DUE PROCESS FOR U.S. PERMANENT RESIDENTS: THE RIGHT TO COUNSEL

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In 1945, the U.S. Supreme Court held that deportation is a serious penalty that may result in the loss of “all that makes life worth living.”1 This statement is as true today as it was nearly seventy years ago. How does the United States, a country founded and built by immigrants, protect immigrants from such peril? The Fifth Amendment to the U.S. Constitution provides that, “no person . . . shall be deprived of life, liberty or property, without due process of law.”2 The inclusion of “no persons,” extends due process protection to aliens and permanent residents alike.3 Due process essentially guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding. Yet, the federal immigration

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2. U.S. CONST. amend. V.
3. See Ferreras v. Ashcroft, 160 F. Supp. 2d 617, 629 (S.D.N.Y 2001) (holding that even aliens who have not achieved legal permanent resident status have been held entitled to protection under the Fifth Amendment’s due process clause).
policies adopted by the United States throughout history have more often than not, failed to preserve the due process rights of immigrants.

This Article will explore the unique class of immigrants defined under federal law as legal permanent residents (LPR). Part I of this Article is an introduction to immigration in the United States and the federal laws and procedures which govern it. Part II will explore the unique nature and vulnerability of legal permanent residence. Part III will address the constitutional protections afforded to LPRs, including due process rights and the right to counsel. Part IV will look at the nature of immigration proceedings and discuss why the outcomes of these proceedings are often the ultimate criminal sentence for LPRs. And lastly, Part V will discuss the split amongst the U.S. Courts of Appeals regarding the right to effective assistance of counsel in immigration proceedings.

I. INTRODUCTION

The first significant federal legislation restricting immigration was the Chinese Exclusion Act of 1882. Prior to this Act, the states were largely responsible for regulating immigration to the United States. It was not until 1864 that Congress enacted federal immigration laws; and it was not until 1892 that the United States assumed plenary power over immigration. The first federal immigration station, Ellis Island, opened in 1892. The Immigration Act of 1924 created a national-origins quota.


6. Id.


9. Id. (the quota provided immigration visas to two percent of the total number of people of each nationality in the United States as of the 1890 national census).
In 1965, Congress passed the Immigration and Nationality Act (INA).\textsuperscript{10} When President Lyndon B. Johnson signed the INA into law, he said that the prior immigration policy “violated the basic principle of American democracy . . . it has been un-American in the highest sense, because it has been untrue to the faith that brought thousands to these shores even before we were a country.”\textsuperscript{11} The Act dramatically altered the immigration policy of the United States and did away with the quota systems of the past. Although it has been amended numerous times since 1965, the Act is still the prevailing immigration policy of the United States.\textsuperscript{12}

The most notable amendment was the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).\textsuperscript{13} The IIRAIRA, often referred to as an “anti-immigration bill,” strengthened United States immigration laws.\textsuperscript{14} It merged exclusion and deportation proceedings into “removal proceedings.”\textsuperscript{15} It increased the categories of criminal activities for which immigrants, including LPRs, could be deported for and set forth guidelines for mandatory detention of aliens pending removal proceedings.\textsuperscript{16} The IIRAIRA also made it harder for LPRs to qualify for relief known as “cancellation of removal.”\textsuperscript{17} IIRAIRA allowed for retroactive removal orders.\textsuperscript{18} Thus, an alien could be subject to deportation or removal at any time, regardless of when the crime was committed.\textsuperscript{19}

\begin{thebibliography}{19}
\bibitem{10} See generally Immigration and Nationality Act of 1965, H.R. 2580 (1965).
\bibitem{12} Id.
\bibitem{16} Slayton, \textit{supra} note 13.
\bibitem{17} Laveran-Stiebar, \textit{supra} note 15, at 623 (The new rule regarding cancellation of removal, relief available to legal permanent residents, is harder to satisfy than the former rule which only required seven years of continuous presence in the United States and the existence of extreme hardship. Under IIRAIRA, legal permanent residents must show continuous physical presence in the U.S. for ten years and exceptional and extremely unusual hardship.).
\bibitem{18} Slayton, \textit{supra} note 13, at 1055.
\bibitem{19} Id.
\end{thebibliography}
A. Immigration Court Proceedings

Removal proceedings begin with an alien being served with a Notice to Appear.\(^{20}\) In the Notice to Appear, an alien is charged as either an inadmissible alien pursuant to INA § 212 or a deportable alien pursuant to INA § 237.\(^{21}\) Proceedings commenced pursuant to INA § 212 are for arriving aliens.\(^{22}\) These proceedings include returning LPRs who fall under INA § 101(a)(13)(C) or aliens who are present in the United States without having been admitted or paroled.\(^{23}\) Proceedings commenced pursuant to INA § 237 are for aliens who have been legally admitted into the United States, but deemed deportable.\(^{24}\)

