⁸ Not so in CAT applications: relief improperly denied runs afoul, not only of the individual's constitutional and human rights, but of the government's international and domestic obligations.²²⁹ By writing the CAT into law, Congress and the President turned the plenary power doctrine on its head—unchecked authority is always free to check itself.

This notion is far from novel. In fact, it is rooted in the plenary power doctrine's jurisprudential foundation: The Court in *The Chinese Exclusion Case* held that “[a]ll exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.”²³⁰ Therefore, when it comes to preventing refoulement under the CAT, the plenary power doctrine serves to elevate the government's interest, not in maintaining status quo, but in ensuring the United States' continued (or, some would argue, renewed) fulfillment of its international obligations.

²²⁴ See Jean Allain, *The Jus Cogens Nature of Non-refoulement*, 13 INT'L J. REFUGEE L. 533, 533 (2001); Mark R. von Sternberg, *The Evolving Law of Non-refoulement and Its Influence on the Convention Refugee Definition*, 24 IN DEF. OF THE ALIEN 205, 205 (2001); David Delgado, Note, *Running Afoul of the Non-refoulement Principle: The [Mis]interpretation and [Mis]application of the Particularly Serious Crime Exception*, 86 S. CAL. L. REV. POSTSCRIPT 1, 7 (2013).

²²⁵ *Clark v. Allen*, 331 U.S. 503, 509 (1947) (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

²²⁶ 8 U.S.C. § 1231(b)(3)(B) (2012).

²²⁷ By ratifying the Protocol Relating to the Status of Refugees, the United States accepted an obligation to comply with the substantive provisions of the Refugee Convention. See generally Refugee Convention, *supra* note 24. In an effort to align U.S. law with these obligations, Congress passed the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). See also H.R. REP. NO. 96-608, at 17–18 (1979) (describing efforts to satisfy the United States' obligations to refugees).

²²⁸ See Refugee Convention, *supra* note 24, at art. 33(2) (providing national security and community safety exceptions to the rule against refoulement).

²²⁹ See *supra* notes 21–24 and accompanying text (describing the CAT's unique status in immigration law as the only absolute bar to removal).

²³⁰ *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) (quoting *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812)).

Despite the elevated public interest in ensuring the faithful application of the law in a manner reflecting the United States' international commitments, other governmental interests weigh against implementing substantial additional safeguards. At the broadest level, the government has a practical interest "in conserving scarce fiscal and administrative resources."²³¹ This interest carries substantial weight when it comes to today's immigration courts, where IJs are already bogged down with "Sisyphean caseload[s]."²³² While it might be "easy for us to say, 'Let them hire more IJs,'" the probability of the government deciding to "ramp up the budget for helping undocumented [and criminal] aliens gain a legal foothold in the United States" in today's political climate is virtually nil.²³³ The government also has an interest in limiting systematic abuses, including the use of loopholes to "take advantage of the system by 'manufacturing' a new case"²³⁴ and the general trend of fraud that plagues immigration courts.²³⁵ CAT removal cases also often implicate the government's legitimate interests in preserving national security²³⁶ and in "safeguarding the public from criminal aliens"²³⁷—inherent in every application for deferral of removal is the issue of whether to permit the continued residence of a person who has been classified, for one reason or another, as dangerous.²³⁸ Considered together, these factors dictate that any additional safeguards imposed should disrupt the current procedural framework to the most limited extent possible.

²³¹ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

²³² *Oshodi v. Holder*, 729 F.3d 883, 906 (9th Cir. 2013) (Kozinski, C.J., dissenting); see also FY 2015 YEARBOOK, *supra* note 55, at W2 (noting that, as of September 30, 2015, immigration courts reported a backlog of 457,106 pending cases).

²³³ *Oshodi*, 729 F.3d at 907 (Kozinski, C.J., dissenting); see also Exec. Order No. 13768, 82 Fed. Reg. 8,799 (Jan. 30, 2017) (prioritizing removal of aliens who "[h]ave been convicted of any criminal offense" and who have entered without inspection, and providing for the hiring of "10,000 additional immigration officers" but neglecting to provide for the hiring of any additional IJs).

²³⁴ *Chun Wang Lin v. Holder*, 402 F. App'x 604, 606 (2d Cir. 2010) (quoting Yuen Jin v. Mukasey, 538 F.3d 143, 155–56 (2d Cir. 2008)).

²³⁵ See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-50, ASYLUM: ADDITIONAL ACTIONS NEEDED TO ASSESS AND ADDRESS FRAUD RISKS (2015).

²³⁶ See *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995).

²³⁷ *Wang v. Ashcroft*, 320 F.3d 130, 139 (2d Cir. 2003) (citations omitted) (internal quotation marks omitted).

²³⁸ See *supra* notes 199–203 and accompanying text (commenting on the prior criminal conviction underlying every application for deferral of removal under the CAT).

