

Justices debate rights of lawful permanent residents against backdrop of Trump's immigration crackdown

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(William Hennessy)

During approximately [90 minutes](#) of [oral argument](#) on Wednesday in [Blanche v. Lau](#), the justices considered a challenge to how immigration officers classify lawful permanent residents who have been accused but not yet convicted of committing a crime that puts them at risk of being removed from the country.

The challenge was brought by Muk Choi Lau, a Chinese national who became a lawful permanent resident of the United States in September 2007. Just under five years later, in May 2012, Lau was arrested and charged in New Jersey for allegedly selling nearly \$300,000 worth of counterfeit [Coogi shorts](#). Shortly after, he briefly left the U.S., returning in June 2012.

Typically, when lawful permanent residents, also known as green card holders, return to the U.S. after a short international trip, they are granted admission, meaning they are free to enter the country and stay indefinitely. The [Immigration and Nationality Act](#) states that their admission will only be in question under a limited set of circumstances, including when they have "committed" "a crime involving [moral turpitude](#)" – that is, a dishonest or immoral act, such as fraud or theft.

Immigration officers determined that Lau's pending counterfeiting charge triggered that exception. And so, rather than being admitted, Lau was

paroled, which enabled him to enter the country only [temporarily](#) "to face prosecution for his counterfeiting offense." In June 2013, Lau [pleaded guilty](#) to trademark counterfeiting.

Because Lau had been paroled, the Department of Homeland Security was able to pursue Lau's removal on the ground that he was [ineligible for admission](#). If Lau had instead been admitted into the country in June 2012, DHS would have had to pursue deportation on the ground that he had been "[convicted](#) of a crime involving moral turpitude committed within five years" of his date of admission into the U.S. Among other differences, the burden of proof for the government is higher in deportation proceedings.

During his removal proceedings, Lau contended that he had been "[improperly classified](#)" by the immigration officers who paroled him. An immigration judge and the Board of Immigration Appeals rejected that argument, but the U.S. Court of Appeals for the 2nd Circuit sided with Lau, [holding](#) that immigration officers must have "clear and convincing evidence" that a lawful permanent resident has actually committed a disqualifying crime – not just been charged with one – to deny him admission.

In January, the Supreme Court agreed to review that ruling and resolve a disagreement between the federal courts of appeals over under what circumstances immigration officers can deny admission to lawful permanent residents.

Sopan Joshi, an assistant to the U.S. solicitor general who argued on behalf of the federal government, noted on Wednesday that the "clear and convincing evidence" standard does not come from the text of the INA. Instead, it comes from a Board of Immigration Appeals decision addressing removal proceedings, and the BIA has "never" applied that standard at the border, Joshi said.

When pressed by Justice Ketanji Brown Jackson to explain what standard does apply at the border, Joshi contended that “the INA doesn’t speak directly to this issue or impose any kind of burden.” In the absence of clear guidance, he continued, “the standard would be the same standard that is longstanding and traditional in immigration law ... which is, when the sovereign controls who enters the country at the border, it’s the person arriving [who] has to establish to the satisfaction of the officer that they’re entitled to be let in.”

Justice Samuel Alito expressed surprise at this response, saying, “Well, Mr. Joshi, ... you’re swinging for the fences here.” Alito noted that the immigration officers speaking with Lau were aware that Lau had been “charged with a criminal offense.” That’s different, Alito implied, than if the officers had just thought Lau “look[ed] very shifty.” Joshi said the government could “certainly try and live with” needing to meet a higher evidentiary standard – such as probable cause – but emphasized that what matters for the purposes of abiding by the INA is the evidence the government presents to an immigration judge, not the evidence it has when a parole decision is made.

Shay Dvoretzky, who argued on behalf of Lau, questioned the government’s focus on “the requisite level of proof” during an interaction at the border, asserting that the debate between satisfaction, probable cause, and clear and convincing evidence was not the focus of the briefing. Instead, he continued, the case is focused on when the government most have clear and convincing evidence. “Even putting aside gamesmanship, the court shouldn’t decide the burden question without full briefing and a lower court decision,” Dvoretzky said. “The court thus should affirm on timing alone” or dismiss the case as improvidently granted.

As for timing, Dvoretzky went on to argue that immigration officers need clear and convincing evidence that the lawful permanent resident has

committed a disqualifying crime at the time when they deny admission, explaining that this evidentiary standard can be met with a conviction or confession. Several justices questioned why the court should apply that standard at that time. For example, Justice Amy Coney Barrett noted that the section of the INA that addresses under what circumstances lawful permanent residents can be denied admission does not say "'conviction.' It says 'committed.'" She also observed that holding immigration officers to the "clear and convincing evidence" standard might incentivize them to detain lawful permanent residents at the border to give themselves more time to "pony up evidence."

Another consequence of imposing that standard, drawn out by Alito and Chief Justice John Roberts, is that immigration officers may not be able to deny admission to a lawful permanent resident even after, for example, receiving "an urgent message from the French police" that the individual had shot someone in France "just before he got on the plane." "It just seems to me to be pretty bizarre to say that in that situation they couldn't even be detained," Roberts said. Dvoretzky responded that, under those circumstances, what might matter is grounds for arrest and extradition, not how to interpret immigration law.

Although President Donald Trump's name was not uttered during the argument, his administration's efforts to limit immigration and increase deportations seemed to loom large for at least Jackson and Justice Sonia Sotomayor. They raised concerns about letting immigration officers decide "willy-nilly" to refuse admission to people with green cards. "[Y]ou could imagine a world in which a government that really is not interested in immigration and having immigrants here, living and working, could use this kind of thing to inappropriately parole people rather than admit them so that it depresses immigration," Jackson said.

Joshi asserted that it's not in the best interest of the DHS to unnecessarily parole lawful permanent residents and urged the justices not to "interpret

the INA on the assumption that the entire executive branch is operating in bad faith." Dvoretzky, on the other hand, echoed Jackson's concern. "I think it is a very real risk that if the court rules in favor of the government in this case and gives the government that power that the power may be used for all it's worth," he said.

Alito pushed back against Dvoretzky, asking whether his argument depends on the court's "acceptance of this conspiracy theory." The justice again emphasized that, in Lau's case, immigration officers based their parole decision not on mere suspicion but on a criminal charge in New Jersey. "I guess the State of New Jersey is in on this conspiracy?," Alito asked.

Based on Wednesday's debate, it seems possible that the court will split along ideological lines, with the six Republican-appointed justices siding with the government. The court's decision is expected by early July.

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