INSTRUMENTS OF DUE PROCESS: SPECIAL CIRCUMSTANCES OF INEFFECTIVE ASSISTANCE OF RETAINED COUNSEL IN REMOVAL PROCEEDINGS

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INTRODUCTION

Given the "disturbing frequency" of ineffective representation by attorneys retained by immigrants seeking legal status in this country, Second Circuit Court of Appeals Judge Robert Katzmann, in a sharply critical opinion, reiterated that while noncitizens have no Sixth Amendment right to the assistance of counsel, due process concerns may arise when an attorney provides representation so egregious that it impinges upon the fundamental fairness of an immigration hearing.[1] Not everyone agrees with Judge Katzmann's assessment. Currently, the circuit courts are squarely divided over whether ineffective representation by a retained attorney under certain narrow sets of circumstances can violate the Fifth Amendment Due Process Clause.[2]

Seven federal courts of appeals have recognized that a noncitizen's claim of ineffective assistance in civil removal proceedings may implicate due process concerns under the Fifth Amendment.[3] However, the Fourth and

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* Ballenger–Green Memorial Paper Winner. The *Vermont Law Review* established the Ballenger–Green Memorial Paper in 2001 to commemorate the lives of Vermont Law School students Chandra Ballenger '02 and Orlando Green '01. The Ballenger–Green Memorial Paper is an opportunity for any student to address issues of human diversity through legal scholarship. Each year a paper is selected from open submissions that most reflects the commitment to excellence Orlando and Chandra demonstrated in their burgeoning legal careers. The *Vermont Law Review* is pleased to present the 2009 Ballenger–Green Memorial Paper.

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1. Aris v. Mukasey, 517 F.3d 595, 600 (2d Cir. 2008); see *infra* Part I.A for a summary of the case. This Article uses the term "noncitizen" instead of "alien" because of the negative connotations linked to "alien." *Accord* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1411 n.1 (1997) (both noting that "noncitizen" is a less prejudicial term); Jill M. Pfenning, *Inadequate and Ineffective: Congress Suspends the Writ of Habeas Corpus for Noncitizens Challenging Removal Orders by Failing to Provide a Way to Introduce New Evidence*, 31 VT. L. REV. 735, 735 n.1 (2007).

2. Rafiyev v. Mukasey, 536 F.3d 853, 860–61 (8th Cir. 2008) (recognizing the circuit court split and taking the minority position that there is no constitutional right to effective assistance of counsel under the Fifth Amendment).

3. *See* Zeru v. Gonzales, 503 F.3d 59, 72 (1st Cir. 2007); Denko v. INS, 351 F.3d 717, 723 (6th Cir. 2003); Jian Jun Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003); Gbaya v. U.S. Attorney Gen., 342 F.3d 1219, 1221 (11th Cir. 2003) (per curiam); Lu v. Ashcroft, 259 F.3d 127, 131 (3d Cir. 2001); Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 241 (2d Cir. 1992); Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986) (all holding that ineffective assistance in removal proceedings

Eighth Circuits recently declined to follow their sister circuits and categorically ruled that there is no constitutional right to effective assistance of counsel under the Fifth Amendment in removal proceedings.[4] Both circuits explained that because removal proceedings are civil and not criminal proceedings, noncitizens facing removal from this country are not entitled to the Sixth Amendment's right to counsel, nor to the corresponding right to effective assistance of counsel.[5] The circuits concluded that without a constitutional right to counsel noncitizens do not have a right to effective assistance of counsel under *Coleman v. Thompson*[6] and other Supreme Court precedent.[7] Therefore, any mistake made by an attorney retained by an immigrant would be imputed to the client, just as in any other civil proceeding, leaving the noncitizen with a malpractice action.[8] The Fourth Circuit has further explained that because the actions of a noncitizen's privately retained lawyer in a removal proceeding are not state action, there can be no due process violation under the Fifth Amendment.[9]

The Fourth and Eighth Circuits' categorical rule forecloses any remedy under the Fifth Amendment Due Process Clause even in the most egregious circumstances where retained counsel's representation renders a removal hearing fundamentally unfair.[10] This minority view recently gained further

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may rise to a due process violation if the proceeding was so fundamentally unfair that the noncitizen was prevented from reasonably presenting his or her case). *But see* Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008) (holding that "there is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding"). This Article uses the term "removal" interchangeably with "deportation." However, it should be noted that after the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in various titles of U.S.C.), the federal immigration laws use the term "removal" to refer to decisions made by the government to expel a noncitizen from the United States.

4. *Rafiyev*, 536 F.3d at 861; Afanwi v. Mukasey, 526 F.3d 788, 798 (4th Cir. 2008) (ruling "that retained counsel's ineffectiveness in a removal proceeding cannot deprive [a noncitizen] of his Fifth Amendment right to a fundamentally fair hearing"), *petition for cert. filed*, 2009 WL 157096 (U.S. Jan. 16, 2009) (No. 08-906), *vacated and remanded*, 2009 WL 3161844 (U.S. Oct 05, 2009) (No. 08-906).

5. *Rafiyev*, 536 F.3d at 861; *Afanwi*, 526 F.3d at 796.

6. Coleman v. Thompson, 501 U.S. 722 (1991).

7. *Rafiyev*, 536 F.3d at 861; *see* Stroe v. INS, 256 F.3d 498, 500 (7th Cir. 2001) (observing that the cases that have assumed there is a right to effective assistance of counsel in deportation proceedings have not considered the bearing of *Murray v. Giarratano*, 492 U.S. 1 (1989), or *Pennsylvania v. Finley*, 481 U.S. 551 (1987)).

8. *See Rafiyev*, 536 F.3d at 861 ("To the extent Rafiyev's counsel was ineffective, the federal government was not accountable for her substandard performance; it is imputed to the client.").

9. *Afanwi*, 526 F.3d at 798–99.

10. The minority view would leave open the possibility that immigrants facing deportation may be without any recourse for even the most egregious acts of attorney incompetence or fraud. If the decision to allow ineffective assistance claims in removal cases is rooted in the Board of Immigration Appeals's (BIA) discretion, the baseline constitutional floor would be swept away from noncitizens facing removal. This means that for whatever reason, mistake or not, a noncitizen could be deported for her attorney's deficiency even when, but for her attorney's mistake, she would have secured legal status

support when outgoing Attorney General Michael Mukasey, in *In re Compean*, overturned a decades-old precedent that recognized the Due Process Clause as a basis for a noncitizen's ineffective assistance claim.[11] However, the new Attorney General, Eric Holder, vacated the order issued in *Compean* and announced his intention to initiate rulemaking proceedings for regulations to govern ineffective assistance claims in removal proceedings.[12] The Supreme Court also granted a petition for a writ of certiorari involving the exact issue but recently remanded the case to the Fourth Circuit in light of Attorney General Holder's decision.[13] The recent activity suggests that the issue of whether there is ever a due process right to effective counsel in removal proceedings is "ripe for reconsideration."[14]

This Article provides historical and legal support for the majority of federal circuit courts that have found a basis for ineffective assistance claims in the Fifth Amendment Due Process Clause. These courts have not directly reconciled the due process underpinnings of ineffective claims with Supreme Court precedent, and little has been written on the subject to fully explain the apparent conflict.[15] This Article provides justification for the

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in this country. Without any procedural protections guaranteed by the Constitution, except the BIA's administrative grace, there is a serious risk that many immigrants with legitimate claims would be erroneously deported, persecuted, or tortured. This Article, to the contrary, argues that due process requires removal proceedings to be fundamentally fair and that fairness includes some recourse for special circumstances when an attorney wholly fails to perform his or her most basic legal duties.

11. *In re* Compean, 24 I. & N. Dec. 710 (A.G. 2009), *vacated*, *In re* Compean, 25 I. & N. Dec. 1 (A.G. 2009).

12. *See In re* Compean, 25 I. & N. Dec. 1, 2 (A.G. 2009) (observing that the process used in the initial review of *Compean* was not "a thorough consideration of the issues involved, particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice").

13. *Afanwi*, 526 F.3d 788.

14. Stroe v. INS, 256 F.3d 498, 501 (7th Cir. 2001).

15. One Note has argued that the right to effective assistance of counsel in the immigration context is correctly rooted in the Due Process Clause and not agency discretion. *See* Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1556 (2007) [hereinafter *Second Chance*] (explaining how federal circuit courts since the mid-1970s developed a due process remedy for ineffective assistance claims in the deportation context with no reference to agency discretion for many years). The Note also argues that the Due Process Clause should be interpreted to protect noncitizens against ineffective assistance of counsel because: (1) immigration proceedings are more like criminal trials than post-conviction proceedings and therefore should be afforded greater procedural safeguards, and (2) the consequences and complexity of removal proceedings call for heightened protection. *Id.* at 1556–58. Although the Note states that the basis for immigrants' ineffective assistance claims is correctly rooted in the Due Process Clause, it does not show how that right can be reconciled with Supreme Court precedent limiting the right to criminal proceedings. Several circuits have also recently concluded that earlier federal circuit cases since the 1970s, which the Note relies on, did "not squarely recognize a right to effective assistance of retained counsel but merely suggest[ed] that such a right, if it existed, would be grounded in the Fifth Amendment rather than the Sixth." *Afanwi*, 526 F.3d at 797 (citing Paul v. INS, 521 F.2d 194 (5th Cir. 1975)). In light of the new arguments raised by these circuits, including a state action argument, this

majority view by showing that the Fifth Amendment Due Process Clause provides an independent basis, apart from the Sixth Amendment, from which noncitizens can seek relief when counsel's wholly incompetent representation renders a removal hearing fundamentally unfair.

