

**CRIMINAL LAW** — USE OF COUNTERFEIT IMMIGRATION DOCUMENTS FOR EMPLOYMENT NOT A CONTINUING OFFENSE — *United States v. Tavarez-Levario*, 788 F.3d 433 (5th Cir. 2015).

The Immigration and Nationality Act allows the United States to penalize aliens who participate in document fraud and identity theft.<sup>1</sup> Section 103 of the Immigration Reform and Control Act of 1986 (§ 1546) criminally barred the use of counterfeit documents in immigration matters for the use of unauthorized employment in the United States.<sup>2</sup> In *United States v.*

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1. See Immigration and Nationality Act, 8 U.S.C.A. § 1324c (2015) (governing penalization of document fraud). The Immigration and Nationality Act (the Act) is the main “body of immigration law,” which is a part of the United States Code. See generally *Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, available at <http://www.uscis.gov/laws/immigration-and-nationality-act> (last updated Sept. 10, 2013) (creating laws relating to immigration, naturalization and nationality). The Act was enacted to amend and organize the laws related to immigration that were previously part of the immigration code in the United States and addresses immigration fraud in several ways. *Id.* The Act includes provisions that allow noncitizens to receive work authorization to obtain employment in the United States and penalties for workers and employers who use fraudulent documents to obtain employment. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101, 66 Stat. 163, 168 (codified at 8 U.S.C. § 1101(a)(15)(H)(2012)). See generally Leticia M. Saucedo, *The Making of the “Wrongfully” Documented Worker*, 93 N.C. L. REV. 1505 (2015) (introducing initial immigration laws relating to employers and workers).

2. See 18 U.S.C. § 1546(a) (2002) (criminalizing fraud and misuse of immigration documents). Section 1546(a) of the Immigration Reform and Control Act provides in full:

Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made . . . [s]hall be fined under this title or imprisoned.

*Id.* Individuals convicted of violating § 1546 are subject to a fine and/or imprisonment up to either twenty-five years if the offense was to facilitate and commit an international act of terrorism, twenty years if it was committed to facilitate a drug trafficking related crime, ten years if the offense was not committed to facilitate either an “act of international terrorism or a drug trafficking crime, or 15 years in the case of any other offense.” *Id.* See generally Howard J. Alperin, *Validity and Construction of Federal*

*Tavarez-Levario*,<sup>3</sup> the United States Court of Appeals for the Fifth Circuit addressed whether the “use” of a counterfeit immigration document for employment is “a ‘continuing offense’ for statute of limitations (SOL) purposes.”<sup>4</sup> The Fifth Circuit held that the indictment for using a counterfeit Social Security card and fraudulent permanent resident card (commonly called a “green card”) was not a continuous offense and, therefore, the five-year SOL period began to run when the respondent obtained employment.<sup>5</sup>

In 2006, Victor Tavarez-Levario (Tavarez) “entered the United States as a non-immigrant” from Mexico with a valid visa.<sup>6</sup> On February 2, 2009, he obtained employment with a fraudulent green card and Social Security card.<sup>7</sup> More than five years later, on March 20, 2014, an officer stopped Tavarez while he was driving his employer’s van.<sup>8</sup> Six days later, Tavarez was

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*Statute (18 U.S.C.A. § 1546) Making Fraud and Misuse of Visas, Permits, and Other Entry Documents a Criminal Offense*, 3 A.L.R. FED. 623 (1970) (indicating relevant issues and law regarding fraud and misuse of immigration documents); George Blum et al., § 2640 *What Actions and Documents Are Covered*, 3C AM. JUR. 2D ALIENS AND CITIZENS §2640 (August 2015) (summarizing situations where §1546 applies). The Immigration Reform and Control Act of 1986’s, including the amendment of § 1546, main focus was to sanction employers who hired illegal aliens without work authorization and to deter noncitizens from coming into the United States for work without legal documentation. See Joseph Z. Fleming and Julissa Rodriguez, *Immigration Reform and Control Act of 1986 (IRCA — Penalizing the Employment of Illegal Aliens)* SR035 ALI-ABA 909, 911-12 (2010) (discussing effect of Immigration Reform and Control Act of 1986 on employers). Other sanctions for noncitizens who work without permission includes “civil fines, immigration penalties, and criminal sanctions.” Saucedo, *supra* note 1, at 1514-15.

3. 788 F.3d 433 (5th Cir. 2015).

4. *Id.* at 435 (stating issue under consideration).

5. See *id.* at 437 (summarizing Court’s holding).

6. Criminal Complaint at 2, *Tavarez-Levario*, 788 F.3d 433 (No. 7:14-cr-00070) (describing Victor Tavarez-Levario (Tavarez)’s immigration status). Tavarez’s visit to the United States, per his visa, was “not to exceed six months” and his visa did not allow for him to work while in the United States. *Id.* Tavarez is currently “a native and citizen of Mexico.” *Id.*

7. *Tavarez-Levario*, 788 F.3d at 435 (explaining how he acquired employment). Tavarez’s employer provided police with a copy of his fraudulent permanent resident card (also known as a “green card”) and Social Security card. Complaint, *supra* note 6, at 2. The employer believed the two documents were valid. *Id.*

8. See Complaint, *supra* note 6, at 2 (recalling Tavarez’s interrogation with officers). The Department of Public Safety officer “contacted the Midland Border Patrol Station” to report he pulled over a commercial vehicle for inspection. *Id.* Tavarez admitted to the Department of Public Safety officer that “he was an undocumented immigrant from Mexico” and “only had a Mexican driver’s license.” *Id.* An agent from Midland Border Patrol proceeded to question Tavarez about his immigra-

indicted for knowingly using a counterfeit Social Security card and green card to authorize his employment status.<sup>9</sup>

The government contended that the “use” of a fraudulent immigration document was a continuing offense and the SOL did not begin to run until Tavaréz stopped using the documents for employment.<sup>10</sup> Tavaréz objected to the indictment because he contended that he committed his offense on February 2, 2009, and therefore his indictment was barred by the five-year SOL period.<sup>11</sup> The United States District Court for the Western District of Texas held that his use of counterfeit documents for employment was a continuing offense.<sup>12</sup> Tavaréz accepted a conditional guilty plea agreement and preserved his “right to ap-