IV. A DEFERENTIAL COMPROMISE

Given the tremendous individual interests at stake,²³⁹ the elevated risk having those interests erroneously deprived,²⁴⁰ and the government's substantial—albeit unencumbered by the plenary power doctrine—interest in maintaining current procedures,²⁴¹ further procedural protections for applicants seeking deferral of removal under the CAT are worth considering. While any number of ideal solutions exist (e.g., de novo circuit court review of credibility determinations, requirement of government-appointed counsel, etc.), “the probable value . . . of additional or substitute procedural safeguards”²⁴² must complement the government's competing interests. For circuit courts considering denied applications for CAT relief, the best solution focuses on ensuring petitioners' procedural due process rights within the narrow scope of cases hinging exclusively on adverse credibility determinations.

While credibility is an important element in every CAT case, not all CAT cases turn on credibility in an absolute way. Oftentimes, relief can be denied justifiably regardless of the applicant's credibility. For example, many applicants, even if found credible, might legitimately fail to demonstrate that future suffering is likely to occur,²⁴³ and many others who can show the likelihood of future suffering might nonetheless be unable to show that it will amount to torture.²⁴⁴ In contrast, the focus here is on what happens when an applicant's claims regarding matters of personal experience and identity are determinative: if his testimony is found credible, relief is granted; if not, relief is denied. Of course, even in cases turning solely on credibility, the possibility remains that the IJ's determination could very well be reasonable.²⁴⁵ But in cases like *Fuller*, in which an IJ's flawed assessment implies an underlying lack of

²³⁹ See *supra* notes 159–67 and accompanying text.

²⁴⁰ See *supra* notes 178–218 and accompanying text.

²⁴¹ See *supra* notes 220–38 and accompanying text.

²⁴² *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁴³ See, e.g., *Konou v. Holder*, 750 F.3d 1120, 1123 (9th Cir. 2014) (agreeing with the BIA's reversal of the IJ's grant of CAT relief when evidence indicated that Marshall Islands law criminalizing homosexuality existed, but was not enforced); *Awuku v. Att'y Gen. of U.S.*, 331 F. App'x 167, 170 (3d Cir. 2009) (denying petition for review when the record established only the “possibility,” rather than a greater-than-not likelihood, that the alien would be subjected to torture); *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 182 (2d Cir. 2006) (denying petition for review when the petitioner's past experiences were too “disparate in time, place, nature and severity” to demonstrate a future likelihood of torture).

²⁴⁴ See, e.g., *Andrade-Garcia v. Lynch*, 828 F.3d 829, 836 (9th Cir. 2016) (denying petition for review when an alien failed to show that the Guatemalan government acquiesced in the torture he was likely to experience at the hands of gang members upon return).

²⁴⁵ See, e.g., *Nasriev v. U.S. Att'y Gen.*, 571 F. App'x 814, 818 (11th Cir. 2014) (listing eight specific and logical reasons cited by the IJ in support of adverse credibility determination).

impartiality, judicial passivity can perpetuate injustice. In these situations, circuit courts, although indisputably bound by deferential statutory and precedential standards of review,²⁴⁶ should nonetheless apply a more contextual due process analysis.

The circuits are split regarding the applicable standard for establishing a due process violation resulting from prejudice. The Third, Fifth, Sixth, and Eleventh Circuits all subscribe to a “substantial prejudice” standard.²⁴⁷ In the Third and Fifth Circuits, a petitioner alleging substantial prejudice must show that he or she would otherwise be eligible for relief.²⁴⁸ For applicants in the Sixth Circuit, establishing substantial prejudice requires a showing that “the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.”²⁴⁹ Similarly, the Eleventh Circuit determines substantial prejudice based on whether the petitioner can “show the alleged due process violation would have affected the outcome of the case.”²⁵⁰ The First Circuit, on the other hand, requires only a showing of prejudice,²⁵¹ but otherwise adopts the same standard as the Eleventh Circuit.²⁵² Diverging from its sister circuits, the Ninth Circuit holds that applicants “need only demonstrate ‘that the outcome of the proceeding *may have been affected* by the alleged violation.’”²⁵³

The Ninth Circuit’s standard is best. Had it been applied in *Fuller*, the IJ’s assertion that Fuller’s sexual relationships with women disproved his bisexuality may have prompted a different result.²⁵⁴ Certainly, the mistake may have been an innocent one. But it is equally likely that the IJ, perhaps overburdened by an

²⁴⁶ See *supra* notes 69–74 and accompanying text (describing the deferential standard of review that circuit courts are bound by).

²⁴⁷ *Denis v. Att’y Gen. of U.S.*, 633 F.3d 201, 219 (3d Cir. 2011); *Lin v. Holder*, 565 F.3d 971, 979 (6th Cir. 2009); *Avila v. U.S. Att’y Gen.*, 560 F.3d 1281, 1285 (11th Cir. 2009); *De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004).

²⁴⁸ See *Denis*, 633 F.3d at 219 (“Mindful of our focus on substantial prejudice, we reasoned that where an alien ‘cannot demonstrate that he was eligible for relief . . . under the CAT, no procedural due process claim can lie.’” (quoting *De Zavala*, 386 F.3d at 883)); *Anwar v. Immigration & Naturalization Serv.*, 116 F.3d 140, 144 (5th Cir. 1997) (“In order for Anwar to show . . . substantial prejudice, . . . [he] must make a prima facie showing that he was eligible for asylum and that he could have made a strong showing in support of his application.”).