Part I uses a recent case to illustrate the alarming pattern of ineffective representation by immigration attorneys. It then provides background on due process requirements in the context of immigration removal proceedings. Finally, it addresses the "state action" argument advanced by the Fourth Circuit. Part II examines early right to effective assistance of counsel cases to show that due process principles underlie Sixth Amendment guarantees and that the Sixth Amendment, therefore, does not provide the sole basis for ineffective assistance claims. It then analogizes the constitutional right to counsel in civil cases to support the argument that due process of law also provides an independent basis for challenging ineffective representation when the Sixth Amendment is not applicable. Part III examines some practical considerations unique to immigration law that support having greater procedural safeguards for noncitizens.

I. BACKGROUND

This Part begins with a summary of a case involving an immigrant who was repeatedly misadvised by several of his attorneys. The case illustrates a common example of the kind of poor legal representation that immigrants receive—or do not receive—during the course of their deportation hearings. The case also serves as a way to introduce the highly complex immigration procedures and to emphasize the need for retaining competent legal representation. This Part then examines the general concept of due process in relation to specific types of removal procedures. It then addresses the "state action" argument advanced by the Fourth and Eighth Circuits. Overall, this Part provides background information to better understand the discussion in Parts II and III.

A. Petitioner Garfield Aris

A recent case in the Second Circuit[16] provides a disturbing example of how many vulnerable immigrants are deprived of adequate legal

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Article provides historical and legal justification to show how there can be a due process right to ineffective assistance of counsel in the absence of the Sixth Amendment.

16. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 6 (2008) (noting that this circuit receives about 21% of the more than 12,000 annual immigration petitions for review).

representation.[17] In 1983, Garfield Aris, a native and citizen of Jamaica, entered the United States as a lawful immigrant at the age of 12.[18] His wife, daughter, stepdaughter, and mother are U.S. citizens and all reside in this country.[19] He also has no close family members in Jamaica.[20] In 1991, Aris was convicted of unlawful possession of cocaine, sentenced to three years probation, and required to pay a fine.[21] Sixteen months later, the government issued an order to show cause charging that Aris was subject to deportation based on the 1991 cocaine conviction.[22] After receiving the order, Aris hired David Scheinfeld of David Scheinfeld & Associates, PLLC, to represent him in the immigration proceedings.[23]

In 1994, at an initial hearing before the Immigration Judge (IJ), Aris conceded he was removable, and the IJ scheduled a hearing for May 2, 1995.[24] The IJ also granted Aris permission to apply for discretionary relief under former section 212(c) of the Immigration and Nationality Act (INA) if he could do so by the end of that day.[25] However, attorney Scheinfeld failed to file the application for relief.[26]

On the date of his scheduled hearing, having heard nothing from his lawyer, Aris phoned the law firm to check the status of the hearing.[27] A paralegal informed him that the firm calendar did not indicate any hearing for that day and that no attorneys were available to speak with him.[28] Relying on this information, Aris did not appear at the scheduled hearing.[29]

The paralegal subsequently telephoned the immigration court, learned that there was in fact a hearing scheduled, and attempted to obtain an

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17. *See* Aris v. Mukasey, 517 F.3d 595, 596 (2d Cir. 2008) ("With disturbing frequency, this Court encounters evidence of ineffective representation by attorneys retained by immigrants seeking legal status in this country.").

18. *Id.* at 597.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*; *see also infra* note 71 (identifying various grounds for deportation).

23. *Aris*, 517 F.3d at 597.

24. *Id.* A noncitizen who is subject to removal by the government is provided a hearing before an IJ. *See infra* Part I.B.2.i.

25. *Aris*, 517 F.3d at 597. The now repealed section 212(c) waiver gave an IJ authority to cancel deportation for immigrants who had been lawful permanent residents for at least five years and had lived in the United States for at least seven years. Beth J. Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 407 (2000). However, section 212(c) relief still remains available to noncitizens who pleaded guilty to certain crimes prior to the enactment of the IIRIRA and who otherwise would have been eligible for that relief. *Aris*, 517 F.3d at 597 n.3.

26. *Aris*, 517 F.3d at 597.

27. *Id.* at 598.

28. *Id.*

29. *Id.*

adjournment.[30] However, the court had already ordered that Aris be removed *in absentia*.[31] Despite learning this information, no one from the law firm informed Aris that the paralegal had been mistaken about the hearing date or that an order of removal had been issued.[32] The only communication Aris received regarding his removal order was a letter from the immigration authority informing him of his arranged deportation.[33]

Aris took the letter to a lawyer in the Scheinfeld firm who assured Aris that he would take care of everything.[34] The lawyer filed a motion to reopen the removal proceedings and attempted to explain that the reason for missing the May 2, 1995 hearing was due to a calendar error.[35] However, the lawyer failed to convey that Aris had relied on erroneous information provided to him by the paralegal.[36] The IJ promptly denied the motion to reopen proceedings, and the Board of Immigration Appeals (BIA) dismissed the appeal of the IJ's denial.[37]

Sadly, the Scheinfeld firm continued its failure to inform Aris about the status of his case, such that for nearly a decade Aris believed his problems had been resolved.[38] Aris learned of his immigration status in June 2005 when he was arrested on the outstanding 1995 removal order.[39] Aris immediately obtained new counsel, who also proved to be wholly inadequate.[40] Aris's new attorney filed a number of factually erroneous and legally flawed submissions to the court and failed to discuss the prior counsel's role in Aris's failure to appear at the May 1995 hearing.[41] Having no success, Aris remained detained for nine months during which his wife and stepdaughter, who were financially dependent on the income Aris received from his two jobs, were unable to pay rent and moved to a homeless shelter.[42]

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30. *Id.*

31. *Id.* An *in absentia* order of removal automatically results when a noncitizen fails to attend a removal proceeding. 8 U.S.C. § 1229a(b)(5)(A) (2006). This is an example of the harsh consequence that can follow if noncitizens or their attorneys fail to stay apprised of the intricate and constantly shifting immigration laws.

32. *Aris*, 517 F.3d at 598.

33. *Id.*

34. *Id.*

35. *Id.*; see *infra* Part I.B.2.iii for a discussion on motions to reopen proceedings.

36. *Aris*, 517 F.3d at 598.

37. *Id.* Noncitizens may appeal decisions made by an IJ to the BIA. *See* discussion *infra* Part I.B.2.ii.

38. *Aris*, 517 F.3d at 598.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

Fortunately, Aris's family secured competent legal assistance from a law firm who agreed to represent him pro bono.[43] New counsel filed disciplinary complaints against Aris's prior counsel and moved that the BIA reopen Aris's removal proceedings on the basis of ineffective assistance of counsel.[44] The BIA, however, denied the motion, and Aris petitioned the Court of Appeals for the Second Circuit to review the BIA decision.[45]

On appeal, Judge Katzmann ruled in a strongly worded opinion that "[a] lawyer who misadvises his client concerning the date of an immigration hearing and then fails to inform the client of the deportation order entered *in absentia* (or the ramifications thereof) has provided ineffective assistance."[46] The court granted Aris's petition for review and remanded the case to the BIA to consider Aris's section 212(c) application for relief.[47]

Unfortunately, there are many other instances of inadequate and incompetent legal services rendered by licensed and unlicensed attorneys to immigrants throughout the country.[48] There are many unauthorized practitioners known as "immigrant consultants," "visa consultants," and "notarios," who charge fees and assume wide-ranging tasks such as maintaining an immigrant's case file, translating documents, "preparing" clients for hearing, and choosing litigation strategies.[49] All too often, however, immigrants rely on faulty advice given by these intermediaries and risk suffering devastating consequences.[50]

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43. *Id.*

44. *Id.* at 598–99.

45. *Id.* at 599. Certain decisions by the BIA may be appealed to the federal circuit courts. *See infra* Part I.B.2.iv.

46. *Aris*, 517 F.3d at 596.

47. *Id.* at 601.

48. *See* Katzmann, *supra* note 16, at 9–10 (discussing the anecdotal evidence involving notarios and licensed lawyers that render inadequate and incompetent legal service and observing that the quality of representation may be suffering because of the enormous volume of immigration cases that typically small law firms handle at one time); *see also* Adam Liptak, *The Verge of Expulsion, The Fringe of Justice*, N.Y. TIMES, Apr. 15, 2008, at A12 (describing an immigration attorney who has been referred to the Second Circuit's disciplinary committee at least six times for copying former briefs submitted to the court without taking into account the distinct facts in each case and engaging in other seriously deficient work).