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tion status on the phone and he confessed he did not have proper documentation to work or stay in the United States. *Id.* Upon being contacted by the officers and providing a copy of the two documents, the employer exposed that Tavaréz used a fraudulent permanent resident card and Social Security card to secure employment. *Id.* The officers conducted an investigation and searched the numbers listed on the permanent resident card and Social Security card. *Id.* They found each one was originally issued to another individual and did not belong to Tavaréz. *Id.*

9. *Tavaréz-Levario*, 788 F.3d at 435 (determining Tavaréz’s offense in violation of § 1546). Prior to the indictment, Tavaréz was given permission “to contact the Mexican Consulate” to let his family know of his arrest and detention but he chose to not to do so. Complaint, *supra* note 6, at 2.

10. *Tavaréz-Levario*, 788 F.3d at 435 (arguing crime actually continuous). The federal government believed the indictment was timely entered because Tavaréz’s use of the counterfeit Social Security card and green card continued throughout his employment. *Id.* at 436. The federal government argued the terms “use” and “utter” within the statute should be interpreted as involving “ongoing employment of the counterfeit” documents. *Id.* at 438. Moreover, the federal government contended that Tavaréz committed a continuing offense because by using counterfeit immigration documents to obtain employment, it allowed him “to maintain his employment” throughout the time period at issue. *Id.* at 440. Additionally, the federal government claimed to have evidence to prove that Tavaréz possessed the permanent resident card and used it to obtain employment in March of 2009 and that he continued using the document because he was still working for the same employer in March of 2014. Brief for United States of America, at 6, *United States v. Tavaréz-Levario*, 788 F.3d 433 (2015) (No. 14-50415), 2014 WL 6735355, at \*3 (noting federal government’s admission of failing to have evidence to prove possession of fraudulent green card). The federal government, however, informed the district court of their lack of evidence to prove that Tavaréz was in possession of a fraudulent permanent resident card when he was pulled over by the officers or that he possessed it at any moment within the last five years. *Id.*

11. *Tavaréz-Levario*, 788 F.3d at 435-36 (rejecting argument levied by federal government). Tavaréz admitted to the facts that the federal government conveyed. *Id.* at 435.

12. *Id.* at 435 (addressing district court’s ruling).

peal the SOL issue.”<sup>13</sup> Subsequently, the district court sentenced him for two years of probation and Tavarez appealed.<sup>14</sup> The Fifth Circuit reversed the conviction and remanded for dismissal of the indictment because his crime of knowingly using a counterfeit immigration document was not defined as a continuous offense, thus the indictment fell outside of the five-year SOL period.<sup>15</sup>

Section 1546 was enacted for the purpose of penalizing criminals that commit fraud and misuse visas, permits, and other immigration-related documents to enter or stay illegally in the United States.<sup>16</sup> Congress enacted § 1546 to prevent document

13. *Id.* at 436. See also FED. R. CRIM. P. 11(a)(2) (explaining conditional plea of guilty).

14. See *Tavarez-Levario*, 788 F.3d at 436 (overruling Tavarez’s statute of limitations argument).

15. *Id.* at 435 (reversing district court’s decision).

16. See Alperin, *supra* note 2, at 5 (highlighting criminal sanctions as related to § 1546). In its original form, it stated:

Any person who knowingly (1) forges, counterfeits, alters or falsely makes any immigration visa or permit, or (2) utters, uses, attempts to use, possesses, obtains, accepts or receives any immigration visa or permit, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained [shall be punished].

18 U.S.C. § 1546(a) (originally enacted as Immigration Act of 1924, ch. 190, §22(a), 43 Stat. 153, 165). Congress passed § 1546 of the United States Code in 1948. Alperin, *supra* (introducing history of statute). In 1952, Congress amended section (a) to expand the list of immigration documents to include “immigrant or nonimmigrant visa[s], permit[s], or other document[s]” needed to enter the United States. *United States v. Krstic*, 558 F.3d 1010, 1016 (9th Cir. 2009) (comparing 1948 and 1952 version of statutes). As part of the Immigration and Reform and Control Act of 1986, Congress amended the statute to include any “border crossing card, alien registration receipt card or other document prescribed by statute or regulation for entry into or as evidence of authorized stay in the United States” as it previously did not specify what document was required and only stated the violation of the statute applied when an individual was entering the United States. See *Illegal Aliens, Hearing on Section 4 of H.R. 982 and Related Bills Before the Subcomm. on Immigration, Citizenship, and International Law*, 94th Cong. 447 (1975) (suggesting making statute broader to apply to all immigration documents); IMMIGRATION REFORM AND CONTROL ACT OF 1986, Pub. L. 99-603, 100 Stat 3359 (expanding immigration documents under §1546). The amendment was made in order to reverse a Supreme Court decision, which held that an alien registration receipt card was not a “document required for entry into the United States.” See IMMIGRATION REFORM AND CONTROL ACT OF 1986 § 103(a) (addressing Congress’s purpose for expanding statute). Additionally, Congress presumes the immigration laws of the United States are enforced “vigorously and uniformly” and enforcement is done adequately to protect the constitutional rights, safety, and human dignity of United States citizens. IMMIGRATION REFORM AND

fraud and identity theft for illegal employment.<sup>17</sup> The statute provides that an individual violates the law if the individual knowingly utters or uses a counterfeit or false immigration document.<sup>18</sup> The statutory wording of “use” and “utter” in § 1546

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CONTROL ACT OF 1986 § 115 (identifying Attorney General’s role in enforcement of immigration laws).