Removal proceedings are conducted by immigration judges who are responsible for deciding the inadmissibility, or deportability of an alien.\(^{25}\) During these proceedings, any person charged with being “removable” is entitled to be represented by counsel, as long as it is at no cost to the government.\(^{26}\) The immigration courts do not provide for court-appointed counsel. This means that those who cannot afford to hire private counsel are left to fend for themselves, while the United States is always represented by counsel, often referred to as “immigration prosecutors.”\(^{27}\)

Immigration law is notably complex, having been compared to the U.S. Tax Code.\(^{28}\)

\(^{20}\) Immigration and Nationality Act § 239(a)(1) (“The Notice to Appear must contain (1) the nature of the proceedings against the alien, (2) the legal authority under which the proceedings are conducted, and (3) the acts or conduct alleged to be in violation of the law.”).

\(^{21}\) Immigration and Nationality Act § 240(a)(2) (The alien’s manner of entry into the United States will determine under which charge removal proceedings are commenced.).

\(^{22}\) 8 C.F.R. §1001.1(q) (“Arriving aliens are aliens who are applying for admission into the United States at a point of entry.”).

\(^{23}\) Immigration and Nationality Act § 101(a)(13)(C) (this section lists scenarios under which legal permanent residents will be considered to be seeking an admission into the United States, including legal permanent residents who have committed certain criminal offenses in the United States prior to departing).

\(^{24}\) Immigration and Nationality Act § 237(a)(1)–(6)(A) (this section lists the specific circumstances for which an alien can be deported from the United States, such as for having been convicted of certain criminal offenses, marriage fraud, unlawful voters, etc.).

\(^{25}\) Immigration and Nationality Act § 240(a)(1).

\(^{26}\) Immigration and Nationality Act § 240(4)(a) (“An alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”).

\(^{27}\) Id.

\(^{28}\) Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987).
A recent study published in the Cardozo Law Review regarded the lack of legal representation for those facing removal as an "immigrant representation crisis." The same study revealed that those facing deportation in New York immigration courts with a lawyer are five times more likely to win their cases than those without representation. Aliens who are detained who are not represented by counsel in removal proceedings have successful outcomes only three percent of the time. In 2010, roughly fifty-seven percent of all respondents in removal proceedings nationwide appeared in immigration court without legal representation.

Aliens in removal proceedings may apply for relief or protection from removal with the immigration court. Criminal convictions limit the forms of relief available to an individual in removal proceedings. For example, LPRs are not eligible for various forms of relief if they have criminal convictions.

II. LEGAL PERMANENT RESIDENTS

An alien is defined under immigration law as "any person not a citizen or national of the United States." An LPR is defined as "a person who has been granted lawful permanent residency in the United States." LPRs are also referred to as "green card recipients." LPRs are granted the privilege


30. Id. at 1.

31. Id.

32. Id. at 4–5.

33. Immigration and Nationality Act § 240 (c)(4)(A) (Relief that aliens may apply for include, but are not limited to: Asylum under INA § 208 (a)(2); Withholding of Removal under INA § 241 (b)(3)(B)(ii); Convention Against Torture and Deferral of Removal under 8 C.F.R. 208.16 (d)(2) or (d)(3); Cancellation of Removal for Certain Permanent Residents under INA § 240A (a); Waiver under INA § 212 (h); and Voluntary Departure under INA § 240B.).

34. See id.

35. Immigration and Nationality Act § 240A(a) (LPR is not eligible for Cancellation of Removal if convicted of any aggravated felony; Asylum not available to those who have been convicted of a particularly serious crime under INA § 208(a)(2); Withholding of Removal not available to aliens who have been convicted of a particularly serious crime under INA § 241 (b)(3)(B)(ii)).


38. Id. at 1.
of living and working permanently in the United States, which includes the right to own property, attend public schools, and the right to join certain branches of the Armed Forces. This immigration status also confers certain responsibilities. LPRs are required to file tax returns and register with the selective service. LPRs, however, do not enjoy the same full bundle of rights as U.S. citizens. Although LPRs are afforded more benefits than non-LPRs, for immigration purposes they are still considered aliens. An LPR can lose his or her status either intentionally or by accident; for example, voting in an election only open to U.S. citizens, traveling outside of the United States for an extended period of time, or being convicted of certain crimes.

There are certain eligibility requirements to become an LPR. Most immigrants apply for LPR status through a family sponsorship, employment, or job offer. Those who were admitted into the United States based on asylum or refugee status may also apply to become an LPR. LPRs can apply to become a U.S. citizen after five years of lawful permanent residency in the United States and successful completion of English language, civics, and history tests. This process is known as “naturalization.”