49. Jennifer Barnes, *The Lawyer-Client Relationship in Immigration Law*, 52 EMORY L.J. 1215, 1217 (2003); *see also* Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449, 1488 (2006) (observing that immigrants from China are particularly dependent on non-lawyer intermediaries); Gary Rivlin, *Dollars and Dreams: Immigrants as Prey*, N.Y. TIMES, June 11, 2006, § 3, at 1 (describing immigration scams where notarios and lawyers convince noncitizens to pay them the going rate of about $5,000 to file frivolous asylum applications that have no likely chance of success and immigrants having practically no recourse because the victims have already been deported).

50. Barnes, *supra* note 49, at 1218.

Licensed attorneys are also responsible for assisting these notarios in the unauthorized practice of law.[51] For example, a number of attorneys accept cases referred to them by notarios and agree to appear in court on behalf of immigrants for a quick fee even though the attorney may have never met the client, sufficiently reviewed the case, or prepared the client for a hearing.[52] Even licensed attorneys who are not associated with notarios too often fall short of providing competent legal assistance.[53] The consequences for an immigrant who suffers from poor representation are devastating because "[u]nlike a person in the United States who can sue a lawyer for malpractice, or file a bar complaint, a deported immigrant is unlikely to pursue such recourse because of financial, geographic, or other constraints."[54]

B. Due Process of Law in Immigration Removal Proceedings

Aris's case raises the question of what recourse, if any, Aris and other noncitizens have when an immigrant's retained counsel provides representation so deficient that it renders a removal hearing fundamentally unfair. Aris and other noncitizens cannot assert an ineffective assistance claim under the Sixth Amendment because removal proceedings are civil proceedings. Civil litigants do not enjoy the full Sixth Amendment procedural safeguards accompanying criminal trials, including the right to counsel and the associated right to effective assistance of counsel.[55] However, some circuit courts would allow Aris to raise an ineffective assistance claim under the Due Process Clause.[56] On the other hand, the Fourth and Eighth Circuits categorically bar any remedy under the Due Process Clause for alleged ineffective assistance of counsel.[57] The following provides background information on the concept of due process and the existing removal procedures, which will provide some context for understanding Parts II and III.

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51. *Id.* at 1217.

52. *See, e.g.*, *id.* (describing the disciplinary action against a California attorney for accepting cases referred to him by notarios and agreeing to appear in court on behalf of noncitizens who had paid the notarios for the legal work).

53. *See* Katzmann, *supra* note 16, at 10 (observing that "the quality of representation varies widely[]" and that "too many of the briefs . . . are barely competent, often boilerplate submissions").

54. *Id.* at 9.

55. *See* Abel v. United States, 362 U.S. 217, 237 (1960) ("[D]eportation proceedings are not subject to the constitutional safeguards for criminal prosecutions.").

56. *See* cases cited *supra* note 3.

57. *See* cases cited *supra* note 4.

1. Due Process of Law

An essential pillar of our democratic system of government is due process of law. The Supreme Court has stated that "[d]ue process of law is the primary and indispensable foundation of individual freedom[]" that "defines the rights of the individual and delimits the powers . . ." of the government.[58] The Fifth and Fourteenth Amendments to the Constitution prohibit the government from depriving a person of life, liberty, or property without due process of law.[59]

The Due Process Clause guarantees both substantive and procedural protections. The substantive component, which does not expressly appear in the Constitution, forbids the government from infringing upon certain "fundamental" liberty interests, regardless of the procedures provided, unless the infringement is narrowly tailored to serve a compelling state interest.[60] Procedural due process, which is the focus of this Article, imposes restraints on arbitrary government action by guaranteeing fair procedures when the government seeks to deprive a person of life, liberty, or property.[61]

In immigration proceedings, it is well established that the Fifth Amendment guarantees noncitizens in the United States due process of law.[62] Defining the exact contours of what due process requires in such proceedings remains less clear. In removal hearings, the government initiates and conducts the proceedings, and, at a minimum, the Fifth Amendment Due Process Clause requires the government to conduct those proceedings fairly.[63] Moreover, from the generality of the Due Process Clause, specific procedural rules have been fashioned to serve as instruments of our adversarial justice system.[64] The core instruments

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58. *In re* Gault, 387 U.S. 1, 20 (1967).

59. U.S. CONST. amends. V, XIV, § 1.

60. Reno v. Flores, 507 U.S. 292, 302 (1993).

61. *See* RHONDA WASSERMAN, PROCEDURAL DUE PROCESS 6 (2004) ("There is no doubt that the Fifth Amendment was expected to limit arbitrary abuses of the powers of government from whatever source abuse might come . . . .") (internal quotation omitted); Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 339 (1987) ("By 1868, due process had come to connote a certain core procedural fairness when government moved against a citizen's life, liberty, or property.").

62. Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (explaining that certain constitutional protections available to noncitizens who are within the United States may not be available to noncitizens outside the country); *Flores*, 507 U.S. at 306 (citing Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903)); *cf.* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that the fundamental protections of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction" of the United States).

63. *Zadvydas*, 533 U.S. at 693–94.

64. *In re* Gault, 387 U.S. 1, 21 (1967) ("[T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential

include notice and an opportunity to be heard.[65] Providing notice and a hearing prevents an unjust ruling by allowing a decision-maker to make a ruling after hearing from both sides.[66] The instruments of due process, therefore, "enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data."[67] In doing so, the instruments of due process provide procedural protections that are designed to maintain fairness in the adversarial system of justice. Similarly, the procedures in removal hearings must be fundamentally fair because a "removal proceeding has the potential to deprive a [noncitizen] of the right to stay in the United States, which can include separation from family and return to possible persecution . . . ."[68] The following section summarizes the comprehensive statutory framework governing how the United States government administers the removal of noncitizens.

2. Immigration Removal Proceedings

Congress has established the framework for modern immigration law mainly through the INA and its subsequent amendments.[69] This comprehensive legislation includes the procedures governing the admission and removal of noncitizens.[70] The INA also specifies grounds on which noncitizens are subject to "removal" from the United States.[71] The

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facts from the conflicting welter of data that life and our adversary methods present.").

65. *See* Powell v. Alabama, 287 U.S. 45, 64 (1932) ("It never has been doubted . . . that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal . . . constitute basic elements of the constitutional requirement of due process of law."); *see, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Id.

66. *Powell*, 287 U.S. at 69.

67. *Gault*, 387 U.S. at 21.

68. *In re* Assaad, 23 I. & N. Dec. 553, 556 (B.I.A. 2003).

69. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in various sections of 8 U.S.C.).

70. *See id.* §§ 211–250 (providing procedures for arriving noncitizens as well as removal procedures). Prior to 1996, proceedings aimed at removing noncitizens from the United States were categorized as either deportation or exclusion proceedings. Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 668 n.78 (2008). After the passage of the IIRIRA, deportation and exclusion proceedings were consolidated into one "removal" category. *Id.*

71. *See* 8 U.S.C. § 1227(a) (2006) (identifying six classes of "deportable aliens": (1) those inadmissible at time of entry, time of adjustment of legal status, or those who violated status; (2) those who committed criminal offenses; (3) those who failed to register or falsified documents; (4) those who pose a national security concern; (5) those who have become a public charge; and (6) those who have voted unlawfully). Additionally, within these broad classifications, there are many other specific

following describes some of the intricate immigration procedures and highlights the importance of having competent counsel at all stages of the removal process.

i. Proceedings before the Immigration Judge

The government[72] initiates removal proceedings by filing a Notice to Appear with an immigration court and serving notice to the noncitizen against whom the charges have been filed.[73] A noncitizen is entitled to a hearing before an IJ and may retain an attorney at his or her own expense.[74] Although the government is not required to furnish counsel at such proceedings, it must: (1) "[a]dvise the respondent of his or her right to representation, at no expense to the government;" (2) "[a]dvise the respondent of the availability of free legal services provided by organizations and attorneys . . . located in the district where the removal hearing is being held;" and (3) "[a]scertain that the respondent has received a list of such programs . . . ."[75]

At the hearing before the IJ, the government must show by "clear and convincing" evidence that the noncitizen is removable.[76] A noncitizen can examine evidence, present evidence, and cross-examine the government's witnesses.[77] Noncitizens can also petition for relief or protection from removal if they satisfy the eligibility requirements and show that they merit a favorable exercise of discretion for any form of relief within the IJ's discretion.[78] For example, noncitizens may file an application for asylum relief if they have suffered past persecution or have a "well-founded fear of future persecution" on account of "race, religion, nationality, membership in a particular social group, or political opinion."[79] However, the burden of proof is on the asylum applicant to establish eligibility for relief by providing credible testimony that is sufficiently corroborated by information such as

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grounds for finding a noncitizen removable. *Id.*

72. The Department of Homeland Security (DHS) is the federal agency that represents the government in removal proceedings.

73. *See* 8 U.S.C. § 1229 (2006) (detailing the procedures for initiating removal proceedings).