17. See RONALD W. MORTENSEN, *ILLEGAL, BUT NOT UNDOCUMENTED IDENTITY THEFT, DOCUMENT FRAUD, AND ILLEGAL EMPLOYMENT* 3 (2009), <http://www.cis.org/sites/cis.org/files/articles/2009/back809.pdf> (examining relationship between document fraud, identity theft, and illegal immigration). Identity theft and document fraud crimes have been named one of the quickest growing crimes in the United States and affect millions of U.S. “citizens and legal residents each year.” *Id.* at 3. In 2002, “the General Accounting Office stated: ‘INS has reported that large-scale counterfeiting has made fraudulent employment eligibility documents (e.g., Social Security cards) widely available.’” *Id.* Furthermore, identity theft done for illegal immigration purposes has been determined to impact millions of Americans as victims and creates a difficult hardship for the victims. *Id.* at 4. Additional laws have been passed in recent years to impose severe penalties on individuals who use fraudulent documents, including fraudulent Social Security numbers. See, e.g., John P. Wixted, *Unknown Thieves: Reforming the Legal Link Between Immigration and Identity Theft*, 41 *RUTGERS L.J.* 403, 403 (2009) (focusing on aggravated identity theft statute). Illegal aliens use stolen information to obtain government benefits with someone else’s name, which causes a direct harm to the victim. See Kristin Finklea, *Identity Theft: Trends and Issues*, CONGRESSIONAL RESEARCH SERVICE (Jan. 16, 2014), available at <https://www.fas.org/sgp/-crs/misc/R40599.pdf> (stating when identity thieves create fake or counterfeit documents for illegal aliens). The perpetrator uses the identify theft victim’s stolen information and name to receive a government benefit which directly harms the victim. *Id.* As the former United States Secretary of Homeland Security, Michael Chertoff, expressed, “Now, this is not only a case about illegal immigration, which is bad enough. It’s a case about identity theft in violation of the privacy rights and the economic rights of innocent Americans” and that “these individuals suffered very real consequences in their lives. These were not victimless crimes.” See Mortensen, *supra*, at 4 (footnote omitted) (citing remarks from executive Department of Homeland Secretary). Additionally, Congress enacted § 1546 to work concurrently with employment laws already in effect, like Social Security benefits, that could be applied to noncitizens. See generally Jared S. Childers, *Touching the Third Rail: An Analysis of Social Security and the Recently Revealed U.S.-Mexico Social Security Totalization Agreement*, 26 *PENN ST. INT’L L. REV.* 227 (2007) (summarizing Social Security Act’s purpose and function). Some of these laws include the Federal Insurance Contributions Act (FICA) tax for employers. See *id.* at 229 (indicating how payroll taxes provide Social Security and Medicare benefits).

18. See 18 U.S.C. § 1546 (a) (2002) (including counterfeit or falsely made Social Security card, green card and other immigration-related documents); Michael John Garcia, *IMMIGRATION-RELATED DOCUMENT FRAUD OVERVIEW OF CIVIL, CRIMINAL, AND IMMIGRATION CONSEQUENCES* (updated December 7, 2005), <http://www.ilw.com/immigrationdaily/news/2006,0130-crs.pdf> (concentrating on criminal penalties for individuals violating §1546).

has typically been interpreted using the plain meaning of the terms.<sup>19</sup>

A SOL forbids the government from prosecuting an offense if the time limit for prosecuting the crime has expired.<sup>20</sup> Within the context of § 1546, the five-year default time period governs because the SOL is not specified.<sup>21</sup> Typically, a SOL commences “when a crime is committed and ‘complete,’ regardless

19. See *Bailey v. United States*, 516 U.S. 137, 143 (1995) (indicating various interpretational differences of word “use”); see also *Smith v. United States*, 508 U.S. 223, 228 (1993) (defining use in firearm statute as to employ or to convert to one’s service). Words that are unambiguous in a statute are interpreted by using the plain meaning rule. See generally United States General Accountability Office, Office of the General Counsel, 2. *The “Plain Meaning” Rule*, 2004 WL 5661347 (2015) [hereinafter *Plain Meaning Rule*] (explaining legal framework of statutory interpretation). “Use” is defined as “to employ for the accomplishment of a purpose.” BLACK’S LAW DICTIONARY 1776 (10th ed. 2014). It is also defined as “to put into practice or employ habitually or as a usual way of doing something to follow as a regular custom.” *Id.* Other definitions are “take, hold, or deploy (something) as a means of accomplishing a purpose or achieving a result; employ.” *Use Definition*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/use](http://www.oxforddictionaries.com/us/definition/american_english/use) (last visited Oct. 30, 2015). “Utter” is defined as “[t]o put or send [a document] into circulation” See BLACK’S LAW DICTIONARY 1687 (9th ed. 2009). Another definition of “utter” is “to put [forged money] into circulation.” *Utter Definition*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/utter](http://www.oxforddictionaries.com/us/definition/american_english/utter) (last visited Oct. 30, 2015).

20. Jeffrey R. Boles, *Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine*, 7 Nw. J.L. & Soc. POL’Y 219, 222 (2012) (summarizing criminal limitations period created by legislatures). The purpose of the statute of limitations (SOL) is to protect the defendant from having to defend against evidence that is stale, may have faded, or is lost. *Id.* It was created to strike a balance between the government’s interest and protecting a defendant’s rights. *Id.* at 224. Additionally, another purpose is to achieve efficiency for a timely prosecution. *Id.* The time limit “may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.” *United States v. Toussie*, 397 U.S. 112, 114-15 (1970). The SOL’s purpose is to “limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions” and to protect a defendant’s rights from having to defend against charges that are stale and too old to be used as sufficient evidence, which depends on the moment in which the offense occurred. Boles, *supra*, at 224 (elaborating on reasons why SOL time periods exist).