40. MONGER & YANKAY, supra note 37, at 1.

41. A GUIDE FOR NEW IMMIGRANTS, supra note 39 at 11 (Males between the ages of eighteen and twenty-six years old must register with the selective service in order to maintain their LPR status.).

42. Id. at 17–18

Examples of crimes that may affect an LPR status include: a crime defined as an aggravated felony, murder, terrorist activities, rape, sexual assault on a child, illegal trafficking in drugs, firearms or people and a crime of moral turpitude committed within five years of admission. An LPR may also be subject to sanctions if they are found to be a “habitual drunkard,” fail to support their family, including failing to pay child support and/or spousal support, fail to file tax returns, willfully fail to register for selective service, etc.


44. Id.

45. Id. at 2.

46. MONGER & YANKAY, supra note 37, at 2.

47. Id.
A. Statistical Information on LPRs

LPRs are an especially vulnerable class of aliens. Most LPRs have deep ties to the United States; they have lived, raised families, and attended schools here. To understand the unique circumstances of LPRs, it is important to know who they are and where they came from. An estimated 13.1 million LPRs were living in the United States on January 1, 2011.48 By 2012, that number increased by 1.03 million.49 Fifty-three percent of these new LPRs already lived in the United States when they became LPRs.50 Forty-two percent of all persons granted LPR status in 2012 were born in Asia, and thirty-two percent were born in North America.51 The five countries accounting for thirty-eight percent of all new LPRs in 2012 were from Mexico, China, India, Philippines, and the Dominican Republic.52 In 2012, ten percent of persons granted LPR status lived in Florida.53 Also, new LPRs are historically younger than the native United States population and are more likely to be female.54

B. LPRs and IIRAIRA

Under IIRAIRA, LPRs became especially vulnerable to deportation.55 Prior to the enactment of the IIRAIRA in 1995, 50,924 aliens were removed from the United States.56 Six years later in 2011, the number of aliens removed grew to a staggering 391,953.57 Ten percent of all the people


49. MONGER & YANKAY, supra note 37, at 1.

50. Id. at 1.

51. Id. at 4.

52. Id.

53. Id.

54. MONGER & YANKAY, supra note 37, at 5.


57. Id.
deported each year are LPRs. As in 2011, roughly 39,000 of the aliens removed from the United States were LPRs, nearly equivalent to the total number of all aliens removed from the United States prior to IIRIRA in 1995.

Between 2001 and 2010, more than one million people were deported from the United States because of post-entry criminal conduct. Amongst those deported was Marco Merino-Fernandez, a thirty-five year old LPR, who had lived in the United States since he was five months old. Marco was convicted of two misdemeanors for drug possession more than a decade prior to being deported in 2007.

III. CONSTITUTIONAL PROTECTIONS

In 2001, the Court for the Southern District of New York reaffirmed the proposition that LPRs are entitled to the same constitutional rights to due process as U.S. citizens. The Court held that, "[t]he Due Process Clause applies to all ‘persons’ within the United States, including aliens." For over a century, the courts have held that aliens are entitled to protection under the due process clause of the Fifth Amendment. However, the Sixth Amendment right to counsel is not extended to aliens. Due process is about fundamental fairness when the government is depriving any person of life, liberty, or property. The Supreme Court has held that, "[t]he] fundamental requirement of due process is the opportunity


59. 2011 YEARBOOK OF IMMIGRATION STATISTICS, supra note 56.

60. Kanstroom, supra note 55.

61. Id.


63. Id.

64. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that all persons within the jurisdiction of the United States shall have the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens).

65. Ramirez v. Immigration & Naturalization Serv., 550 F.2d 560, 563 (9th Cir. 1977) (holding that the Sixth Amendment’s guarantee of the right to counsel is not applicable in deportation proceedings).

66. Abdulai v. Ashcroft, 239 F.3d 542, 549 (3d Cir. 2001) (citing Sewak v. INS, 900 F.2d 667, 671 (3d Cir. 1990)).
to be heard at a meaningful time and in a meaningful manner.\textsuperscript{67} In removal proceedings, due process requires:

1) Fact finding based on a record produced before the judge and disclosed to the alien;
2) An alien must be allowed to make arguments on his or her own behalf; and
3) An alien has the right to an individualized determination of his or her interest.\textsuperscript{68}

If LPRs are entitled to the same constitutional protections as U.S. citizens, then why are aliens precluded from asserting the Sixth Amendment right to counsel? The Sixth Amendment states that, "the accused shall . . . have the assistance of counsel for his defense."\textsuperscript{69} Opponents argue that immigration proceedings are civil rather than criminal; thus, the Sixth Amendment does not apply.\textsuperscript{70} So, how can due process be preserved without the right to appointed counsel? In removal proceedings the right to due process and the right to counsel go hand in hand. Aliens in removal proceedings are accused of being removable or inadmissible from the United States; therefore, the right to counsel should apply.\textsuperscript{71} As mentioned previously, the immigration laws are notoriously complex and the United States is represented by counsel in all removal proceedings. Denying aliens the right to counsel, especially indigent aliens, contradicts the due process protections in which they are constitutionally entitled to.