74. *See id.* § 1229a(b)(4)(A) (providing the rights and procedures in removal proceedings). An IJ is an employee of the Executive Office for Immigration Review (EOIR), which is an office within the United States Department of Justice and under the direction of the U.S. Attorney General. 8 C.F.R. § 1001.1 (2009).

75. 8 C.F.R. § 1240.10(a) (2009).

76. 8 U.S.C. § 1229a(c)(3)(A) (2006).

77. *Id.* § 1229a(b)(4)(B).

78. *Id.* § 1229a(c)(4)(A).

79. 8 C.F.R. § 208.13 (2009).

authenticated documents or country condition reports.[80] The IJ is responsible for receiving evidence, administering oaths, and interrogating, examining, and cross-examining the noncitizen and any other witnesses.[81] At the conclusion of the hearing, the IJ decides whether a noncitizen is removable based only on the evidence produced at that hearing.[82]

It is imperative that noncitizens have quality legal representation before and during the IJ hearing. Because the IJ is charged with the duty of interrogating noncitizens and making credibility findings, noncitizens must be sufficiently informed and prepared to respond to the adversarial and sometimes hostile interrogations.[83] At the outset, noncitizens also face a significant disadvantage because many immigrants are not fluent in the English language, and the IJ must work with a translator to understand the immigrant's case.[84] This disadvantage may work against a noncitizen if the IJ believes the immigrant's demeanor or testimony is "evasive, less than candid, [or] unresponsive[]"[85] even though the immigrant may have simply misunderstood the IJ's question because of a translation or communication error. Furthermore, the importance of quality legal representation before the IJ is critical because appellate review of the IJ's decision is highly constrained.[86] Given the significant legal challenges immigrants face in removal proceedings, immigrants who do not receive competent legal

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80. 8 U.S.C. § 1158 (2006); *see also* Dorosh v. Ashcroft, 398 F.3d 379, 382–83 (6th Cir. 2004) (holding that petitioner "did not meet her burden of proof necessary for a granting of asylum because she neither corroborated her testimony with reasonably expected documentation nor provided an explanation for its absence").

81. 8 U.S.C. § 1229a(b)(1) (2006).

82. *Id.* § 1229a(c)(1)(A).

83. *See id.* § 1229a(b)(1) (stating that the IJ "shall . . . interrogate, examine, and cross-examine" the noncitizen). Indeed, instances of immigration judges engaging in hostile or abusive conduct toward immigrants are prevalent. *See, e.g.*, Qun Wang v. U.S. Attorney Gen., 423 F.3d 260, 269 (3d Cir. 2005) ("The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding."); Reyes-Melendez v. INS, 342 F.3d 1001, 1007 (9th Cir. 2003) ("The record thus indisputably demonstrates that the IJ was hostile towards Reyes-Melendez and judged his behavior as being morally bankrupt."). Former Attorney General Gonzales expressed similar concerns: "While I remain convinced that most immigration judges ably and professionally discharge their difficult duties, I believe that there are some whose conduct can aptly be described as intemperate or even abusive and whose work must improve." Memorandum from U.S. Attorney General Alberto Gonzales to Immigration Judges (Jan. 9, 2006), *available at* http:///www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf.

84. Katzmann, *supra* note 16, at 9–10.

85. *See* Kalitani v. Ashcroft, 340 F.3d 1, 4 (1st Cir. 2003) (upholding the IJ's observations of the noncitizen's demeanor and finding her "evasive, less than candid, and unresponsive").

86. *See* 8 U.S.C. § 1252(b)(4)(B) (2006) (granting strong deference to the administrative record, unless a compelling reason for the contrary is shown); *see also* Majidi v. Gonzales, 430 F.3d 77, 79 (2d Cir. 2005) ("It cannot be overstated that our review of the IJ's credibility findings is highly deferential . . . .").

assistance are at a major disadvantage, which could mean the difference between remaining in the country or being deported.[87]

ii. Board of Immigration Appeals

A noncitizen may appeal an adverse IJ decision to the BIA.[88] The BIA reviews an IJ's findings of fact for clear error and reviews questions of law, discretion, and judgment on all other issues *de novo*.[89] After reviewing the record, the BIA may issue an opinion or summarily affirm an IJ decision without an opinion.[90]

iii. Motion to Reopen Proceedings

An immigrant who has received a final administrative removal order and believes he or she has been the victim of ineffective or fraudulent representation can file a motion to reopen or to reconsider with the IJ or BIA.[91] A motion to reopen seeks a second review of a case based on previously unavailable evidence or new facts, whereas a motion to reconsider seeks a re-examination of the agency decision for alleged errors in appraising the facts and law.[92]

The motion to reopen is a remedy, provided by the BIA, for ineffective assistance claims and is based on various circuit courts' recognition that the Fifth Amendment Due Process clause provides for such claims.[93] To

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87. *See* Katzmann, *supra* note 16, at 7 ("[Q]uality legal representation in gathering and presenting evidence in a hearing context and the skill in advocacy as to any legal issues and their preservation for appeal can make all the difference between the right to remain here and being deported.").

88. 8 C.F.R. § 1003.38(a) (2009) ("Decisions of Immigration Judges may be appealed to the Board of Immigration Appeals as authorized by 8 C.F.R. § 1003.1(b)."). The BIA also falls under the EOIR. *Id.*

89. *Id.* § 1003.1(d)(3).

90. *See id.* § 1003.1(e)(4) (providing guidelines for when one BIA member may summarily affirm without an opinion).

91. *See* 8 U.S.C. § 1229a(c)(7) (2006) (allowing noncitizens the opportunity to file a motion to reopen proceedings); *see also id.* § 1229a(c) (providing time and number restrictions on motions to reopen and reconsider removal proceedings).

92. *In re* J-J-, 21 I. & N. Dec. 976, 977 n.1 (B.I.A. 1997).

93. *See In re* Assaad, 23 I. & N. Dec. 553, 560 (B.I.A. 2003) (stating that the BIA may find a valid ineffective assistance of counsel claim under the Fifth Amendment Due Process Clause). In January 2009, outgoing Attorney General Mukasey overturned the 20-year-old BIA precedent that recognized that special circumstances of ineffective assistance of counsel by attorneys retained by immigrants can constitute a due process violation. *In re* Compean, 24 I. & N. Dec. 710, 714 (A.G. 2009), *vacated*, *In re* Compean, 25 I. & N. Dec. 1 (A.G. 2009). After acknowledging the existing circuit court split, the Attorney General took the minority position and concluded that the Constitution does not confer a due process right to effective counsel in civil removal proceedings. *Id.* ("I conclude that the

support an ineffective assistance claim a noncitizen must first satisfy specific procedures known as the *Lozada* factors.[94] The *Lozada* approach provides "an appropriate framework for analyzing ineffective assistance claims, balancing the need for finality in immigration proceedings with some protection for [noncitizens] prejudiced by ineffective assistance of counsel."[95] To comply with the *Lozada* requirements, a petitioner must (1) submit an affidavit detailing the agreement that was entered into with his or her counsel, (2) show that the allegations of ineffective assistance were communicated to counsel and that counsel had ample opportunity to respond, and (3) provide a statement indicating if a complaint was filed with the appropriate disciplinary authorities or adequately explain why a complaint was not filed.[96] A petitioner also must shoulder the heavy burden of showing that prior counsel's misadvice resulted in prejudice.[97]

iv. Federal Court of Appeals

When a noncitizen has exhausted all administrative remedies, and there is a final order of removal, the immigrant's last option is to file a petition for review with the appropriate federal court of appeals.[98] Circuit courts, however, can only make decisions on the relevant administrative record and are largely limited to deferring to the agency's ruling, unless substantial evidence does not support the ruling or the agency's decision is manifestly contrary to law.[99] Additionally, the decision to grant or deny a motion to

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Department *may*, in its discretion, allow an alien to reopen removal proceedings based on the deficient performance of his lawyer."). However, in June 2009, new Attorney General Eric Holder vacated the order issued by Mukasey and reinstated the earlier framework for reviewing motions to reopen immigration proceedings based on claims of ineffective assistance of counsel. *In re* Compean, 25 I. & N. Dec. 1, 3 (A.G. 2009). These recent developments reflect the constantly shifting nature of immigration law and procedure.

94. *See In re* Lozada, 19 I. & N. Dec. 637, 639 (B.I.A. 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (describing the requirements that a petitioner must show in a motion to reopen premised on an ineffective assistance claim).

95. *Assaad*, 23 I. & N. Dec. at 556–57.

96. *Lozada*, 19 I. & N. Dec. at 639. Additionally, noncitizens must be aware that failure to comply with the *Lozada* requirements, in some jurisdictions, forfeits the ineffective assistance claim. *See* Jian Yun Zheng v. Ashcroft, 409 F.3d 43, 47 (2d Cir. 2005) ("We hold today that an alien who has failed to comply substantially with the *Lozada* requirements in her motion to reopen before the BIA forfeits her ineffective assistance of counsel claim in this Court.").