21. See 18 U.S.C.A. §3282 (a) (2003) (expounding default SOL time period when not stated in statute for offenses not capital). The statute states, “[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.” *Id.* Congress has enacted statutes with specified SOL periods for a variety of crimes, including capital and other serious offenses. See Boles, *supra* note 20, at 223 (discussing nature and effect for criminal SOL). The offenses that Congress has determined to be extremely severe may be prosecuted at any time with no SOL expiration. *Id.*

of whether the government has discovered the existence of the crime.”<sup>22</sup> Conflicts arise between a SOL and when a crime is termed a “continuous offense,” which is an unlawful act or series of acts committed that are deemed to be a single ongoing crime.<sup>23</sup> To be deemed a continuing offense, the crime is not considered complete until the wrongdoer refrains from the entire course of conduct.<sup>24</sup>

Many courts in the criminal law context have interpreted the overlap between SOL and continuing offense doctrine.<sup>25</sup>

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22. Boles, *supra* note 20, at 229 (demonstrating when limitation period begins). Generally, a crime is “complete” when each element of the crime occurs. *Id.* See also *Pendergast v. United States*, 317 U.S. 412, 418 (1943) (affirming when crime terminates); *United States v. Archer*, 671 F.3d 149, 171-72 (2d Cir. 2011) (recognizing crime completed when defendant presented false document to federal government).

23. See Benjamin E. Rosenberg, ‘*Continuing Crimes*’ and Statutes of Limitations, 2 No. 3 Westlaw J. Corp. Officers & Director Liab. 2, 1-6 (2010) (considering connection between both doctrines); Boles, *supra* note 20, at 228 (providing definition of “continuing offense”); see also *Toussie*, 397 U.S. at 115, 120 (deciding continuing offense doctrine application only in limited circumstances). The SOL for a continuing offense is applied, in limited circumstances, when Congress’s language specified it in the statute or the nature of the crime is one that produces an ongoing threat of harm. *Id.*

24. See *United States v. Motz*, 652 F. Supp. 2d 284, 292-93 (E.D.N.Y. 2009) (describing when SOL begins to run); see also *Pendergast*, 317 U.S. at 418 (asserting SOL starts at completion of crime). The SOL does not begin to run when all elements of the crime are met but rather “when the ongoing commission of the crime comes to an end.” See *United States v. Edelkind*, 525 F.3d 388, 393-398 (5th Cir. 2008) (emphasizing moment SOL starts for continuing offenses). Some courts have ruled the SOL commences when the last act of the offense occurs. *Id.* See also CHARLES DOYLE, CONG. RESEARCH SERV., RL31253, STATUTE OF LIMITATIONS IN FEDERAL CRIMINAL CASES: AN OVERVIEW 11 (2012) (summarizing time period SOL begins). In cases where the nature of the offense is a possessory one, the SOL begins to run when the possessor parts with the item. *Id.* at 11-14. See also *Krstic*, 558 F.3d at 1017 (ruling possession of false green card constituted possessory and continuous offense); *Eichelberger v. United States* 252 F.2d 184, 184-85 (9th Cir. 1958) (holding possession of illegal firearms continues until date on indictment for SOL purposes).

25. See Boles, *supra* note 20, at 235 (explaining application of continuous offense doctrine); Francis C. Amendola et al., *Continuing Offenses*, 22 C.J.S. CRIMINAL L. § 256 (2015) (reviewing link between SOL and continuing offenses). Some courts have unanimously been able to agree and rule some crimes as continuous ones. *Continuing Offenses, supra*; see, e.g., *United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999) (determining conspiracy continuing offense); *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999) (classifying kidnapping as continuing offense); *United States v. Hull*, 456 F.3d 133, 146 (3d Cir. 2006) (identifying crime of possession precedent). Other courts have held continuous offenses in other types of crimes. See, e.g., *United States v. Merino*, 44 F.3d 749, 753-54 (9th Cir. 1994) (concluding flight to avoid prosecution continuous offense); *United States v. Kayfez*, 957 F.2d 677, 678 (9th Cir. 1992) (establishing possessing counterfeit currency as continuous offense); *United States v. Winnie*, 97 F.3d 975, 975-76 (7th Cir. 1996) (finding possession of skin

The Supreme Court of the United States, in *Toussie v. United States*,<sup>26</sup> held that the SOL began to run when the petitioner failed to register for the draft.<sup>27</sup> The Court issued a two-prong test to determine when an offense should be deemed continuous for SOL purposes.<sup>28</sup> To satisfy the first prong, Congress must have inserted explicit plain language in the federal statute in question for a court conclude that it intended the offense to be a continuous one and when the SOL begins to run.<sup>29</sup> If Congress

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and skull of endangered species as continuous offense); *United States v. Gomez*, 38 F.3d 1031, 1035 (8th Cir. 1994) (deciding reentering country after deportation as continuous offense); *United States v. Santana-Castellanos*, 74 F.3d 593, 598 (5th Cir. 1996) (explaining deported alien returning to United States with knowledge of illegal entry as continuous offense); *United States v. Gray*, 876 F.2d 1411, 1419 (9th Cir. 1989) (ruling failure to appear for sentencing continuous offense). However, some disagreement exists on the application of the doctrine. *See generally* Boles, *supra*, at 236 (analyzing difficulty in interpreting continuing offenses).

26. 397 U.S. 112 (1970).

27. *Id.* at 113 (setting forth issue Court considered). Prior to this case, courts classified continuing offenses crimes inconsistently with minimal guidance. *See* Boles, *supra* note 20, at 230 (recalling prior history of continuing offense doctrine). Before 1970, most courts only agreed on conspiracy, concealment of bankruptcy assets, and failure to register for the draft were continuing offense for SOL purposes. *Id.* In *Toussie v. United States*, the defendant was convicted for failing to register for the draft. *Toussie*, 397 U.S. at 112 (stating forth conviction of defendant). The defendant argued the offense was complete when he failed to register in 1959, and that the five-year SOL period did not allow for him to be prosecuted. *Id.* at 114. The federal government opposed his argument and contended the crime continued to be committed every day he did not register, which was thirteen years after his initial failure to register. *Id.* The Court explained that nothing in the act of failing to register created “a renewed threat of the substantive evil Congress sought to prevent” like it had determined in precedent conspiracy cases. *Id.* at 122.

28. *Toussie*, 397 U.S. at 115 (indicating principles of continuing offense doctrine). The Court stated that to determine when an offense is continuous “the explicit language of the substantive criminal statute [must] compel[ ] such a conclusion” or “the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.” *Id.* The Court specified the continuous offense doctrine should be applied in limited circumstances. *Id.* Applying the test, the Supreme Court held the congressional intent for failing to register for draft was not intended to be treated as a continuing offense for SOL purposes because it was neither in the language of the draft registration statute nor the nature of the crime involved showed Congress’ intent. *Id.* at 115-16, 119 (holding failure to register for draft not continuing offense).