A. Life, Liberty, and Property for LPRs

Opponents further argue that the right to counsel should not be extended in immigration proceedings because deportation is not a punishment.\textsuperscript{72} However, for some, this is the ultimate punishment. When

\begin{quotation}
68. Abdulai, 239 F.3d at 549.
69. U.S. CONST. amend. VI.
70. Ramirez, 550 F.2d at 563.
71. Id.
72. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893), stating:
The order of deportation is not a punishment for crime . . . . It is but a method for enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend.
\end{quotation}
LPRs are deported from the United States they are deprived of life, liberty, and property. They are deprived of their legal status in the United States and forced back to sometimes-unfamiliar countries. 73

Many individuals "came to the United States legally, sometimes in early childhood, and have been living as lawful permanent residents, often with spouses or children who are U.S. citizens." 74 Between 1997 and 2007, more than 100,000 children were affected by parental deportation. 75 At least 88,000 of these children were U.S. citizens. 76 During this time, 217,000 other immediate family members were affected by the deportation of LPRs. 77

Some LPRs, like Marco Merino-Fernandez, were deprived of the only life they have ever known. 78 Similarly, Chally Dang, who came to the United States as a child refugee from Cambodia, was deprived of his life in the United States with his fiancé and children, who are U.S. citizens. 79 Dang was an LPR who was removed from the United States in 2011 for committing a crime that carried a retroactive removal order under the IIRAIRA. 80 Dang committed the crime when he was fifteen years old. 81 He was removed from the United States when he was twenty-nine. 82

In removal proceedings, the liberty interests of aliens are at stake. 83 Removal from the United States deprives an individual of the right to stay, live and work in the "land of freedom." 84 The Supreme Court has recognized not only that an individual’s liberty is at stake, but also that deportation is a serious penalty. 85 Removal from the United States physically separates LPRs from the property that they are legally entitled to own in the United States.

73. Id.
74. Slayton, supra note 13, at 1056–57.
75. The Ones They Leave Behind, supra note 58.
76. Id.
77. Id.
78. Kanstroom, supra note 55.
80. Id.
81. Id.
82. Id.
83. Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (recognizing a liberty interest in an alien’s right to be and remain in the United States).
84. Bridges, 326 U.S. at 154.
85. Id.
Removal can also be inhumane and life threatening. For example, criminal deportees who are returned to Haiti from the United States face government-imposed, mandatory, and indefinite detention in Haitian prisons. The U.S. Department of State reports that, "many prisoners and detainees, suffer from lack of basic hygiene, malnutrition, poor quality of health care, and illness caused by lack of access to clean water." Diseases such as HIV/AIDS, malaria, and drug-resistant tuberculosis are a serious problem amongst Haitian prisons.

Sixty-eight percent of LPRs deported each year are deported for criminal offenses. IIRAIRA expanded the definition of aggravated felonies, thus expanding the list of crimes for which LPRs can be deported. The U.S. Department of Homeland Security estimates that aliens account for twenty percent of inmates in prisons and jails across the United States. LPRs need the assistance of counsel to ensure that their due process rights are not violated when they are charged as removable from the United States for criminal convictions. Those LPRs who are subject to mandatory detention for their criminal convictions are also vulnerable to suffering a denial of their due process rights. LPRs are not only being threatened with deportation but they are also subject to mandatory detention throughout the proceedings, thus depriving them of their liberty even before they are adjudicated as removable.

B. The Gideon Promise

The landmark Supreme Court decision in Gideon v. Wainwright extended the Sixth Amendment right to counsel to indigent defendants in criminal proceedings. The Court noted:

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87. Id. at 5.
88. Id. at 6.
89. The Ones They Leave Behind, supra note 58, at 2.
90. Id. ("The expanded definition of an 'aggravated felony' includes non-violent offenses, non-violent drug offenses, forgery, receipt of stolen property, perjury, fraud, or deceit, and tax evasion.").
92. See generally Immigration and Nationality Act § 236(c).
That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries . . . [our laws] have laid great emphasis on procedural and substantive safeguards designed to assure fair trials[ . . . ] in which every defendant stands equal before the law. This noble idea cannot be realized if the poor man charged with the crime has to face his accusers without a lawyer to assist him.94

It is impossible for aliens who are charged as removable pursuant to criminal convictions to stand equal before the law without a lawyer. Under IIRAIRA, the definition of conviction was expanded to include withholdings of adjudication, no contest, and plea deals.95 Thus, with the expansion of the list of crimes for which aliens could be subject to removal and the expansion of the term conviction, the need for representation is even more vital. The assistance of counsel in removal proceedings involving criminal convictions are not luxuries. Rather they are essential in protecting the procedural and substantive safeguards designed to ensure fair trials, just as in their criminal counterparts.