97. *See* Zheng v. Gonzales, 422 F.3d 98, 107 (3d Cir. 2005) (denying a noncitizen's ineffective assistance claim because the noncitizen failed to demonstrate that prejudice resulted from his attorney's failure to file a brief with the BIA); Romero v. INS, 399 F.3d 109, 112–13 (2d Cir. 2005) (holding that counsel's decision not to raise certain information that had been previously deemed insufficient to support a petition for relief did not prejudice the noncitizen petitioner).

98. 8 U.S.C. § 1252(a)(2)(D) (2006).

99. *See id.* § 1252(b)(4) (setting forth the scope of judicial review).

reopen proceedings based on ineffective assistance is within the discretion of the agency and is reviewed by appellate courts for abuse of discretion.[100]

3. "State Actor" Requirement

An unresolved due process issue is whether fundamental fairness includes the right to a remedy for ineffective assistance of counsel in civil removal hearings. The Fourth Circuit recently concluded that due process does not encompass such a right.[101] Interestingly, it explained that because a privately retained lawyer is not a state actor whose actions can be attributed to the government for due process purposes, a noncitizen cannot be deprived of his Fifth Amendment right to a fundamentally fair hearing.[102] This argument, however, conflicts with several well established Supreme Court decisions.

The Supreme Court, in *Cuyler v. Sullivan*, established that in criminal proceedings the Sixth Amendment not only protects against incompetent attorneys who are appointed by the state, but also against deficient representation by privately retained attorneys.[103] The Court found no basis for distinguishing between appointed and privately retained counsel because a state is equally responsible for the fairness of the trial regardless of whether it provides counsel.[104] The Court reasoned that a trial becomes infected when a state obtains a criminal conviction by relying on a proceeding where the defendant has been denied his or her Sixth Amendment guarantees.[105] It is the state, therefore, that "unconstitutionally deprives the defendant of his liberty[]" when it relies on these infected proceedings even though the counsel has been privately retained.[106] Although *Cuyler* is a criminal Sixth Amendment case, the Court's rationale seems to apply with equal force in other contexts where due process concerns are present.

For example, in *Evitts v. Lucey*, the Court held that once a state creates a system that provides a first appeal of right as "'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,'" those

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100. 8 C.F.R. § 1003.2(a) (2009) ("The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.").

101. Afanwi v. Mukasey, 526 F.3d 788, 798–99 (4th Cir. 2008).

102. *Id.* While a comprehensive treatment of this state action argument by the Fourth and Eighth Circuits is beyond the scope of this Article, it is worth mentioning briefly. This Article focuses on the more convincing argument advanced by the Fourth and Eighth Circuits—because there is no right to counsel in civil removal hearings, there is no corollary constitutional right to effective assistance of counsel.

103. Cuyler v. Sullivan, 446 U.S. 335 (1980).

104. *Id.* at 343.

105. *Id.*

106. *Id.*

procedures must comport with the protections of the Due Process Clause.[107] Because the state had set up such a system, due process entitled the criminal defendant to effective assistance of counsel on his first appeal as of right.[108]

Similarly, there is no basis in government-initiated removal proceedings to distinguish between ineffective assistance by retained and appointed counsel for due process purposes. The government has created an intricate scheme that allows noncitizens to raise ineffective assistance claims by filing a motion to reopen proceedings with an appropriate immigration court. It also implements proceedings for adjudicating the removability of noncitizens. Once these procedures have been created, the government must "act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."[109] Moreover, when an attorney retained by a noncitizen renders such unacceptable representation without any redress, and the government relies on the infected deportation order, it is the government that has deprived the noncitizen of his or her most basic right. The state action argument advanced by the Fourth and Eighth Circuits is inconsistent with Supreme Court precedent and does not help answer the important issue of whether due process includes the right to a remedy for ineffective assistance of retained counsel in removal hearings. The next Part explains why due process of law includes that remedy.

II. DUE PROCESS AS A SAFETY NET

Coleman and *Wainwright v. Torna* are Supreme Court cases that appear to preclude noncitizens in removal proceedings from any recourse, except malpractice, for counsel-related errors because civil litigants have no Sixth Amendment right to counsel and therefore no right to effective assistance of counsel.[110] Indeed, the Fourth and Eighth Circuits have recently interpreted this precedent as foreclosing any due process remedy for ineffective assistance claims in removal hearings.[111] This Part argues that this Supreme Court precedent does not categorically bar counsel-related due process challenges in removal cases. It shows that due process may operate independently as a safety net in special circumstances when retained attorneys provide representation so deficient that it renders a hearing fundamentally unfair. It does so by showing that due process is the

107. Evitts v. Lucey, 469 U.S. 387, 393 (1985) (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956)).

108. *Id.* at 393–94.

109. *Id.* at 401.

110. Coleman v. Thompson, 501 U.S. 722 (1991); Wainwright v. Torna, 455 U.S. 586 (1982) (per curiam).

111. Rafiyev v. Mukasey, 536 F.3d 853 (8th Cir. 2008); Afanwi v. Mukasey, 526 F.3d 788 (4th Cir. 2008).

source of the right to effective counsel, and as such, the Sixth Amendment is not the sole basis for claims of gross attorney incompetence. This Part also examines Supreme Court cases that recognized a due process right to appointed counsel in other civil contexts to show that due process is also relevant to ineffective assistance claims in the immigration context.

A. Instruments of Due Process: Right to Effective Assistance of Counsel

Ineffective assistance of counsel is fundamentally a due process concern because it interferes with the essential right to be heard. The premise of our adversarial system of justice is that partisan advocacy on both sides of a case will enable the most just result. However, the adversarial system fails if one side is prevented from being heard because of poor legal representation. Such a one-sided proceeding results in an unjust ruling. We rely, therefore, on due process to safeguard these fundamental concerns.

The history of our jurisprudence shows that the Due Process Clause is the original source of protection against ineffective assistance of counsel.[112] Early cases show that due process principles lie at the heart of effective representation and are still relevant even when there is no recognized right to effective representation. The following examines the development of the right to effective assistance.

1. Ineffective Assistance of Counsel in Criminal Proceedings

The right to effective assistance of counsel in criminal proceedings is traceable to *Powell v. Alabama*.[113] In addition to the "duty of the court . . . to assign counsel . . . as a necessary requisite of due process[,]" the *Powell* Court stated that assigned counsel in a capital trial must provide "effective aide in the preparation and trial of the case."[114] Like the early right to counsel cases where the Sixth Amendment did not directly apply, claims of ineffective assistance of counsel rested on due process considerations.[115] In

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112. *See* Richard Brody & Rory Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROBS. 1, 6 (1977) ("Indeed, until recently, most courts regarded the right to effective representation not as an element of the sixth amendment, but solely as an aspect of the due process of law secured by the fourteenth amendment.").

113. Powell v. Alabama, 287 U.S. 45 (1932).

114. *Id.* at 71.

115. *See* William H. Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 237 (1979) ("Initially all of the lower courts, both federal and state, looked to the requirements of due process in resolving claims of ineffective assistance of counsel."); *see also* James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 446–47 (1977) (describing the wide ranging standards for determining due process violations for ineffective assistance claims).

early state criminal trials, ineffective assistance claims relied not on state right to counsel provisions but rather on the due process concept.[116] *Diggs v. Welch* is another early example that shows how due process, even for federal defendants entitled to the Sixth Amendment, was the primary basis for bringing ineffective assistance claims.[117] In sum, these early cases show that courts relied on due process principles to determine whether instances of deficient performance had risen to a constitutional violation.

A major transformation began to take shape when, in *Gideon v. Wainwright*, the Supreme Court incorporated the Sixth Amendment right to counsel into the Fourteenth Amendment Due Process Clause for indigent criminal defendants in state courts.[118] *Gideon* transformed the theoretical root of right to counsel claims in state criminal trials from the Fourteenth Amendment Due Process Clause to the Sixth Amendment, necessarily expanding the legal basis for ineffective assistance claims from a limited due process right to a more robust right under the Sixth Amendment.[119]

The due process underpinnings have unfortunately been overshadowed since the landmark case of *Gideon v. Wainwright*. Because the Sixth Amendment provides a specific guarantee of effective assistance of counsel, defendants no longer need to rely on the more narrow due process standard as the source of that right.[120] However, *Gideon*'s dramatic transformation did not altogether eviscerate a defendant's due process right for counsel-related violations. The due process safety net still persists and may surface in special circumstances, including in certain civil proceedings such as removal hearings.

However, in the years after *Gideon*, the Supreme Court began to limit right to effective assistance claims in certain state proceedings by ruling that the right applies only to proceedings in which the government is required by the Constitution to provide counsel.[121] In *Wainwright v. Torna*,

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116. Strazzella, *supra* note 115, at 448.

117. Diggs v. Welch, 148 F.2d 667 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 889 (1945); *see also* Robert S. Catz & Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards An Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397, 445 (1984) (citing *Diggs* as an example of the early view that the "due process clauses were the only sources of effective assistance guarantees").

118. Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963).