29. *See* *United States v. Banks*, 708 F. Supp. 2d 622, 623 (E.D. Ky. 2010) (expanding on explicit language of statute). As the United States Court of Appeals for the Tenth Circuit explained that “[i]f Congress intended the [alleged offense] to be a continuing offense, it could have clearly stated so.” *United States v. Reitmeyer*, 356 F.3d 1313, 1322 (10th Cir. 2004) (emphasizing on significance of Congress’s intent for continuing offenses); *see, e.g.*, 18 U.S.C. § 3284 (2015) (finding concealment of bankrupt’s asset); 22 U.S.C. § 618(e)(2004) (regulating failure to register as foreign agent).



was silent, courts use the second prong and look to many factors like the structure, purpose, and legislative history of statute, the danger posed to society, or past precedent to indicate whether the nature of the offense is continuous.<sup>30</sup> If an offense is found to be continuous, then the SOL tolls after the crime is considered complete.<sup>31</sup>

In *United States v. Tavaréz-Levario*, the Fifth Circuit held the use of counterfeit immigration documents to obtain employment was not a continuing offense because the use of the documents occurred in a single incident and did not involve ongoing or continuous criminal activity.<sup>32</sup> The Court began its analysis by determining if the explicit language of the criminal statute suggested that use of a counterfeit or fraudulently obtained immigration document constitutes a continuous offense.<sup>33</sup> The Court reasoned that the language under § 1546 did not include clear language indicating Congress intended for the crime to be

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Each term in the statute should be reviewed upon the construction of the statute. *See Plain Meaning Rule, supra* note 19 (acknowledging primary rule of statutory construction). It is a well-established rule within statutory construction that where a word is not defined within a statute, the words are interpreted to have their ordinary and common meaning applied. *Id. See also* *Sandifer v. United States Steel Corp.*, 134 S.Ct. 870, 876 (2014) (determining terms at issue and applying canon of statutory construction).

30. *See Toussie*, 397 U.S. at 115 (indicating application of continuous offense doctrine); *United States v. Blizzard*, 812 F. Supp 79, 81 (E.D. Va. 1993) (construing overall statutory scheme of words in statute compels continuing offense); *United States v. Del Percio*, 657 F. Supp. 849, 852 (W.D. Mich. 1987) (examining the legislative history of act in question); *United States v. Bailey*, 444 U.S. 394, 413 (1980) (observing previous cases ruling continuing offense); *United States v. Green*, 305 F.3d 422, 433 (6th Cir. 2002) (enhancing crimes posing societal threat and danger). The “nature of a crime” prong has been applied inconsistently, as some courts provide minimal analysis while others carefully provide a detailed one consistent with *Toussie’s* test. *See, e.g., United States v. Dunne*, 324 F.3d 1158, 1165 (10th Cir. 2003) (finding making false statement in jurisdiction of Securities and Exchange Commission not continuing offense). The defining characteristic of a continuing offense is that it involves an ongoing unlawful act, which creates an ongoing threat of harm. *Id. See United States v. Brazell*, 489 F.3d 666, 668 (5th Cir. 2007) (identifying continuous threat of harm for continuous offenses). The continuing offense doctrine was created to examine the hard to detect nature of the crime into account. *See Rosenberg, supra* note 23 (highlighting completed crimes but not detected until later in time).

31. *See Pendergast*, 317 U.S. at 418 (stating when SOL begins to run); *Fiswick v. United States*, 392 U.S. 211, 216 (1946) (asserting SOL runs from last day of continuing offense).

32. *See Tavaréz-Levario*, 788 F.3d at 437 (holding use of counterfeit immigration document under § 1546 not continuous offense).

33. *See id.* at 437 (comparing statutes which explicitly state continuous offense).

a continuous offense.<sup>34</sup> The Court analyzed the terms “use” and “utter” to determine if the ordinary meaning, from legal and non-legal dictionaries, defined them to be interpreted as involving ongoing action.<sup>35</sup> The Court concluded that within the context of § 1546, the terms “use” and “utter” indicate that a person using or employing the document may be charged or convicted under § 1546, whether or not that individual tendered that document for use by another individual but did not express ongoing conduct.<sup>36</sup>

After concluding that the explicit language of the statute did not include language involving ongoing conduct, the Fifth Circuit examined the nature of the crime involved to determine if the violation of § 1546 constituted a continuing offense.<sup>37</sup> The Court noted that an essential characteristic of a continuing offense involves an ongoing illegal act, which produces a threat of harm to society while the perpetrator continues the unlawful act.<sup>38</sup> The Court held that the use of counterfeit immigration documents offense does not produce a threat of harm to society because the immigration documents are utilized for a specific

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34. *See id.* at 437 (affirming how courts interpret language stated in statutes). The Court explained that courts determine congressional intent from a statute by looking at the language of the statute in its ordinary meaning and whether that interpretation would indicate continuous conduct of the crime. *Id.* at 437-38. Furthermore, the Court stated that congressional silence should be viewed as Congress not identifying a crime as continuous because it has explicitly stated in other statutes when it deems an offense to have ongoing conduct. *Id.*

35. *See id.* at 438-39 (examining statutory scheme of verb “use” and word “utter”). The Court noted that the ordinary meaning of the word “use” relating to counterfeit or fraudulently obtained immigration documents in § 1546 means “to employ for the accomplishment of a purpose.” *Id.* at 438. The Court explained the word “utter” within § 1546 means “to put or send a document into circulation.” *Id.* Therefore, the Court determined the term “use” should not be construed as involving an ongoing employment of the counterfeit or fraudulently obtained document. *Id.*

36. *See id.* at 439 (stressing terms meaning as applied within § 1546). Additionally, the Court explained a person can also use a counterfeit immigration documents without them putting into circulation the document themselves. *Id.* Therefore, the Court concluded the terms “use” and “utter” did not create an act of ongoing conduct. *Id.*

37. *See id.* at 439-40 (analyzing offenses which nature of crime intended as ongoing).