C. Padilla v. Kentucky

For non-citizens, the repercussion of criminal convictions often means facing deportation for crimes that they pled not guilty to, or for which they accepted a plea deal, often at the advice of counsel.96 In Padilla v. Kentucky, the Supreme Court recognized the implications that criminal convictions could have on an individual’s immigration status.97 The Court held that defense counsel in criminal proceedings must advise non-citizen clients of the deportation consequences of a conviction or adjudication.98 Failing to advise a non-citizen of the effect of their criminal conviction constitutes ineffective assistance of counsel in violation of the Sixth Amendment.99

94. Id.
95. Slayton, supra note 13, at 1047.
97. Id. at 364.
98. Id. at 374 (Counsel must inform her client whether his plea carries a risk of deportation: “Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”).
99. See id.
The Sixth Amendment not only provides criminal defendants the right to appointed counsel, but it also provides the right to effective assistance of counsel. 100 An effective counsel is one whose representation does not fall below an objective standard of reasonableness and whose conduct does not prejudice the defendant. 101 Conduct falls below an objective standard when counsel's errors are so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. 102 A breach of the duties that counsel owes to a client may also lead to ineffective representation. 103 Pursuant to the Supreme Court's decision in Padilla, a defense counsel is now required to advise their non-citizen clients of the effect of their criminal conviction. 104 This is a step towards extending the Gideon promise to immigration proceedings to ensure that due process is served.

LPRs are a vulnerable class of aliens who are faced with a deprivation of their due process rights when they are not guaranteed counsel in removal proceedings. Their due process rights are especially vulnerable when they are subject to removability pursuant to criminal convictions and are not guaranteed the right to counsel pursuant to the Sixth Amendment. LPRs are likely to be deprived of their life, liberty, and property without the assistance of counsel. Like U.S. citizens, LPRs pay taxes, work, and have strong ties to the United States. The current immigration laws, which do not provide for the representation of counsel in removal proceedings, violate the due process rights of LPRs who have been held to enjoy the same constitutional rights as U.S. citizens.

IV. CIVIL OR CRIMINAL PROCEEDINGS

Despite the blurred lines between criminal prosecutions and immigration proceedings, the Sixth Amendment right to counsel is non-existent in removal proceedings. The courts have found that removal proceedings are civil in nature, not criminal, and thus, the protections afforded in criminal trials are not applicable. 105

100. Id. at 364.
102. Id. at 687.
103. Id. at 688.
104. Padilla, 559 U.S. at 369.
105. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (Explaining that a deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry. The deportation looks prospectively to the respondent's right to stay in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain.).
A. Article I Courts

Immigration courts are Article I courts. Article I of the U.S. Constitution expressly gives Congress the power "to establish a uniform Rule of Naturalization." Immigration courts are created through Congress's constitutional authority over immigration.

Under the constitutional law principle known as the Public Right Doctrine, Congress can assign immigration cases to Article I administrative agencies. Public rights cases "arise between the government and others, which from their nature do not require judicial determination and yet are susceptible to it." Congress plays a unique role in public rights cases. Article I courts are distinct from Article III courts in that they are not based on the principle of separation of power. Article I courts are thus more susceptible to a prejudiced adjudication of an individual's claim which may be plagued by the biases and external influences of Congress. Most criminal cases are adjudicated by Article III courts.

B. Protections Afforded in Criminal Versus Civil Cases

Because immigration proceedings have been labeled as civil, the full bundle of protections afforded in criminal proceedings have not been extended to aliens in removal proceedings. In INS v. Lopez-Mendoza, the Supreme Court explained the difference between civil immigration proceedings and criminal proceedings:

The judge's sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry into or presence in this country. Consistent with the civil nature of the proceeding, various protections that apply

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107. Id.
110. Id. ("Congress may reserve itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.").
111. Yeh, supra note 108, at 443 (Separation of power is a political doctrine implicitly stated in the structure of the U.S. Constitution in which the legislative, the executive, and the judicial branch of the government have been kept distinct to prevent abuse of power.).
112. Id.
113. Lopez-Mendoza, 468 U.S. at 1038.
in the context of a criminal trial do not apply in a deportation hearing.\textsuperscript{114}

Essentially, a judge or jury determines the guilt or innocence of an individual, whereas in an immigration proceeding, an immigration judge determines whether an individual is removable from the United States. Several protections guaranteed by the Bill of Rights are expressly limited to criminal cases, such as the right to a jury trial, the right to counsel for one’s defense, protection against double jeopardy, and protection against self-incrimination.\textsuperscript{115} \textit{Ex Post Facto}, a protection guaranteed in criminal proceedings, does not apply in removal proceedings because they are designated as civil.\textsuperscript{116} Thus, under IIRIRA, Congress has been permitted to retroactively attach prior criminal convictions when such convictions, when obtained, had no immigration consequences.\textsuperscript{117} Because the immigration proceedings have been classified as civil rather than criminal, aliens have been stripped of constitutional protections, even though their nature more closely resembles criminal proceedings.