119. *See* Erickson, *supra* note 115, at 236. Under the due process standard, "the defendant was required to show a causal relationship between the lack of counsel and the denial of a fair trial," but under the less stringent Sixth Amendment standard, "this relationship was presumed once the defendant showed a denial of his right to counsel." *Id.* After *Gideon*, the more expansive right under the Sixth Amendment also extended to the effective assistance doctrine. To prevail on a due process claim for ineffective assistance, the defendant in some jurisdictions had the difficult task of showing that the proceedings were a "'farce and mockery of justice.'" *Id.* at 237 (quoting *Diggs*, 148 F.2d at 669).

120. *Id.* at 236.

121. Coleman v. Thompson, 501 U.S. 722, 752 (1991); Wainwright v. Torna, 455 U.S. 586,

the Court held that because a convicted felon had no constitutional right to counsel in a discretionary state appeal, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to timely file an application for certiorari in the Florida Supreme Court.[122] Similarly, in *Coleman*, where an attorney had filed an untimely appeal in state court, the Court held that because there is no constitutional right to counsel in a state post-conviction proceeding, there can be no deprivation of effective assistance of counsel.[123] The Court reasoned that when a state is constitutionally obligated to provide counsel and the appointed counsel provides incompetent assistance, the mistakes made by that counsel are "imputed to the State."[124] However, when a state is not constitutionally required to provide counsel, mistakes by a defendant's counsel are imputed to the client.[125] In other words, in criminal trials where there is no right to counsel, there can be no right to effective assistance of counsel.[126] Some circuit courts have viewed this Supreme Court precedent as categorically barring ineffective assistance claims in civil removal proceedings.[127]

The modern framework for conceptualizing ineffective claims post-*Gideon* is to view the right to effective assistance as synonymous with the right to counsel. It is difficult to conceptualize the former without the latter. This notion is furthered by *Coleman* and *Torna*, which hold that a defendant cannot be deprived of effective representation if no constitutional right to counsel exists.[128] While this rule precludes defendants who are not entitled to counsel from claiming an affirmative right to effective counsel under the Sixth Amendment, it does not preclude claims of due process violations when a noncitizen has been prevented from meaningfully presenting his or her case in a removal proceeding. Due process provides an independent basis, apart from the modern Sixth Amendment analysis, from which to challenge wholly incompetent legal representation when an immigrant's opportunity to be heard is seriously undermined. This underlying due process safety net, which historically has been the source for remedying

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587–88 (1982) (per curiam).

122. *Torna*, 455 U.S. at 587–88.

123. *Coleman*, 501 U.S. at 752.

124. *Id.* at 754 (internal quotations omitted).

125. *Id.*

126. *Strickland v. Washington*, 466 U.S. 668 (1984), set forth the modern standard for determining whether an attorney's performance was so ineffective as to render a trial unfair. Under *Strickland*, a criminal defendant must show that (1) counsel's error was so serious that it fell below reasonably effective assistance and (2) that the deficient performance prejudiced the defense. *Id.* at 687.

127. *See* cases cited *supra* note 4.

128. *Coleman*, 501 U.S. at 752; Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (per curiam).

ineffective legal representation, justifies how circuit courts have found a basis for ineffective claims in the Fifth Amendment Due Process Clause.[129]

B. Instruments of Due Process: Right to Counsel

In civil proceedings, there is no specific guarantee of counsel but only a general right to due process of law. From this general constitutional guarantee, however, the Supreme Court has held that due process of law can require the right to counsel in special circumstances. Similarly, the civil right to counsel cases examined below support the argument that due process of law provides an independent basis for challenging deficient legal representation even when the Sixth Amendment is not applicable.[130] It should be noted that this Part does not argue that noncitizens should have an absolute right to counsel and therefore a guaranteed right to effective counsel in removal proceedings. Rather, the use of the following right to counsel cases are intended to show (1) how Sixth Amendment protections originate from the general concept of due process and (2) how due process can work separately from the specific guarantees of the Sixth Amendment, notwithstanding its availability.

1. Early Right to Counsel Cases

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[131] However, the Sixth Amendment initially did not apply to state criminal trials because it had not been incorporated into the Fourteenth Amendment Due Process Clause. Defendants in state criminal trials,

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129. If a due process right to effective assistance of counsel exists in immigration proceedings, the standard for proving ineffective representation should be more stringent than the standard in criminal cases where the Sixth Amendment applies. In other words, the "fundamental fairness" test that is applied in removal hearings should be a higher standard to meet than under the *Strickland* standard. While it is beyond the scope of this Article to evaluate the two standards, I assume that the standard for showing ineffective assistance in removal proceedings is more stringent than the *Strickland* standard. As the Ninth Circuit has explained, under the Fifth Amendment, "petitioners must shoulder a heavier burden of proof" and "must show not merely ineffective assistance of counsel, but assistance which is so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause [sic]." Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986) (citing Paul v. INS, 521 F.2d 194, 198 (5th Cir. 1975)).

130. This general right, unlike the Sixth Amendment, is limited and only applies on a case-by-case basis when fundamental fairness so requires. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 480 (1972) ("[R]evocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.").

131. U.S. CONST. amend. VI.

therefore, relied on the general Fourteenth Amendment Due Process Clause to redress right to counsel violations.

In *Powell v. Alabama*, one of the earliest cases involving the right to counsel in state proceedings, the Supreme Court concluded that the Fourteenth Amendment Due Process Clause entitled indigent defendants incapable of conducting their own defense to obtain counsel in state criminal trials.[132] Because the Court found a basis for a right to counsel under the Fourteenth Amendment Due Process Clause, it did not impose the Sixth Amendment right to counsel upon the states by incorporating it into the Fourteenth Amendment.[133] Moreover, the Court limited the right to capital offenses "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like . . . ."[134]

In another early state criminal case, *Betts v. Brady*, the Court established a case-by-case standard to determine whether due process required the appointment of counsel in state trials and again rejected the argument that the Fourteenth Amendment Due Process Clause incorporated the specific guarantees of the Sixth Amendment.[135] The Court held that a state's denial of "rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, . . . deprive a litigant of due process of law in violation of the Fourteenth [Amendment]."[136] Although the Court concluded that the right to counsel was not an absolute fundamental right, it recognized that special circumstances might require the assistance of counsel if fundamental fairness so required.[137] These special circumstances where due process of law might apply were to be determined "by an appraisal of the totality of facts in a given case."[138] For the next 20 years, until *Gideon v. Wainwright*,

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132. Powell v. Alabama, 287 U.S. 45, 71 (1932).

133. *Id.* at 70.

134. *Id.* at 71.

135. *See* Betts v. Brady, 316 U.S. 455, 471 (1942) (concluding that states are not required to appoint counsel in every case and that appraisal for determining when there is a denial of due process depends on the totality of facts in a given case).

136. *Id.* at 462.

137. *See* Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1436 (1965) (characterizing the rule in *Betts v. Brady* as the "special circumstances" approach). This rule, also called the "case-by-case" approach, is a limited right when compared with a "categorical" or "per se" right. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973) (recognizing that the Court rejected the case-by-case approach in *Betts v. Brady* in favor of the per se rule in *Gideon v. Wainwright*). This Article revives the distinction from these right to counsel cases and argues that the same "special circumstances" approach should be applied to ineffective claims in immigration proceedings.

138. *Betts*, 316 U.S. at 462.

state courts applied this "case-by-case" approach to determine whether appointed counsel was required in criminal proceedings.[139]

These early right to counsel cases, like the early right to effective assistance cases, provide further historical support for the idea that due process provides an independent basis for challenging ineffective representation when the Sixth Amendment is not applicable. Even if specific procedural protections like the Sixth Amendment are not available in civil removal cases, due process concerns may arise when fundamental fairness requires it.

2. Modern Right to Counsel Cases

The following civil right to counsel cases show that even though the specific guarantees of the Sixth Amendment are not available in civil proceedings, individuals still have a due process right to a fair hearing and may be denied that right if an attorney prevents a person from meaningfully presenting his or her case.

In re Gault was the first case in which the Supreme Court found a right to counsel in civil proceedings.[140] *Gault* involved a juvenile delinquency hearing that resulted in the civil commitment of a juvenile in a state industrial school.[141] Because a juvenile delinquency proceeding is considered "civil," there is no Sixth Amendment right to counsel.[142] The Court, however, ruled that the Fourteenth Amendment Due Process Clause required the assistance of counsel in civil juvenile delinquency proceedings.[143] By doing so, the Court rejected the notion that there is no absolute right to counsel in civil proceedings.[144] It compared juvenile delinquency proceedings that have the effect of subjecting children to a loss of liberty to a criminal felony prosecution, explaining that: "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[145] Based on the special circumstances of juvenile delinquency proceedings,

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139. Robert N. Black, *Due Process and Deportation—Is There a Right to Assigned Counsel?*, 8 U.C. DAVIS L. REV. 289, 291 (1975); *see* Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing that the right to counsel is fundamental).

140. *In re* Gault, 387 U.S. 1 (1967).