38. *See Tavarez-Levario*, 788 F.3d. at 439-40 (clarifying continuing offenses produce ongoing threat). The Court identified conspiracy, escape, a noncitizen remaining in the United States illegally until found, and failure to appear for sentencing as unlawful acts that are continuous crimes because the unlawful condition remains until the perpetrator is no longer in the unlawful condition. *Id.* at 439.

purpose.<sup>39</sup> The Court reasoned the use of a counterfeit immigration document does not involve an ongoing unlawful act or series of acts because it occurs in instances of finite duration and is a discrete incident—for example, to enter the country, to obtain employment, or to attain a benefit.<sup>40</sup> Upon examining the offense and not Tavaréz’s particular conduct, the Court held that his use of continuous immigration documents coupled with his long-term benefit of employment did not inherently involve criminal activity of an ongoing or continuous character to warrant being treated as a continuous offense.<sup>41</sup> In light of analyzing the explicit language of the statute and nature of the offense, the Court concluded that Congress did not intend for a § 1546 offense to be treated as a continuous one; therefore, the SOL barred the indictment because it was not filed within the five years of the commission of the offense.<sup>42</sup>

The Fifth Circuit appropriately applied the explicit language of the statute guideline within the continuous offense doctrine to decide whether the language of the substantive criminal statute would be defined as continuous for SOL purposes.<sup>43</sup> The Court correctly held that following the plain meaning rule, the terms “use” and “utter” do not create an ongoing action, thus failing to meet the “explicit language of the statute” requirement necessary to conclude that using a counterfeit immigration

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39. See *id.* at 440 (explaining immigration documents obtained for specific purpose). The Court stated that counterfeit obtained documents are used for a specific purpose, either to secure employment, to enter the United States, or to gain other benefits that result from having a valid immigration document. *Id.* See also *Garcia, supra* note 18, at 5 (discussing purposes and requirements noncitizens must comply with). The Court provided an example of the meaning of “use” from § 2 of the Passport Title of the Act of June 15, 1917, which meant it was used “by an American citizen of a passport obtained by false statements to facilitate reentry into the United States.” *Id.* at 440 (citations omitted).

40. See *Tavaréz-Levario*, 788 F.3d at 440 (identifying attainment of employment with fraudulent document ongoing in nature). The Court compared the ongoing nature of traditional continuing offenses, like conspiracy, with the use of a counterfeit immigration document. *Id.* The main distinction is that conspiracy by nature forbids illegal conduct that remains throughout a substantial period of time. *Id.*

41. See *id.* at 440 (scrutinizing crimes with benefits without continuing effects). See, e.g., *Dunne*, 324 F.3d at 1165 (reasoning single act did not create “prolonged course of conduct”).

42. See *Tavaréz-Levario*, 788 F.3d at 441 (holding use of counterfeit immigration document for employment not continuous offense).

43. See *id.* at 438-39 (finding explicit language of statute did not constitute continuous offense); see also *supra* note 35 and accompanying text (determining applicable definitions of “use” and “utter” within § 1546 and their interpretations).

document is a continuing offense.<sup>44</sup> Unlike statutes that demonstrate with unambiguous language that Congress intended to create a continuing offense, § 1546 does not clearly state that it is a continuing one.<sup>45</sup> There was no such evidence within the language of the statute or the definitions of the terms “use” and “utter” at issue to suggest the meaning of ongoing conduct.<sup>46</sup>

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44. See *Tavarez-Levario*, 788 F.3d at 439 (explaining terms “use” and “utter”). In determining the intent of terms within a statute, a court should always first look at the plain meaning of a term when it is not defined and apply the word’s ordinary and common meaning. See *Plain Meaning Rule*, *supra* note 19 (asserting plain meaning used when unambiguous); *Sandifer*, 134 S.Ct. at 876 (addressing fundamentals of statutory construction). The term “use” within the context of § 1546 means an individual knowingly utilized and employed the counterfeit document for a given purpose, like Tavarez did to obtain employment. See *supra* note 19 and accompanying text (discussing appropriate interpretations and meaning of terms at issue within § 1546); *supra* note 8 (covering why Tavarez used counterfeit documents) Additionally, the term “utter” means the individual knowingly put the counterfeit or forged immigration document into circulation for entry into the United States or to obtain employment. See *supra* note 19 and accompanying text (noting traditional interpretations of “use” and “utter”).

45. See, e.g., 18 U.S.C. § 3284 (2015) (declaring concealment of bankrupt’s assets as continuous offense). The statute states, “the concealment of assets of a debtor . . . shall be deemed to be a continuing offense.” *Id.* Another illustration is 22 U.S.C. § 618(e), where a subcategory of the statute is labeled as a continuing offense. 22 U.S.C. § 618(e) (2004) (penalizing individuals who fail to register as foreign agents). The statute states, “failure to file any such registration statement or supplements . . . shall be considered a continuing offense for as long as such failure exists.” *Id.* Moreover, congressional silence in a statute strongly suggests that Congress did not intend to incorporate the crime as a continuing offense. See *Toussie*, 397 U.S. at 120 (determining failure to plainly state continuing offense language demonstrates Congress did not intend it).

46. See 18 U.S.C. § 1546(a) (regulating use of counterfeit immigration documents); see also *supra* note 19 and accompanying text (recognizing interpretations of “use” and “utter”). Congress did not intend for § 1546 to be continuous because despite amending the statute many times since its original enactment in 1952, it has not changed it to include explicit language for to be determined a continuous offense. See *supra* note 16 and accompanying text (analyzing modifications and changes in statute over time). Unlike the United States Court of Appeals for the Ninth Circuit’s holding which determined the possession of a counterfeit or fraudulent immigration document under § 1546(a) to be a continuous offense, Tavarez was charged with knowingly using or uttering counterfeit documents to obtain employment because the federal government could not provide evidence that Tavarez possessed the counterfeit documents when he was stopped in March 2014. See *United States v. Tavarez-Levario*, 788 F.3d at 435 n.1 (acknowledging federal government failed to obtain proof Tavarez possessed counterfeit immigration documents); *Krstic*, 558 F.3d at 1013 (holding possession of immigration document obtained by false statement as continuous offense). The court in *Krstic* explained that in possessory offenses, the SOL begins to run when the possessor parts with the item. 558 F.3d at 1017 (emphasizing offense at issue as possessory).