The need to extend these constitutional protections to civil proceedings has been recognized by the American Bar Association (ABA).\textsuperscript{118} The ABA has endorsed the establishment of the right to court-counsel in any civil proceeding where “basic human needs” are at stake.\textsuperscript{119} According to the ABA, the right to appointed counsel in civil proceedings is “long overdue and deeply embedded in the nation’s promise for justice for all.”\textsuperscript{120} Basic human needs are at stake in immigration proceedings. It is well founded in our jurisprudence that aliens have a right to life, liberty, and property.\textsuperscript{121} The Supreme Court has acknowledged the “concomitant impact of deportation on families.”\textsuperscript{122} Thus, deportation proceedings involve basic human needs—the right to life, liberty, property, and the right to be with

\begin{itemize}
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} U.S. CONST. amends. V–VI.
  \item \textsuperscript{116} Harisiades v. Shaughnessy, 342 U.S. 580, 595 (1952) (holding that passage of an \textit{ex post facto} law by Congress in Section 9 of Article I of the U.S. Constitution applies only to criminal laws and not to a deportation act.).
  \item \textsuperscript{117} Slayton, \textit{supra} note 13, at 1040.
  \item \textsuperscript{118} \textsc{American Bar Association, Report to the House of Delegates} 12 (2006), available at \texttt{http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_solid_06A112A.authcheckdam.pdf} (last visited July 31, 2013).
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} Ferreras, 160 F. Supp. 2d at 629.
  \item \textsuperscript{122} Padilla, 559 U.S. at 17.
\end{itemize}
one’s family. The New York Defense Project has proposed the first deportation defense system in the nation to ensure that constitutional protections afforded in criminal proceedings are extended to immigration proceedings. 123

In immigration proceedings where an alien may be deemed removable from the United States for criminal convictions, the civil proceeding very much resembles a criminal trial. The immigration judge plays a dual role—the judge must first determine whether an alien is removable based on the innocence or guilt of the criminal conviction, and secondly, whether that conviction is a crime as defined by the INA. The duality that occurs in immigration proceedings leaves it very hard to see a clear line where a criminal trial ends and an administrative hearing begins.

C. Matter of Castro

Immigration proceedings often involve retrying criminal cases. In Matter of Castro, the court found that an alien’s conviction for possession of marijuana might establish that the conviction is not an aggravated felony by presenting evidence outside the record of conviction. 124 Going beyond the conviction record means that an alien can present evidence, have witnesses testify on his or her behalf, review the evidence against him or her, and cross-examine any of the government’s witnesses. 125 This involves retrying the criminal case to see if the conviction falls within the purviews of immigration law.

In Castro, the court held that the burden of proof is on the alien respondent to prove that his conviction was not an aggravated felony under immigration law. 126 The alien respondent in that case was an LPR from Bolivia. 127 The alien respondent proved that he possessed a small amount of marijuana for no remuneration. 128 He was also able to meet his burden of proof by testifying in immigration court regarding the events leading up to his arrest. 129 The court also considered evidence regarding what was on

125. Id. at 702.
126. Id. at 701.
127. Id. at 698.
128. Id. at 704.
the alien respondent's person when he was arrested and other specific evidence leading up to his arrest and conviction.\textsuperscript{130} While immigration proceedings may be civil proceedings under the law, they are often criminal in nature. Aliens charged as removable from the United States for criminal convictions are forced to retry their criminal case after having already been through one trial and often after having already served their time.\textsuperscript{131} The assistance of counsel is indispensable in these circumstances. Therefore, in this context, immigration proceedings are more criminal than civil.

While opponents have recognized that under certain circumstances the need for counsel may be necessary in immigration proceedings, such as cases involving unaccompanied minor aliens,\textsuperscript{132} they argue that the government is simply broke. However, the cost of providing housing for detained aliens is tremendous. The average daily cost of immigration detention per person is $164 per bed, including operational expenses.\textsuperscript{133} The number of persons who pass through detention pending an immigration hearing has doubled from 204,459 individuals in 2001, to almost 429,247 individuals in 2011.\textsuperscript{134} It is hard to imagine that appointing counsel in immigration proceedings that are by nature more criminal than civil will further exuberate immigration costs, especially at the increasing rate in which aliens are detained.