141. *Id.* at 4.

142. *Id.* at 17.

143. *Id.* at 41.

144. *Id.*

145. *Id.* at 36.

the Supreme Court found a due process right to counsel in these civil proceedings even though the Sixth Amendment did not apply.

The Supreme Court also expanded the right to counsel in other types of civil proceedings. In *Gagnon v. Scarpelli*, the Supreme Court recognized that due process of law may require the assistance of counsel in certain parole revocation proceedings.[146] These special circumstances were to be judged on a "case-by-case" basis when the fundamental fairness of the proceedings was at stake.[147] The Court acknowledged that although parole revocation hearings in general are functionally different from criminal trials, the peculiarities of certain parole revocation cases such as when "the unskilled or uneducated probationer or parolee may . . . have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence[]" may require a trained attorney to assist the parolee.[148] Additionally, the Court noted that even though a parole revocation hearing is generally non-adversarial, unlike a criminal trial involving complex rules and procedures by which a prosecutor seeks to compel conformance to a strict code of behavior, such proceedings become adversarial once a parole officer recommends revocation.[149] Because these varying factors may implicate due process concerns in certain parole revocation hearings, the Court stated that there remained "certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees."[150] *Gagnon*, therefore, is another example where the Supreme Court recognized a due process right to counsel in certain civil proceedings irrespective of the Sixth Amendment's application.

The Supreme Court has also relied on due process of law in deciding whether a state may be required to appoint counsel in certain termination of parental rights proceedings.[151] In *Lassiter v. Department of Social Services*, the Court refined the *Gagnon* due process analysis by applying the *Mathews v. Eldridge* test,[152] balancing "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions" against the presumption that there is a right to appointed counsel only where the defendant may be deprived of physical

146. Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973).

147. *Id.* at 790; *see Betts*, 316 U.S. at 471 (following the "case-by-case" approach).

148. *Gagnon*, 411 U.S. at 787.

149. *Id.* at 785.

150. *Id.* at 790.

151. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27, 32–33 (1981) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

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

liberty.[153] The Court concluded that the petitioner's parental termination hearing without counsel did not deprive her of due process.[154] However, it noted that if "the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak," due process would require the appointment of counsel.[155] Some of the special circumstances that the Court considered were: (1) that the termination proceeding at issue did not involve complex points of law; (2) it included no expert witness testimony; and (3) having counsel would not have made a determinative difference for the petitioner.[156] The Court, as it did in *Gagnon*, employed a case-by-case approach to test whether due process required the appointment of counsel in a civil proceeding.

These cases show that although the Sixth Amendment is not relevant in civil proceedings, individuals still have a due process right to a fair hearing and may be denied that right for egregious counsel-related errors. Like juvenile delinquency and parole revocation hearings, removal proceedings are civil in nature and therefore do not require the Sixth Amendment protections found in criminal proceedings. Similarly, like the right to counsel cases, noncitizens in removal proceedings can rely on the Fifth Amendment due process guarantees when attorneys they retain deny them a meaningful opportunity to be heard. This is analogous to how the Supreme Court analyzed the civil right to counsel cases when, in the absence of the Sixth Amendment, it lodged a right to counsel in a juvenile delinquency proceeding and recognized that other types of civil proceedings might require the same. The civil right to counsel cases, therefore, support the proposition that even when there is no Sixth Amendment right to effective assistance of counsel, due process may provide some recourse for noncitizens who have been prejudiced by their counsel's incompetence in removal proceedings.

The majority of circuit courts have already recognized this, and contrary to some circuits that have raised doubts about the source of this right, *Coleman* and *Torna* do not categorically foreclose claims founded upon the Fifth Amendment Due Process Clause. Due process of law ensures the constitutional minimum level of procedural safeguards. This includes an opportunity to make a meaningful presentation to defend against government charges and to demonstrate eligibility for relief from removal. If an attorney retained by an immigrant seeking legal status in this country wholly fails to represent his or her client, that victim can fall back on the due process safety net to vindicate ineffective assistance of counsel. As the

153. *Lassiter*, 452 U.S. at 27.
154. *Id.* at 33.
155. *Id.* at 31.
156. *Id.* at 32–33.

Supreme Court has said, "due process is flexible and calls for such procedural protections as the particular situation demands."[157]

III. PRACTICAL CONSIDERATIONS

Although this Article argues that there is a strong legal foundation for recognizing ineffective assistance claims in removal proceedings under the Fifth Amendment Due Process Clause, there are also practical considerations unique to immigration law that warrant greater procedural safeguards for noncitizens facing deportation. As Second Circuit Judge Katzmann expressed in a recent opinion:

> The importance of quality representation is especially acute to immigrants, a vulnerable population who come to this country searching for a better life, and who often arrive unfamiliar with our language and culture, in economic deprivation and in fear. In immigration matters, so much is at stake—the right to remain in this country, to reunite a family, or to work.[158]

This Part describes some practical considerations that may, and should, motivate federal courts of appeals to recognize some remedy under the Fifth Amendment Due Process Clause for seriously deficient legal representation.

In removal cases, circuit courts that have located ineffective assistance claims in the Fifth Amendment Due Process Clause apply the fundamental fairness test.[159] This standard considers whether retained counsel's performance is so egregious that it impinges upon the fundamental fairness of the hearing, causing the noncitizen to suffer prejudice.[160] Although these circuits do not directly apply a modern due process analysis to determine the scope of due process protection in removal cases, they may be driven by practical considerations that the *Mathews v. Eldridge* factors draw out.

The *Mathews* test examines: (1) the private interest that will be affected by the government action; (2) the risk of an erroneous deprivation of that interest through the existing procedures and the probable value of additional safeguards; and (3) the government's interest in avoiding the safeguards in question.[161] These factors must be balanced against each other and then

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157. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

158. Aris v. Mukasey, 517 F.3d 595, 600 (2d Cir. 2008).

159. *See* cases cited *supra* note 3.

160. *Id.*

161. *Lassiter*, 452 U.S. at 27. This Article does not attempt a formal application of the *Mathews* test, it only uses the *Mathews* factors as a framework to highlight the serious due process concerns present in removal proceedings.

against the presumption that there is a right to effective counsel only where the noncitizen, if she is unsuccessful, may lose her personal freedom.[162] Considering the devastating consequences of deportation for a particularly vulnerable group, the high risk of erroneous deprivation through removal procedures, and the government's pecuniary interest, there are compelling reasons to support the circuits that have left open the possibility that some counsel-related errors can rise to a due process violation.

A. Private Interest

Noncitizens facing deportation from this country have life-changing private interests that will dramatically be affected by the government's action. Noncitizens who have left their home country to start a new life in the United States, where they have established ties, have a strong interest in remaining in the country. When immigrants are charged with being removable they face deportation, separation from family, and the loss of their livelihood.[163] For many long-established legal permanent residents, removal to their home country is akin to removal to a foreign country because many came to the United States as children or have not returned to their native country for many years.[164] Even worse, immigrants who are refugees may be killed, imprisoned, or persecuted if they are deported.[165] The obvious private interests of noncitizens cannot be emphasized enough.

B. Risk of Erroneous Deprivation

The risk of erroneous deprivation in removal hearings is another major reason why circuit courts should recognize greater procedural safeguards for immigrants facing deportation. The second *Mathews* factor, risk of erroneous deprivation, analyzes "the fairness and reliability of the existing [removal] procedures, and the probable value . . . of additional procedural safeguards."[166]

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162. *Id.* at 27, 31.

163. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (noting that "deportation is a drastic measure and at times the equivalent of banishment or exile"); Bridges v. Wixon, 326 U.S. 135, 154 (1945) (recognizing that deportation "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom[,]" and that "[m]eticulous care must be exercised lest the procedure by which [a noncitizen] is deprived of that liberty not meet the essential standards of fairness").

164. Werlin, *supra* note 25, at 405; *see, e.g.*, Munoz v. Ashcroft, 339 F.3d 950, 953 (9th Cir. 2003) (concluding that the IJ's discretionary denial of deportation for a 24-year-old petitioner who was illegally brought into the U.S. by his mother when he was one year old, lived in the country for virtually his entire life, and had no family abroad did not violate substantive due process where petitioner's mother failed to protect him by not filing for relief when he was a minor).

165. Werlin, *supra* note 25, at 405.

166. Mathews v. Eldridge, 424 U.S. 319, 343 (1976).

The complexity and constantly evolving nature of immigration law raises a significant risk of erroneous deprivation. The "maze of immigration rules and regulations" has been described as a "labyrinth that only a lawyer could navigate"[167] and "second only to the Internal Revenue Code in complexity."[168] For noncitizens, navigating the federal immigration statutes, regulations, and case law is like stepping through a minefield—any slight misstep or inaction may instantly set off an order of removal. Every step, including before and after a hearing, is critical in removal proceedings.