Conversely, the Fifth Circuit incorrectly applied the second guideline, regarding how Congress must have certainly intended the nature of the crime to be noncontinuous because the offense did not create an ongoing threat to society each day it persisted.<sup>47</sup> Based on the Court's narrow interpretation, Tavaréz's conduct does not seem to have reached the same level of harm to society as other offenses, such as crimes of conspiracy, escape of legal custody, or kidnapping.<sup>48</sup> The Fifth Circuit, however, did not consider Tavaréz's use of the false documents when he acquired his job or his daily work for five years, which could have produced great economic loss to his employer when the employer withheld another individual's payroll taxes to fund his Social Security benefits and Medicare benefits, thus subjecting the employer to a potential fine from the federal government for employing a noncitizen without work authorization.<sup>49</sup>

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47. See *Tavaréz-Levario*, 788 F.3d at 440 (rejecting argument about immigration documents which permitted Tavaréz to maintain employment when he initially presented them); see also *supra* note 30 and accompanying text (recognizing threat to society as factor to determine nature of crime).

48. See *Boles*, *supra* note 20, at 9 (comparing offenses normally identified as continuous). Conspiracy, escape, and kidnapping fall within the definition of a continuous offense because every day the crime persists it brings "a renewed threat of the evil Congress sought to prevent, even after the elements necessary to establish the crime have occurred." See *Yashar*, 166 F.3d at 875 (elucidating crimes which meet continuing offense definition). The offense is determined to have ongoing conduct for SOL purposes as long as the perpetrator continues to act in that state. *Id.* Unlike in kidnapping where the crime does not end when the victim is abducted but ends instead when the victim is free, Tavaréz's offense did not amount to the ongoing stress and involuntary detention of a victim to be deemed as a continuing offense. See *Rodríguez-Moreno*, 526 U.S. at 281 (defining continuing nature of kidnapping offenses); *Boles*, *supra* (observing threat to society kidnapping creates); *Tavaréz-Levario*, 788 F.3d at 440 (indicating fraudulent document obtained with purpose to work). Similarly, a perpetrator that escapes from federal custody creates a harmful threat to society until the individual is apprehended again. See *Bailey*, 444 U.S. at 413 (determining escape as continuous offense). Crimes of possession have also been deemed to be a continuing offense without the use of the *Toussie* guideline. See *Krstic*, 558 F.3d at 1018 (holding defendant violated § 1546 when he possessed alien registration card). The federal government, however, did not have proof that Tavaréz possessed the counterfeit immigration document when he was stopped or that he possessed the documents at any time within the previous five-year period. *Tavaréz-Levario*, 788 F.3d at 435 n.1 (recalling federal government failed to obtain proof Tavaréz possessed counterfeit immigration documents). Therefore, the United States Court of Appeals for the Fifth Circuit was not able to examine his offense as a possessory offense. *Id.*

49. See *Childers*, *supra* note 17, at 230 (summarizing withholding payroll taxes funds Social Security and Medicare parts of FICA tax); see also *Mortensen*, *supra* note 17, at 7 (exposing effect of employees not paying payroll taxes). FICA mandates

Furthermore, the Fifth Circuit failed to examine the economic and societal impacts of the use of counterfeit immigration documents.<sup>50</sup> The use of illegal document fraud for employment may have a spillover effect onto innocent victims and may cause tax corruption, economic loss, or a security threat to the nation, which creates a recurring harm the longer the crime persists.<sup>51</sup>

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that employers pay Social Security taxes and Medicare taxes on employees' earned income. Childers, *supra*, at 230. Moreover, employers fall victim to immigration fraud, they may be subject to harsh penalties and sanctions, as imposed by the Immigration Reform and Control Act of 1986. See Saucedo, *supra* note 1, at 1513 (revealing law requires employers to verify their employee's work authorization documents). The penalties for employers include fines and arrests of executives for continuous violators. *Id.*

50. See Mortensen, *supra* note 17, at 7 (emphasizing harm document fraud creates on society). The counterfeit documents allowed Tavarez to obtain his employment and its accompanying benefits until the officers stopped him. See *Tavarez-Levario*, 788 F.3d at 436, 440 (opposing government's argument of presenting counterfeit documents daily gave him employment benefits).

51. See Mortensen, *supra* note 17, at 7 (criticizing culture of corruption document fraud creates). Document fraud does not tremendously affect U.S. citizens and legal permanent residents, regardless of whether they are direct victims of identity theft. *Id.* For example, a report regarding 37,000 complaints from victims of identity theft in California reported a loss of USD40 million in 2003. See Wixted, *supra* note 17, at 404 (identifying rise of identity theft crimes). Other studies have shown an estimated 16.6 million U.S. resident have been victims. Finklea, *supra* note 17, at 9 (stressing prevalence of identity theft nationwide). Victims of identity theft, caused by individuals using counterfeit immigration documents in their name, have greater difficulty filing their taxes, obtaining future jobs, and verifying their credit score. See *id.* at 20 (pointing to employment fraud issues and consequences). Saucedo, *supra* note 1, at 1539 (considering victim of fraud's potential loss of legal rights or interests). In many instances, a noncitizen's use of counterfeit immigration documents for employment can lead an employer to commit tax fraud, which in the long-term results in lower profits for the federal government and higher taxes for the overall American population. Mortensen, *supra*, at 7 (predicting consequences of tax fraud). The United States Department of the Treasury has reported that millions of dollars have been disbursed in tax refunds to nontitled individuals who possess fraudulent Social Security cards. *Id.* Additionally, noncitizens that work with counterfeit or fraudulent immigration documents send majority of their earnings to foreign countries instead of spending and investing it within the United States to stimulate the economy. *Id.* at 8. This causes a great impact to the economy, especially during times of recession when the noncitizen may continue to be employed, yet many American citizens and legal residents may be let go or when the individual continues to send their money outside of the country instead of spending it within the United States to stimulate the American economy. *Id.* Also, document fraud and identity theft have been linked to impact the nation's security. See Finklea, *supra*, at 19 (indicating fraudulent crimes connection to international terrorism). Section 1546 contains a provision discussing the amount of imprisonment time if the violation relates to an act of terrorism, which demonstrates that Congress intended to protect the United States from illegal immigration crimes related to terrorism. See 18 U.S.C. § 1546(a) (2002) (specifying years of imprisonment for offense committed in relation to terrorism act). The use of fraud-