V. CIRCUIT SPLIT

The U.S. Courts of Appeals disagree on whether there is a right to effective assistance of counsel in immigration removal proceedings.\textsuperscript{135} The Sixth Amendment right to counsel and the right to effective assistance of counsel in criminal proceedings are well established in our jurisprudence.\textsuperscript{136} However, before this became the prophylactic rule, courts used a due

\begin{itemize}
  \item \textsuperscript{130} \textit{Id.} at 703.
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} Lin v. Ashcroft, 377 F.3d 1014, 1034 (9th Cir. 2004) (Holding that, “absent a minor's knowing, intelligent, and voluntary waiver of the right to counsel, the [immigration judge] IJ may have to take an affirmative role in securing representation by competent counsel.”).
  \item \textsuperscript{134} \textit{Id.} at 3.
  \item \textsuperscript{135} \textit{A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings}, 120 \textit{HARV. L. REV.} 1544, 1552 (2007).
  \item \textsuperscript{136} \textit{Id.} at 1545.
\end{itemize}
process analysis to evaluate a right to counsel claim on a case-by-case basis.\textsuperscript{137} Courts have used the Due Process Clause as the sole ground in which litigants in civil proceedings may claim a constitutional right to appointed counsel.\textsuperscript{138}

In extending this concept, the Third Circuit has held that an alien is entitled to effective assistance of counsel in removal proceedings pursuant to the Fifth Amendment as a guarantee of due process.\textsuperscript{139} The Third Circuit did not extend the right to effective assistance of counsel under the Sixth Amendment because the court found that immigration proceedings are civil, and thus, the Sixth Amendment does not apply.\textsuperscript{140} Like the Third Circuit, the First, Second, Sixth, Ninth, Tenth, and Eleventh Circuits have similarly held that the Due Process Clause guarantees an alien the right to effective assistance of counsel.\textsuperscript{141}

In contrast, the Seventh Circuit has held that civil litigants have no constitutional right to the assistance of counsel and therefore have no

\begin{itemize}
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.} at 1546.
\item \textsuperscript{139} \textit{Fadiga v. United States Att'y Gen.}, 488 F.3d 142, 155 (3d Cir. 2007).
\item \textsuperscript{140} \textit{Id.} at 157.
\item As a matter of formal constitutional doctrine, the Sixth Amendment right to (effective) counsel does not apply in a civil context such as immigration proceedings. Nevertheless, ‘we cannot treat immigration proceedings like everyday civil proceedings, despite their formally civil character, because unlike in everyday civil proceedings, the liberty of an individual is at stake in deportation proceedings.’
\item \textsuperscript{141} \textit{See Zeru v. Gonzales}, 503 F.3d 59, 72 (1st Cir. 2007) (stating that “ineffective assistance of counsel in a deportation proceeding is a denial of due process”); \textit{United States v. Perez}, 330 F.3d 97, 101 (2d Cir. 2003) (stating that “for an alien to prevail on a claim of ineffective assistance of counsel, he or she ‘must show that his counsel's performance was so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause’”); \textit{Denko v. INS}, 351 F.3d 717, 723–24 (6th Cir. 2003) (holding that “an ineffective assistance of counsel claim is reviewed under the Due Process Clause of the Fifth Amendment rather than under the Sixth Amendment”); \textit{Nehad v. Mukasey}, 535 F.3d 962, 967 (9th Cir. 2008) (holding that “litigants in removal proceedings have no Sixth Amendment right to counsel; their counsel can, however, be so ineffective as to deprive them of their Fifth Amendment right to due process of law”); \textit{Tang v. Ashcroft}, 354 F.3d 1192, 1196 (10th Cir. 2003) (holding that a respondent “can state a Fifth Amendment violation if he proves that retained counsel was ineffective and, as a result, [he] was denied a fundamentally fair proceeding”); \textit{Dakane v. United States Att'y Gen.}, 399 F.3d 1269, 1273–74 (11th Cir. 2005) (holding “that an alien in civil deportation proceedings, while not entitled to a Sixth Amendment right to counsel, has the constitutional right under the Fifth Amendment Due Process Clause right to a fundamentally fair hearing to effective assistance of counsel”).
\end{itemize}
constitutional right to effective assistance of counsel. In comparing the Sixth and Fifth Amendments, the court held that the Sixth Amendment creates a right to counsel; whereas, the only thing that is required by the Fifth Amendment is notice and an opportunity to be heard. The Seventh Circuit further explained that there is neither a statutory nor a constitutional imperative to allow a claim for ineffective assistance of counsel. Instead, the Board of Immigration Appeals has the discretion to allow a claim for ineffective assistance of counsel. In _Magala v. Gonzales_, the Seventh Circuit again held that there is “no constitutional ineffective-assistance doctrine.”