For example, immigrants can file an application for asylum, withholding of removal, or other forms of relief alleging facts and circumstances to support their petition for relief from deportation.[169] However, immigrants who have retained an attorney with little knowledge, or outdated knowledge,[170] of immigration law may be surprised to learn that information they proffered in an asylum application will later figure prominently in an IJ's credibility findings.[171] Even something as simple as failing to inform a noncitizen about a scheduled hearing, which results in the petitioner's failure to appear, can instantly trigger an order of removal.[172]

Immigrants are also at a major disadvantage because most have limited skills, money, education, and knowledge of the English language and culture.[173] Without these basic resources, it may be incredibly difficult to secure a trained immigration attorney, prepare a proper defense, understand the intricate filing and hearing procedures, and appreciate the severity of procedural mistakes. These factors can seriously jeopardize an immigrant's ability to mount his or her case and heighten the risk of an erroneous deportation order.

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167. Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) (internal citation omitted).

168. Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988) (citation omitted); *see also* Iturribarria v. INS, 321 F.3d 889, 901 (9th Cir. 2003) ("One reason that aliens . . . retain legal assistance in the first place is because they assume that an attorney will know how to comply with the procedural details that make immigration proceedings so complicated.").

169. *See* 8 U.S.C. § 1158(b) (2006) (setting forth conditions for granting asylum); *id.* § 1231(b)(3)(A) (noncitizens may apply for withholding from removal if "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion"); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113.

170. *See* Barnes, *supra* note 49, at 1219 (analogizing immigration law to the complexity and constantly changing tax code).

171. Katzmann, *supra* note 16, at 9.

172. *See* discussion of *Aris v. Mukasey*, 517 F.3d 595, 596 (2d Cir. 2008), *supra* Part I.A. Immigration law is rife with many other rules that have draconian consequences for immigrants. *See, e.g.*, 8 U.S.C. § 1229a(b)(5)(A) (2006) (providing that failure to attend a removal hearing results in an automatic order of removal).

173. *See* Abel, *supra* note 49, at 1488 (describing how immigrant clients are unusually vulnerable because they are "poor, deeply in debt, uneducated, ignorant of language and culture, and

The severity of consequences for such a particularly vulnerable group, together with the complexity and adversarial nature of deportation proceedings, raises serious concerns about the inequality and fairness of such proceedings. This is particularly true if no recourse other than a malpractice action is available. Removal hearings are highly fact-intensive and require significant preparation.[174] The proceedings before the IJ have been compared to criminal trials.[175] Like criminal trials, the government brings removal charges against noncitizens and seeks to deprive noncitizens of their right to remain in this country.[176] The government, as the prosecutor, then seeks to prove those charges before the IJ, and the accused immigrant becomes subject to cross-examination and interrogation by the government and the IJ.[177] This is often a confusing and threatening process, particularly for noncitizens who are unfamiliar with immigration laws and procedures.[178] Noncitizens, for example, must establish a positive credibility finding by providing testimony, which will be heavily scrutinized for inconsistencies.[179] Language and cultural differences also make credibility findings susceptible to mistake or error and may undermine an immigrant's credibility determination.[180] It is no surprise that such credibility findings have been the source of much criticism by federal judges and have repeatedly been found to be baseless because of "factual error, bootless speculation, and errors of logic."[181]

Because of the many legal challenges immigrants face in removal

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threatened with losing everything they have so painfully won").

174. Katzmann, *supra* note 16, at 9.

175. *Second Chance*, *supra* note 15, at 1558.

176. *See* discussion *supra* Part I.B.2.i.

177. *Id.*

178. Werlin, *supra* note 25, at 393–94.

179. *See* Tu Lin v. Gonzales, 446 F.3d 395, 401–02 (2d Cir. 2006) (stating how inconsistencies and omissions in the record, even though minor, can support an IJ's adverse credibility finding in the aggregate); *see also* Ruiz v. U.S. Attorney Gen., 440 F.3d 1247, 1255 (11th Cir. 2006) (explaining that reliable testimony includes "consistency on direct examination, consistency with the written application, and the absence of embellishments").

180. *See, e.g.*, Cham v. U.S. Attorney Gen., 445 F.3d 683, 692 (3d Cir. 2006) (describing the discrepancy in petitioner's testimony about the year of his birth, which resulted in the IJ's determination that petitioner was unable to explain the contradiction despite the clear translation problems evident during the exchange).

181. Pramatarov v. Gonzales, 454 F.3d 764, 765 (7th Cir. 2006); *see also* Chen v. U.S. Dep't of Justice, 426 F.3d 104, 115 (2d Cir. 2005) (holding that the IJ's finding "was grounded solely on speculation and conjecture"); Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054 (9th Cir. 2005) ("[T]he IJ's assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture . . . ."); Dia v. Ashcroft, 353 F.3d 228, 250 (3d Cir. 2003) (en banc) ("[The IJ's] opinion consists not of the normal drawing intuitive inferences from a set of facts, but, rather, of a progression of flawed sound bites that gives the impression that [the IJ] was looking for ways to find fault with [petitioner's] testimony.").

proceedings, it is critical that immigrants retain competent attorneys who fully understand the immigration laws to avoid the high risk of erroneous deprivation. Having a competent immigration attorney to raise issues of law, present evidence, and challenge due process grounds during removal hearings provides protection against inaccurate and unfair adjudication.[182]

C. Government Interest

The third *Mathews* factor considers the government interest. This includes "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[183] The government has an interest in the "expeditiousness and finality of removal proceedings."[184] The Supreme Court, for example, has observed that motions to reopen are "especially" disfavored in removal proceedings because generally "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States."[185] Additionally, the sheer volume of cases that are adjudicated yearly by the immigration courts and the BIA is significant. For example, in 2007, the immigration courts heard over 270,000 removal cases, and the BIA heard over 30,000 appeals from the immigration courts.[186] Additionally, there were almost 9,000 motions to reopen proceedings filed with the BIA that same year.[187] Federal courts of appeals, particularly the Second and Ninth Circuits, also bear the burden of reviewing thousands of petitions for review each year in addition to their regular argument calendar cases.[188] There is undoubtedly a high administrative cost for adding more procedural protections for noncitizens. Expanding motions to reopen proceedings based on ineffective assistance could potentially allow meritless claims to tie up the system and postpone a noncitizen's removal or departure date.[189] On the other hand, the government shares a strong interest in maintaining the integrity of the immigration courts by ensuring fair and accurate adjudication of removal cases.[190]

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182. *See* Werlin, *supra* note 25, at 417 (describing the advantages of having adequate counsel during removal hearings).

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

184. *In re* Compean, 24 I. & N. Dec. 710, 729 (A.G. 2009), *vacated*, *In re* Compean, 25 I. & N. Dec. 1 (A.G. 2009).

185. *Id.* (citing INS v. Doherty, 502 U.S. 314, 323 (1992)).

186. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REV., FY 2007 STATISTICAL YEAR BOOK C3 t.3 (2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf.

187. *Id.* at C3 t.2.

188. *See* Katzmann, *supra* note 16, at 6 (explaining that the Second Circuit is second to the Ninth Circuit in the quantity of petitions for review it receives each year).

189. *Compean*, 24 I. & N. Dec. at 730.

190. *Id.* at 728.

Too much is at stake for immigrants to enter these foreign proceedings without adequate legal representation. When there is a greater complexity in laws and procedures there is a greater risk of erroneous deprivation, and thus a greater need for adequate legal representation to ensure a fair result.[191] Moreover, because removal proceedings implicate a significant deprivation of liberty upon a vulnerable group of people, and the complexity of such proceedings raises a high risk of erroneous deprivation, there must be greater procedural protections to noncitizens facing deportation.

CONCLUSION

The majority of federal circuit courts justifiably recognize that due process may afford noncitizens an opportunity to reopen removal proceedings when their attorneys provide inadequate legal assistance that runs far afoul of acceptable professional standards. This due process right is not foreclosed by modern ineffective assistance jurisprudence that has, since the *Gideon* transformation, made the right to effective counsel coterminous with the Sixth Amendment right to counsel. As the general source of the specific Sixth Amendment guarantees, due process operates independently of the Sixth Amendment and acts as a safety net in special circumstances even when the Sixth Amendment is not available.

Removal proceedings have devastating consequences for a particularly vulnerable group of people, and the complexity of such proceedings presents a high risk of erroneous deprivation. Such practical concerns may be the underlying reason why some circuit courts have provided some recourse when deficient legal representation impinges upon the fundamental fairness of removal proceedings. While circuit courts remain divided over the issue, the new Attorney General recently initiated rulemaking proceedings for regulations to govern ineffective assistance claims in removal proceedings. However, any remedy provided by the government is likely to remain on shaky footing so long as the government can strip away those remedies at its discretion, as outgoing Attorney General Mukasey did early this year. At some point, the Supreme Court may choose to reach the constitutional issue and resolve the division in the circuit courts. If it does, there is ample historical and legal precedent to support having a remedy under the Due Process Clause in special circumstances when counsel's ineffectiveness renders a removal hearing fundamentally unfair.

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191. *See* Werlin, *supra* note 25, at 414 (verifying the courts' acknowledgment of the complexity of immigration laws and the deportation process).