Assuredly, Congress would have intended to protect economic and societal harms caused by the use of counterfeit immigration documents when passing § 1546.<sup>52</sup>

Considering the Court's narrow approach, the Court was correct in using the five-year default SOL and tolling when the documents were first used in February of 2009.<sup>53</sup> Conversely, if the Fifth Circuit had considered the societal and economical impacts, specifically, the employer harms that the use of counterfeit immigration documents create, the SOL would not have been tolled until March of 2014.<sup>54</sup> As a ruling of first impression, the Fifth Circuit's decision established a defense in SOL tolling for individuals who use counterfeit immigration documents for employment.<sup>55</sup> This defense is misapplied because it does not consider the economic impact and employer harms that

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ulent documents directly raises homeland security concerns because it affects the national security of the United States. *See* Wixted, *supra*, at 404 (noting importance of identity theft laws); Finklea, *supra*, at 18-20 (stating link between document fraud and national security). The United States Department of Justice has previously been able to make a connection between terrorists and false documents. *See* Finklea, *supra*, at 19-20 (identifying relation between identity theft and international terrorists).

52. *See Toussie*, 397 U.S. at 115 (requiring nature of crime for continuous offense as one Congress must have intended); *see also supra* notes 49-51 and accompanying text (discussing employer economic loss and societal harms).

53. *See supra* notes 37-39 and accompanying text (highlighting Court's application of continuing offense doctrine); *Tavarez-Levario*, 788 F.3d at 435 (specifying initial date offense committed). Due to Tavarez's offense not being a continuous one, the SOL began to run when all elements of the crime were first satisfied. *See Edelkind*, 525 F.3d at 393-98 (emphasizing when SOL begins to toll). The legislature did not specify a specific SOL time period for § 1546. *See supra* note 21 (demonstrating specific SOL time periods for statutes). Therefore, the date Tavarez obtained employment, February 2, 2009, was when he knowingly used the counterfeit green card and Social Security card as evidence of employment in the United States to satisfy all the elements within § 1546 and complete the crime. *Tavarez-Levario*, 788 F.3d at 435 (stating when Tavarez's employment began); *Toussie*, 397 U.S. at 115 (reasoning SOL begins to run at completion of crime).

54. *See Toussie*, 397 U.S. at 115 (identifying SOL starts to run when crime complete); *Tavarez-Levario*, 788 F.3d at 435 (detailing date officers discovered Tavarez's use of counterfeit immigration documents for employment). *See also supra* notes 49-52 and accompanying text (considering effect use of fraudulent and counterfeit immigration documents imposes on society). Under this approach, the continuous use of Tavarez's counterfeit Social Security card and green card ceased when the officers apprehended him. *Tavarez-Levario*, 788 F.3d at 435 (contemplating incident when officers pulled over Tavarez). In that moment was when his offense ended. *See Amendola et al.*, *supra* note 25 (examining when continuous crimes end for SOL purposes).

55. *See Tavarez-Levario*, 788 F.3d at 441 (providing defense where indictment not timely filed).

are created long-term when an individual obtains employment with fraudulent immigration documents.<sup>56</sup> In the aggregate, the use of this defense for counterfeit immigration offenses similar to Tavaréz's may create a catastrophic impact to the United States and its economy.<sup>57</sup>

In *United States v. Tavaréz-Levario*, the Fifth Circuit held that, as a matter of first impression, knowingly using a counterfeit Social Security card and green card was not a continuous offense, and accordingly, the five-year SOL period began to run when defendant used the documents to obtain employment in the United States.<sup>58</sup> The Court properly applied the first prong to determine the explicit language of §1546 did not contain terms that indicate Congress intended the offense to be continuous.<sup>59</sup> The Court incorrectly applied the second prong, however, as it maintained a narrow focus when analyzing the ongoing threat or harm that the nature of the offense could create to society.<sup>60</sup> The Fifth Circuit's interpretation of the threat or harm that an offense may cause to society was erroneous if examined broadly, as the Court failed to consider the economic loss to the employer and the economic and societal harms that a violation of § 1546 may trigger.<sup>61</sup> Ultimately, the Fifth Circuit has provided a misplaced defense for the use of fraudulent and counterfeit immigration documents for employment.<sup>62</sup>

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56. See *supra* notes 49-51 and accompanying text (explaining economical harms and threats which may arise when violation of §1546 occurs).

57. See *supra* notes 49-51 (analyzing long-term effects which identity theft and fraudulent documents cause); see also Finklea, *supra* note 17, at 9-10 (identifying statistics regarding victims of identity theft's complaints).

58. *Tavaréz-Levario*, 788 F.3d at 437 (concluding § 1546 failed to meet requirements of continuous offense).

59. See *supra* notes 43-46 (concurring with Court's application of first prong of *Toussie* test).

60. See *Tavaréz-Levario*, 788 F.3d at 440; *supra* note 30 and accompanying text; *supra* notes 48-49 (criticizing Court's analysis about harm caused to society from illegal use of immigration documents).

61. See *supra* notes 49-51 and accompanying text (examining economic and societal impacts of counterfeit immigration documents); see also *Toussie*, 397 U.S. at 115.

62. See *supra* notes 49-51, (critiquing long term effects and impact of using fraudulent immigration documents).