The Fifth Circuit has adopted the same rationale as the Seventh Circuit. In _Mai v. Gonzales_, the Court stated, “the Board’s decision to allow aliens to claim ineffective assistance of counsel as a basis for reopening deportation proceedings is within the scope of the Board’s discretionary authority even though it is probably not compelled by statute or the Constitution.” Similarly, the Eighth Circuit has held that an alien has no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding. The Fourth Circuit has followed the Fifth, Seventh, and Eighth Circuits in finding that there is “no Fifth Amendment right to effective assistance of counsel in removal proceedings.”

Accordingly, the First, Second, Third, Sixth, Ninth, Tenth, and Eleventh U.S. Courts of Appeals have recognized the possibility of a due process right to effective assistance of counsel in immigration proceedings pursuant to the Fifth Amendment. Conversely, the Fourth, Fifth, Seventh, and Eighth U.S. Courts of Appeals have found that there is no constitutional right to effective assistance of counsel in immigration removal proceedings. Thus, even if courts are reluctant to extend the Sixth Amendment right to

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142. _Stroe v. I.N.S._, 256 F.3d 498, 500 (7th Cir. 2001).
143. _Id._ at 501.
144. _Id._
145. _Id._
146. _Magala v. Gonzales_, 434 F.3d 523, 525 (7th Cir. 2005) (holding that “the Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering”).
147. _Mai v. Gonzales_, 473 F.3d 162, 165 (5th Cir. 2006).
148. _Id._ (quoting _Stroe_, 256 F.3d at 501).
149. _Rafiyev v. Mukasey_, 536 F.3d 853, 861 (8th Cir. 2008) (“There is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding. Removal proceedings are civil; there is no constitutional right to an attorney, so an alien cannot claim constitutionally ineffective assistance of counsel.”).
150. _Cruz v. Holder_, 321 F. App’x 280, 281 (4th Cir. 2009).
counsel in immigration proceedings because of their designation as civil proceedings, a majority of the courts would extend the right to effective assistance of counsel under the Due Process Clause of the Fifth Amendment. These precedents, held by the majority of the U.S. Courts of Appeals, are a move towards protecting the constitutional due process rights for aliens and LPRs facing removal.

VI. CONCLUSION

"History repeats itself; that’s one of the things that’s wrong with history."151 Throughout United States history, federal immigration policies have disregarded and minimally preserved the due process rights of aliens, despite the important role immigrants have played in the development of the United States. In light of the ongoing immigration reform debate, it is imperative that the due process rights of aliens be taken into consideration so that history does not repeat itself. Although the U.S. Government may lack the resources necessary to provide appointed counsel in all immigration proceedings, it is essential that safeguards be in place to protect the due process rights of those most likely to be deprived and those who have strong ties to the United States. This safeguard is the right to appointed and effective assistance of counsel in removal proceedings.

LPRs fall in a paradox between U.S. citizens and illegal aliens. LPRs that are subject to mandatory detention under federal immigration law are also vulnerable to deprivation of life, liberty, and property. Their liberty is stricken even before they are adjudicated as inadmissible or deportable by an immigration judge. This vulnerability has led to over a century of court decisions holding LPRs are entitled to the same due process rights as U.S. citizens. U.S. citizens enjoy the full bundle of rights prescribed by the U.S. Constitution, including the Fifth and Sixth Amendments. However, these constitutional protections are not extended to LPRs, specifically in regards to the Sixth Amendment’s right to counsel. Due process in immigration proceedings cannot exist without the right to counsel. Statistics have shown that aliens in removal proceedings accompanied by counsel are five times more likely to win their cases than those without representation. This representation crisis, as it has been appropriately termed, proves that the due process rights of aliens—the right to life, liberty, and property—are not being preserved under the current federal immigration policies.

While immigration proceedings are labeled as civil rather than criminal, they often resemble criminal prosecutions more than civil administrative hearings. Despite the fact that there are clear distinctions

between both types of proceedings, being deported or removed from the United States and being found guilty of a criminal offense, have the same serious impact on the life of the respondent. Deportation is not a punishment, but it is a serious penalty that may result in the loss of all that makes life worth living, very much like a criminal sentence. Unlike a criminal sentence, however, deportees are often separated from their families, banished from the United States for up to ten years, and potentially face harsh treatment upon return to their home country.

Even if immigration proceedings are labeled as civil rather than criminal through a due process analysis pursuant to the Fifth Amendment, a court may still find that due process requires the appointment of effective counsel. The vulnerability of unaccompanied minor children in complex immigration proceedings has led the courts to take an affirmative role in securing representation by competent counsel. The courts should extend this right to other vulnerable immigrant groups such as LPRs and those who are mandatorily detained pending the outcome of immigration proceedings. A majority of the U.S. Courts of Appeals have accurately found that the right to effective assistance of counsel may be found under the Due Process Clause of the Fifth Amendment. Hopefully, these Circuits will apply this right to vulnerable groups of immigrants to safeguard their due process rights regardless of the federal immigration policies.