²⁴⁹ *Lin*, 565 F.3d at 979 (quoting *Hassan v. Gonzales*, 403 F.3d 429, 436 (6th Cir. 2005) (internal quotation marks omitted)).

²⁵⁰ *Avila*, 560 F.3d at 1285 (11th Cir. 2009).

²⁵¹ *Zhou Zheng v. Holder*, 570 F.3d 438, 442 (1st Cir. 2009).

²⁵² Compare *id.* (“[P]rejudice equates with a showing that ‘an abridgement of due process is likely to have affected the outcome of the proceedings.’” (quoting *Pulisir v. Mukasey*, 524 F.3d 302, 311 (1st Cir. 2008))), with *Avila*, 560 F.3d at 1285 (requiring the petitioner to “show the alleged due process violation would have affected the outcome of the case”).

²⁵³ *Oshodi v. Holder*, 729 F.3d 883, 896 (9th Cir. 2013) (quoting *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1076 (9th Cir. 2005)).

²⁵⁴ See *Fuller v. Lynch*, 833 F.3d 866, 869 (7th Cir. 2016).

ever-increasing caseload and unduly influenced by surrounding circumstances, let bias slip through the cracks.²⁵⁵ In either instance, the IJ's actions "may have . . . affected" the outcome of the case."²⁵⁶ As a result, the matter would have been remanded, along with instructions that would "strongly encourage the BIA to assign [the] case to a different judge on remand in order to avoid any perception of lingering bias."²⁵⁷ On remand, Fuller might still have been denied relief, but he would not have been denied due process.

Under the "may have been" standard, reviewing courts are better equipped to protect CAT applicants' substantial liberty interests by preventing miscarriages of justice that would otherwise be unreviewable. Further, this less restrictive approach is unlikely to prove unduly burdensome for the government—reviewable dispositions of CAT claims amounted to only 4% of completed matters in immigration courts in 2015,²⁵⁸ and its limited scope is likely to only apply to a small portion of that percentage.²⁵⁹ This solution also fits squarely within the plenary power doctrine's well-established procedural due process exception and, far from treading upon the political judgment of Congress and the Executive Branch, furthers the federal government's statutorily enshrined policies by ensuring the proper disposition of applications for CAT-based relief.²⁶⁰

CONCLUSION

Foreign nationals living in the United States today face one of the most overtly xenophobic administrations in modern American history. For those at risk of being tortured upon returning to their home countries, the President's apparent coziness with implementing state-sponsored torture provides yet another reason for concern.²⁶¹ Applying a more exacting standard of due process

²⁵⁵ See *supra* notes 178–207 (discussing the factors affecting bias in CAT proceedings).

²⁵⁶ *Oshodi*, 729 F.3d at 896 (quoting *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1076 (9th Cir. 2005)) (emphasis omitted).

²⁵⁷ *Sosnovskaia v. Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005).

²⁵⁸ See FY 2015 YEARBOOK, *supra* note 55, at A2, M1 (10,483 denied or approved CAT claims out of 262,293 completed immigration matters).

²⁵⁹ It is important to clarify that this solution's scope is limited to cases, such as *Fuller*, that turn on adverse credibility determinations. Other complicating factors, such as the government's definition of torture, have been addressed elsewhere. See sources cited *supra* note 56.

²⁶⁰ See *Kerry v. Din*, 135 S. Ct. 2128, 2136 (2015); *Negusie v. Holder*, 555 U.S. 511, 517 (2009).

²⁶¹ E.g., Damian Paletta, *Donald Trump Says He Believes Torture, Waterboarding "Work," but Will Defer to Defense Chief*, WALL ST. J. (Jan. 27, 2017, 2:00 P.M.), <https://www.wsj.com/articles/donald-trump-says-he-believes-torture-and-waterboarding-work-but-will-defer-to-defense-chief-1485543609>; Charlie Savage, *Trump Poised to Lift Ban on C.I.A. "Black Site" Prisons*, N.Y. TIMES: POLITICS, (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/cia-detainee-prisons.html?_r=0.

review in CAT cases hinging on credibility will not drastically alter the legal landscape, nor is it intended to. The goal here is not to drastically increase the number of successful applications for relief, but ensure that when relief is denied, it is denied *correctly*. To borrow from Justice Jackson, “Procedural fairness and regularity are of the indispensable essence of liberty.”²⁶² When decision makers are overburdened, applicants are disadvantaged, and outcomes are defined in terms of relative safety and possible torture, additional due process guarantees—however slight—are not only justified, but necessary.

D. BRUCE JANZEN, JR.*

²⁶² *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

* Emory University School of Law, J.D., 2018; Candler School of Theology, Emory University, M.Div., 2018. I would like to thank Professors Abdullahi Ahmed An-Na'im and Silas Allard at the Center for the Study of Law and Religion for their constant support and encouragement throughout the writing process, as well as the editorial staff and executive board, specially Matthew Demartini, Lucy Gauthier, and Janiel Myers of the *Emory Law Journal* for spending their graduation week editing this Comment and also for the countless hours of editing and re-editing that made this Comment possible.